[2020] JMFC Full 05

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012HCV04918

COR: **The Honourable Mr. Justice Hibbert**

The Honourable Mrs. Justice Thompson-James

The Honourable Mr. Justice D. Fraser

BETWEEN	**GORSTEW LIMITED**	**1ST CLAIMANT**
AND	**HON. GORDON STEWART O.J.**	**2ND CLAIMANT**
AND	**THE CONTRACTOR-GENERAL**	**DEFENDANT**

Hugh Small QC, Ransford Braham QC and Jerome Spencer instructed by Patterson Mair Hamilton for the claimants

Mrs Jacqueline Samuels-Brown QC and Ms Tameka Jordan instructed by Firm Law for the defendant

October 22-25, 2013; July 22, 2020

Claim for judicial review — Whether Contractor-General acted ultra vires Contractor General's Act in seeking to investigate sale of land — Whether Requisition empowered Contractor-General to investigate prior agreements for the supply of goods and services, disputes in relation thereto and their

resolution which led to the sale of land — Effect of non/late disclosure in judicial review proceedings

Hibbert J

[1] I have read in draft the judgment written by my brother D. Fraser J and agree with his reasoning and conclusion.

Thompson-James J

[2] I too have read in draft the judgment written by my brother D. Fraser J and agree with his reasoning and conclusion.

D. Fraser J

THE BACKGROUND TO THE CLAIM

[3] The Office of the Contractor-General (OCG) was established in Jamaica by **The Contractor-General's Act** (The Act) which came into force in 1986. The OCG is a special commission of Parliament. It was established to monitor the award and implementation of government contracts, on behalf of Parliament, to ensure those processes are impartial, based on merit, and reflect propriety. Concomitantly the OCG also carries out investigations in support of its monitoring functions. The OCG maintains that the introduction of the Act was an attempt to directly address concerns about corruption and that the OCG is a dedicated anti-corruption body.

[4] The Urban Development Corporation (UDC) is a statutory body established by the **Urban Development Act**. The National Investment Bank of Jamaica (NIBJ) (later to be renamed the Development Bank of Jamaica (DBJ)) is a registered company in which the Accountant General and other public Officers hold shares on behalf of the Government of Jamaica. Gorstew Limited the 1st claimant is a private registered company totally owned by the 2nd claimant.

[5] In or about 1990 the government of Jamaica, via public bodies, made available to the 1st claimant by way of a lease and sale agreement, lands located at Ackendown in the parish of Westmoreland. The agreement specified that the 1st claimant was to have commenced construction of a 200-300 room hotel on the property by June 1991 to be completed by November 1992. The construction was to be at the 1st claimant's own cost. The agreement further made provision for termination, in the event that the lessee/purchaser failed to honour the terms of the agreement. The hotel was not constructed in the time stipulated.

[6] In or about 2001, the 1st claimant, the UDC and the NIBJ entered into a joint venture agreement for the construction of a 360-room hotel on the said lands located at Ackendown in the parish of Westmoreland covered by the initial agreement between the Government of Jamaica and the 1st claimant in 1990. This new agreement provided that upon completion of construction, the hotel, to be known as Sandals Whitehouse, was to be leased to the 1st claimant for a period of 20 years and operated under the 1st claimant's Sandals brand.

[7] The property upon which the hotel was constructed was owned by Ackendown Newtown Development Company Limited (ANDCo). The ordinary shares of ANDCo were subscribed in the following proportions:

a. UDC – 861 shares or approximately 37.43% of the ordinary shares;

b. NIBJ – 689 shares or approximately 29.96% of the ordinary shares;

c. Gorstew- 750 shares or approximately 32.61% of the ordinary shares.

[8] The construction was undertaken by ANDCo. The initial costing for the construction of the hotel was projected at US$60 million and was financed largely by Government of Jamaica injected and sourced capital. The financing was apportioned as follows: US$30 million - ***external***

debt, US$15 million – ***NIBJ***, US$10 million – ***UDC***, US$5 million – ***1st claimant***. However, the final cost for the construction of the hotel, completed on or about April 26, 2011, was almost double at approximately US$110 million.

[9] The construction was beset by several problems including cost overruns, delayed completion and substandard construction. As a result, the 1st claimant alleged that it sustained significant losses and commenced legal proceedings in the Supreme Court of Jamaica against ANDCo, UDC and NIBJ. These court proceedings were later discontinued and the issues in dispute referred to arbitration.

[10] Early in 2011, after the reference of the disputes between the parties to arbitration, and before the hearing of any evidence in the arbitration, the parties to the joint venture agreement, with the sanction of the Government of Jamaica, agreed to amicably resolve the issues in dispute. This resolution included an agreement between the 1st claimant and ANDCo for the 1st claimant to purchase "the Hotel" known as Sandals Whitehouse constructed on two parcels of lands, specifically "all that parcel of land part of Ackendown in the parish of Westmoreland comprised in the Certificate of Title registered at Volume 1325 Folio 14 of the Register Book of Titles and all that parcel of land part of Ackendown in the parish of Westmoreland comprised in the Certificate of Title registered at Volume 1373 Folio 429 of the Register Book of Titles".

[11] The sale of the Hotel including the land, the building, the fixtures, fittings, furniture and equipment was completed on April 26, 2011 and transferred to the 1st claimant's nominee, Sandals Whitehouse Management Limited. The sale was at a price of approximately US$40 million which was financed in part by a vendor's mortgage from the Government of Jamaica. The sale therefore represented a divestment of State assets.

[12] Earlier, on or about January 19, 2011, the OCG had invoked its statutory powers to commence an investigation into the divestment of the said assets. Pursuant to the said investigation, several Requisitions were issued to various persons and entities by the OCG which were complied with.

[13] On or around June 20, 2012, the Contractor-General issued a Requisition by letter to the 2nd claimant containing over 30 requisitions/questions related to the 1st claimant's purchase of Sandals Whitehouse Hotel. The letter stated *inter alia*:

> **Re: Notice of Formal Requisition for Information and Documentation to be supplied under the Contractor-General Act-Special Statutory Investigation- Concerning the divestment of Government of Jamaica owned assets- Allegation of secret talks for the sale of Sandals Whitehouse Hotel to Gorstew Limited**.
>
> The Office of the Contractor-General ("OCG"), acting on behalf of the Contractor-General is continuing its Special Investigation into, inter alia, the allegations of secret talks, discussions and/or negotiations which concern the sale of Sandals Whitehouse Hotel, which was a public majority owned asset, to Gorstew Limited….
>
> In the discharge of the mandates of the Contractor-General under the Contractor-General Act and in furtherance of the express powers which are reserved to him by the Act, the OCG, acting on behalf of the Contractor-General, now hereby formally requires you to fully comply with the below mentioned requisitions by providing all of the information and documentation which is demanded of you and to supply same in a sealed envelope, marked "confidential" and addressed to the Contractor-General."

[14] The letter continued to set out the thirty-eight (38) requisitions/questions, which included several sub-parts.

[15] The 2nd claimant initially agreed to respond to the Requisition, but through his Attorneys-at-Law asked for time to do so as he needed to retrieve documents from his archives, and as he had "programmed"

business trips abroad. Subsequently after receiving further legal advice, the claimants sought to obtain leave for judicial review to challenge the legality of the OCG's requisition sent to the 2nd claimant. By written judgment delivered January 30, 2013, (formal order filed February 20, 2013), D. Fraser J granted the claimants leave to commence judicial review proceedings.

PRELIMINARY CONSIDERATION

[16] Counsel for the defendant raised the question whether it was appropriate for D. Fraser J to sit on the panel hearing the review, given that leave was granted by him after a fulsome hearing involving counsel. Counsel for the claimants responded that there were many precedents in this court and elsewhere where the judge who granted leave participated in the full hearing as all the judge at the leave stage has to decide is whether there is an arguable case for judicial review.

[17] The court took time for consideration and decided that the matter would continue with the panel as composed, as in granting leave D. Fraser J had made no finding concerning how the statute should be interpreted.

THE CLAIM

[18] By Fixed Date Claim Form (FDCF) filed February 14, 2013 the claimants sought the following reliefs:

1. A declaration that on a proper construction of the **Contractor-General Act**, the Contractor-General is not permitted to initiate an investigation and/or special investigation in relation to a contract for sale or purchase of real estate to or from a public body as defined by the **Contractor-General Act**.
2. A declaration that the Agreement for Sale dated February 7, 2011 between Ackendown Newtown Development Company Limited, Gorstew Limited and Sandals Whitehouse Management Limited does not represent an award of a government contract for the purposes of the **Contractor-General Act**.

3. A declaration that on a proper construction of the **Contractor-General Act** the Contractor-General is not permitted to initiate an investigation and/or special investigation in relation to a contract for sale of chattels or goods by a public body as defined by the **Contractor-General Act** to another person.
4. A declaration that on a proper construction of the **Contractor-General Act**, a contract for the sale of real estate, which incorporates provisions for the sale of chattels and/or goods used in connection with the said real estate, is not a government contract for the purposes of the **Contractor-General Act** and as a consequence the Contractor-General is not permitted to initiate an investigation and/or special investigation in relation to that said contract.
5. A declaration that the letter of June 20, 2012 from the Contractor-General to the Honourable Gordon Stewart, O.J., Chairman, Gorstew Limited is illegal, void and of no effect.
6. A declaration that the commencement of the special investigation into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel is illegal, void and of no effect.
7. A declaration that the extension of the special investigation into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel to include Gorstew Limited and/or the Honourable Gordon Stewart, O.J., is illegal, void and of no effect.
8. An order of certiorari quashing the letter dated June 20, 2012 from the Contractor-General to Honourable Gordon Stewart, Chairman, Gorstew Limited.
9. An order of certiorari quashing the Contractor-General's decision to commence the special investigations into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel.
10. An order of prohibition prohibiting the Contractor-General from taking any steps to compel or require the Claimants to comply

with and or respond to the said letter or any question or direction contained therein.

11. An order of prohibition prohibiting the Contractor-General from continuing the special investigations into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel.
12. Such further and other relief as the Court may deem fit.

THE ISSUES IN THE CLAIM

[19] I have adopted with some adaptation the outline of the issues framed by counsel for the defendant as follows:

(i) The meaning and compass of the **Contractor-General Act** in particular the term "government contract".

(ii) The true and essential nature of the transaction dubbed by the nomenclature "Sale of Sandals White House" and whether:

1. This was a sale of land simpliciter as in the case of ***Ashton George Wright vs. Telecommunications of Jamaica Limited*** [1989] 26 JLR 411 (***Wright's*** case); or
2. This was really an arrangement for the provision of goods and services albeit culminating in a sale.
3. Assuming it was a sale without more, what was the subject matter of the sale.

(iii) Were the claimants in breach of:

1. Their requirement of disclosure under the Civil Procedure Rules; and/or
2. Their obligation of candour in judicial review proceedings?

If so should any breach preclude the granting of the reliefs sought by the claimants?

The Submissions of Counsel for the Claimants

[20] Mr. Hugh Small QC, commenced his submissions by referring to the nature of the questions outlined in the Requisition. These he grouped into two sets. Questions from 1 – 21 and questions from 22 – 38.

Counsel described the requests as sweeping and going beyond what the Act permitted. The questions from 22 – 38 he noted dealt with conflict of interest and corruption.

[21] Counsel highlighted that on many occasions the OCG has asserted that it is "a dedicated anticorruption body". However although different sections of the Act confer jurisdiction on the Contractor-General to ensure impartiality and transparency in relation to certain matters, the Contractor-General does not have plenipotentiary powers entitling the OCG to be described as a dedicated anti-corruption body. Rather under the Act the jurisdiction of the Contractor-General is limited to responsibility to oversee and promote the integrity and fairness of the procurement procedures and systems that are related to the supply of goods and services and the carrying out of building or other works by a public body.

[22] Further counsel submitted that the Contractor-General does not have any jurisdiction regarding the divestment of state assets. These comprise the assets of government and public bodies which include companies in which government has a controlling interest.

[23] Counsel pointed out that the term "corruption" is not used in the Act. Counsel also argued that in ***Wright's*** case Wolfe J, (as he then was), having found that the Contractor-General did not have jurisdiction over land acquisition, queried whether the Act covered divestment. That judgment having been delivered in 1989, ten years later when the Act was amended to include a Part IIIA in 1999, the query raised by Wolfe J was not addressed.

[24] Subsequently in 2001 the **Corruption (Prevention) Act** (CPA) was passed. That Act though focused on the integrity of public officials, defined corruption to include actions of both public and private persons and made provisions for addressing conflicts of interest. Counsel submitted that the Contractor-General had therefore assumed powers

that belong to another statutory body. In particular questions 22-38 covered practically all the elements of corruption and conflict of interest covered by the CPA. (See sections 2 and 14 of the CPA). The information sought was properly within the remit of the Corruption Prevention Commission.

[25] Counsel also submitted that the use of the word "includes" to define the terms, "agent", "consideration" and "principal" in section 14(12) of the CPA did not operate to enlarge the meaning of those terms but given the scheme of the CPA, the use of the word "includes" should be read as "means".

[26] Counsel argued a similar approach was warranted in relation to the interpretation of the term, "government contract" used in the Act. That definition reads:

> "government contract" includes any licence, permit, or other concession or authority issued by a public body or any agreement entered into by a public body for the carrying out of building or other works or for the supply of any goods or services";

[27] Counsel submitted that in order to make grammatical and common sense of the definition, the court should hold that the particular type of arrangements/agreements and set of relationships embodied by that form of words are confined to those arrangements for the carrying out of services. He argued that those words in their ordinary natural meaning do not include arrangements and relationships for the sale disposition, rental or acquisition of any other assets not associated with building or other works or the supply of any goods or services. All material including the reports made by the Contractor-General to parliament pursuant to his statutory duty, show parliament intended that the Contractor-General's jurisdiction was with respect to the procurement of services related to building or other works and the supply of goods or services.

[28] Counsel noted that though Ministers of Government and even the Prime Minister had on occasion invited the Contractor-General to oversee divestment processes their *ipse dixit* did not create a power in the

Contractor-General that the law did not provide. Counsel pointed to a number of instances in which what he termed this misplaced assumption that the Contractor-General had power to oversee divestments operated. These included:

(i) Investigation into the circumstances surrounding the divestment by the GOJ of its 49% stake in the Petrojam refinery to Petroleos de Venezuela S.A. (PDVSA);

(ii) Monitoring of the divestment of the publicly owned Jamaica Sugar Industry Assets;

(iii) Request from the Hon. Don. Wehby then Minister with portfolio responsibility for the national airline, for the OCG to investigate the 2007 divestment of Air Jamaica's Heathrow slots;

(iv) Letter dated January 14, 2010 from the OCG to the Cabinet Secretary Ambassador Douglas Saunders formally requesting a comprehensive list of all Government assets slated for divestment for the financial year 2010/2011. By letter dated February 16, 2010 the Cabinet Secretary responded and itemized 81 different public assets slated for divestment in the 2010/2011 financial year;

(v) Media release dated May 30, 2008 in which the OCG spoke to conclusion of investigations concerning divestment of shares of Petrojam Limited;

(vi) A media release dated June 1, 2010 in which the OCG noted that the Contractor-General had launched a Special Statutory Investigation into the Government's proposed divestment of its 45% stake in Jamalco;

(vii) In respect of this divestment there was a letter also dated June 1, 2010 giving formal notice to the Hon Prime Minster Golding MP, Hon Minster of Mining and Energy Robertson MP and Mrs, Alexander JP, Permanent Secretary in the Ministry of Mining and Energy. In this letter counsel submitted that the OCG sought to enlarge its remit to cover the entire field of government contracts and amalgamated powers under the Act, and the CPA with other Laws of Jamaica such as the Public Bodies Management and Accountability Act and the Financial Administration and Audit Act. Counsel highlighted:

    1. That in paragraphs 8 and 9 of this letter the OCG seemed to have enlarged its remit to cover the entire field of government contracts. Further that in paragraphs 10 and 11 the OCG sought to amalgamate the powers under the CPA, the Act and other pieces of legislation such as the Public Bodies Management and Accountability Act and the Financial Administration and Audit Act;
    2. The fact that the Permanent Secretary adverted to a legal opinion that the divestment of government assets

did not fall within the jurisdiction of the OCG was described in the letter as “scandalous”;

(viii) Letter from the Contractor-General to Hon. Prime Minister Golding and Ms. Miller, Permanent Secretary in the Office of the Prime Minister in which the Contractor-General gave formal notice of his commencement of a Special Statutory Investigation concerning the divestment and sale of the Sandals Whitehouse Hotel to Gorstew Ltd. Counsel submitted this letter assumed the Contractor-General had power to intervene in the divestment based on plenipotentiary anti-corruption powers;

(ix) Reference in the Media Release from the Office of the Contractor-General dated September 10, 2012 to an Expert Legal Opinion from Dr. the Hon. Lloyd Barnett, OJ obtained in January 2000 that stated that a Contractor-General does have jurisdiction under the Act to monitor and investigate divestments by the State;

(x) A media release dated May 30, 2008 in which the OCG spoke to conclusion of investigations concerning divestment of shares of Petrojam Limited;

(xi) Statement to Parliament by Prime Minister RT Hon Patterson PC, QC, MP February 22, 1994 on divestment of government lands in which he indicated divestments by private treaty would be brought to the attention of the Contractor-General for his prior guidance *(Referred to by Mr. Craig Beresford in his affidavit);*

(xii) Invitation by letter dated May 13, 2003 from the Permanent Secretary of the Ministry of Land and Environment on May 13, 2003 to the then Contractor-General Mr. Derrick McKoy, to nominate two officers to sit on the National Land Divestment Committee.

[29] Turning in more detail to the interpretation of the Act, Counsel pointed out that the only two definitions in section 2 of the Act where the word “includes” is used as opposed to the word “means” is in relation to “functions” and “government contracts”. In section 4(1) “function” was related to “government contract” which has a limited meaning. He submitted that in section 4(1) the use of the word “function” did not capture the broad sweep of queries contained in questions 22-38.

[30] Counsel continued that the provisions of section 4(2)(a) are entirely consistent with the submission that the meaning of government contract is restricted in the manner contended by the claimants. Further section 4(2)(b) indicates the term “government contract” is not at large to include covering divestment. It is Government that sets the rules and then the Contractor-General ensures the process is carried out.

[31] Counsel next reviewed Part III of the Act which concerns investigations. Section 15 (a) deals with registration of contractors. He submitted it was noteworthy that section 2 of the Act does not cover contractors who are doing activities that are not covered by the definition of contractors. Section 15 (b) concerns tender procedures – open of tender, receipt of tender and evaluation of procedures. Further none of the functions, powers and duties contained in section 15 c – f impinge on the acquisition or sale of assets. In fact in ***Wright's*** case Wolfe J found the acquisition of the land by Telecommunications of Jamaica (TOJ) did not satisfy any of the categories in section 15 a-f. However, as highlighted before, the 1999 amendment to the Act did not address that conclusion.

[32] Counsel pointed out that the inclusion of Part IIIA – Sections 23 A – J, which introduced the National Contracts Commission (NCC) into the regime of procurement, was the only amendment to the Act introduced in 1999. Section 23C states the principal objects — its function to enhance and undertake detailed responsibilities in assistance to the OCG. Section 23D sets out administrative functions all related to the purpose and objects set out on 23C. Section 23E provides for regulations but these have nothing to do with the acquisition or sale of land. Section 23F addresses sector committees and references section 23D. However it does not address divestment activities. Section 23G outlines the whole system put in place for the classification of awards which involves looking at section 23 A, B, and D. Section 23H addresses what the NCC should do on an application. Section 23I details the notification process which seeks to promote fairness by ensuring that all who fall within a particular classification are notified that they can tender. Section 23J provides for the NCC to receive its funding through the OCG.

[33] In counsel's view everything in Part IIIA is specifically and emphatically a refinement of the procedures for the procurement of goods and services and contracts for building and other works. He submitted that

the term “government contract” is used several times in PART IIIA in section 23 A, C, E, F, and I, in a way that leaves no doubt that it is pursuant to the refinement of procurement systems. Counsel therefore invited the court, when considering the Act as a whole and the impact of the 1999 amendment, to find that this was entirely consistent with the interpretation urged on the court concerning how the term “government contract” in section 2 and throughout the Act should be construed.

[34] Counsel noted that in ***Wright’s*** case the term “government contract” as used in section 15(1) was construed by Wolfe J (as he then was). He relied on the fact that the learned judge found that the relevant contract under consideration for the purchase of two (2) parcels of land by a public body (TOJ) from a company controlled by its Chairman was not a government contract that the OCG was empowered to investigate.

[35] Counsel also took issue with obiter comments made by the learned judge towards the end of the judgment when he said the public interest demanded that such contracts should come within the ambit of the Act. He stressed that Wolfe J did not state why parliament might have intended otherwise or why such contracts should fall under the scrutiny of the Act. Counsel went as far as positing that the final observations were contrary to the previous interpretation. Counsel noted that ***Wright*** had been the law since 1989 and despite numerous recommendations from the OCG complaining about its impact parliament had not chosen to do anything about it up to the time of the making of his submissions.

[36] Considering the meaning of the word “includes” counsel stressed that the court needed to look at the Act in its full context to see what the Act in its entirety provided for. Counsel relied on the authorities of ***Dilworth v Commissioner of Stamps; Dilworth and Others v The Commissioner for Land and Income Tax*** [1899] AC 99; ***Inland Revenue Commissioners v Joiner*** [1975] 3 All E R 1050; and ***Y.Z. Finance Company PTY. Limited v Cummings*** (1963 -1964) 109 C.L.R. 395. Counsel argued that the use of “includes” in the Act indicated that the words that follow are an exhaustive definition of the term

"government contract". Counsel maintained that apart from the words "licence", "permit" and "concession", there was nothing in the rest of the words that would not fall in the ordinary understanding of the word contract. Counsel submitted that the most operative words in the definition are the words in the last two sentences. Therefore counsel maintained that in ***Wright's*** case Wolfe J was basically saying that the reason why the contract into which TOJ entered did not fall under the Act was that it was not a contract for building or goods and services.

[37] Counsel noted that the other instance in which "includes" was used in the Act was in section 7 with regard to "functions". However the phrase "government contract" occurs much more frequently in the Act than "functions". Counsel also noted in passing that the 1999 amendment included a definition of "Commission"; which introduced a conflict in the Act between the definition of Commission in section 2 (the NCC) and the definition of Commission in section 3 (the Contractor-General).

[38] Counsel argued that the use of the word "contractor" and its definition in section 2 could assist in the determination of the meaning of "government contract". Though the definition of "contractor" is much longer, it is confined to and includes nothing more than the categories/classifications provided for in the definition of government contract. Counsel submitted that the provisions in Part IIIA of the Act, disclose that no other contractor apart from the ones who fall within the listed categories/classifications can be registered for or enter into a government contract. For e.g. section 23A specifically states that a prospective contractor "means any person firm or entity proposing to obtain an award of a government contract." The rest of the provisions speak to the functions of the NCC in registering prospective contractors and classifying those contracts to which their application applies.

[39] For the general legal position underpinning his submissions, counsel for the claimants Mr. Hugh Small Q.C. relied on De Smith's ***Judicial Review*** 6th Edition at paragraphs 5 -002 — 5-003 pages 225-6. Those sections

discuss administrative decisions which are challenged as illegal. They read:

> 5-002 An administrative decision is flawed if it is illegal. A decision is illegal if it:
>
> (a) contravenes or exceeds the terms of the power which authorises the making of the decision;
>
> (b) pursues an objective other than that for which the power to make the decision was conferred;
>
> (c) is not authorised by any power;
>
> (d) contravenes or fails to implement a public duty.
>
> 5–003 The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or statutory instrument, but it may also be an enunciated policy, and sometimes a prerogative or other ‘‘common law’’ power. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the ‘‘four corners’’ of their powers or duties. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments.

[40] Counsel also relied on the cases of ***R v Lord President of the Privy Council, ex p Page*** [1993] AC 682 and ***R v Secretary of State for the Home Department ex Parte Fire Brigrades Union*** [1995] 2 AC 513.

[41] In summary, counsel submitted that all the requisitions were beyond the Contractor-General’s jurisdiction. Concerning requisitions 1-21 the challenge was that they were unauthorised by the Act and therefore unlawful. In respect of requisitions 22-38 counsel argued that the Contractor-General had unlawfully enlarged his jurisdiction, to enquire into matters that parliament has specifically stated in the CPA are within the jurisdiction of the Commission created under the CPA. Those matters are not within the jurisdiction of the Contractor-General. Further in any event counsel maintained that requisitions 22-35 were actually

outside the scope of both acts. His requests were also made under the threat of criminal sanctions if his requisitions were not complied with. The requisitions were therefore unlawful and subject to the judicial review orders sought.

[42] Counsel emphasized that the transactions being investigated concerned divestment. They focussed on the sale and purchase of the hotel and to valuations in relation to that, as well as the lease; a lease in some circumstances can also be a divestment though not of the fee simple. Counsel maintained however that the contracts about which the Act is concerned are those that flow from a tender and award process; a process which was not engaged in this instance. There was on the contrary, specific evidence before the court that the dealings in relation to the sale and purchase of the hotel were as a result of the involvement of a mediator after court and potential arbitration proceedings. The sale was therefore not based on a tender and award process, but based on a consensual approach between the parties. This is clear on an examination of the recitals of agreement in the Agreement for Sale.

[43] Further, while acknowledging that the Agreement for Sale does refer to the FF&E counsel maintained that the goods mentioned in the FF&E are not goods contemplated by the definition of “government contract”, as they are not goods for the carrying out of building or other works or the supply of goods and services, but rather, as the Agreement for Sale makes it pellucid they were to be used in connection with the hotel that was being sold. The intention was that the whole operation should move from Ackendown to the Purchasers and should move with the land. In fact some items in strict law would be attached to the land and in any event flow with the land. Those FF&E were therefore part of divestment as they were meant to go with the land, do not come under the rubric “government contract” and were not subject to a tender and award process.

[44] Finally, in relation to the issue of non/late disclosure counsel acknowledged the fact that claim no 2005HCV02914 Appliance Traders Ltd v ANDCO Ltd. was not disclosed until during the hearing. He however maintained that late disclosure of this "pup" of litigation, should not stand in the way of the court exercising its discretion to say that the Contractor-General had exceeded his powers under the Commission granted to him by Parliament. Counsel therefore invited the court to grant the orders prayed.

The Submissions of Counsel for the Defendant

[45] Mrs. Jacqueline Samuels-Brown QC, counsel for the defendant, in opposing the claim identified the three-fold issues which the court has adopted and adapted, as aptly framing the questions the court has to determine in this claim. Counsel first submitted that the claimants could have approached the court for a declaration to clarify the scope of the Contractor-General's remit but instead chose to proceed by way of judicial review. Accordingly they were bound to comply with the rules governing judicial review including duties of candour and disclosure. The conduct of the claimants would therefore be relevant to the court's exercise of any discretion.

[46] Counsel charged that in paragraphs 4 and 5 of the affidavit of the 2nd claimant in support of the application for leave to commence judicial review, the reasons given for the litigation were incomplete as they only spoke to problems associated with construction. However in civil claims 2005HCV02911; 2005HCV05059 and 2005HCV02914, (the last only disclosed during the hearing) it was made clear that the supply of goods and services was also in dispute and the subject of the litigation which was initially referred to arbitration and then mediation.

[47] Counsel further submitted that even before the media release by the Contractor-General dated January 19, 2011 when he indicated he was querying the veracity of allegations of secret negotiations for the sale of

Sandals Whitehouse, the 2nd claimant was aware of the interest of the Contractor-General in the dealings prior to the sale. Counsel adverted to the investigations carried out by the OCG between January to June 2006, in which the OCG found conflicts of interest in the award of government contracts associated with the construction of the hotel, breaches of Government Procurement Procedures and major changes in the scope of work leading to massive cost overruns. Counsel maintained that the genesis of the sale was relevant as what had been termed a sale was the culmination of the provision of goods and services, a dispute in relation thereto and the consideration for resolving the dispute was the sale well below the market value. It was in that context that the questions asked by the Contractor-General had to be viewed.

[48] Counsel in seeking to demonstrate that the transaction was not simply a sale of land as in ***Wright's*** case detailed the following:

(i) The joint venture agreement to develop a hotel entered into by Gorstew Limited, NIBJ and UDC in March 2000 was over time governed by the following legal instruments the effects of which were summarised as follows:

1. ***Heads of Agreement dated July 2, 2001***:
    a. The parties were to work together in the planning, design, financing, development, construction and equipping of a first class four-star all-inclusive family hotel;
    b. UDC was to incorporate Newton Development Company Ltd with UDC, Gorstew and NIBJ as principal shareholders;
    c. Gorstew was to provide technical assistance to UDC to negotiate loan financing on behalf of Newtown;
    d. The cost of infrastructural works, construction, FF&E, landscaping, professional fees and financing costs were to amount to no more than US$60M;
    e. Any cost overruns in the project were to be borne by the parties as follows:

i. Gorstew – any overrun due to Gorstew's instructions to change the design or design brief after they have been agreed/signed off on by the parties prior to commencement of the project.

ii. UDC – overruns due to inefficient implementation of the project or poor contractual arrangements.

iii. UDC and NIBJ – overruns due to events outside the parties' control such as changes in exchange rates or Government policy.

f. Gorstew at its sole cost was to subdivide and prepare for transfer to Newtown for consideration of US$250,000.00, forty (40) acres of land part of Ackendown upon receipt of Letter of Commitment relating to the loan financing.

g. Newtown to lease the completed hotel to Gorstew and/or its nominee; to operate the resort in a name to be agreed by the parties.

2. ***Variation of Heads of Agreement October 29, 2003.***

3. ***Technical Services Agreement November 1, 2001:***

Some of the terms were as follows:

a. Gorstew to provide technical advisory services for the planning, designing, constructing, furnishing and equipping of the Hotel, and to advise Newtown and its consultants on the standards, aesthetics and systems necessary for the Hotel's operations.

b. Newtown to pay Gorstew fixed fees of US$439,375.00 plus applicable taxes payable in JMD at a fixed rate of exchange of US$1.00 to J$47.00.

4. ***Shareholders Agreement December 19, 2003:***

Indicated the primary objective of the company was "to undertake the project" ("an all-inclusive resort hotel to be called 'Sandals Whitehouse' (or such other name as the Company may agree with the Operator) at Whitehouse in the parish of Westmoreland, Jamaica. Clause 3 dealt with share capital, Clause 4 with equity injection, and Clause 8 Appointment of Directors.

5. ***Lease Agreement July 7, 2004:***

   Gorstew entered into a twenty (20) years lease for the realty and the FF&E. It was to be for a yearly rental of US$2,000,000.00.

[49] Counsel maintained that the Heads of Agreement was concerned primarily with "*agreements entered into by a public body for the carrying out of building or other works and for the supply of goods and services".* Counsel argued that no sale of land was then contemplated. Counsel also argued that the Technical Services Agreement was undoubtedly an agreement for the provision for goods and services. Both contracts which counsel argued were within the scope of the investigative remit of the OCG.

[50] Counsel posited that it was against the background of those agreements that law suits were commenced by the claimants when problems developed. Counsel summarised the substance of the claims as follows:

(i) In claim no. 2005HCV02911 Gorstew v ANDCo Ltd, Gorstew alleged that under the Technical Services Agreement it provided the services of planning, designing, constructing, furnishing and equipping the Hotel and advised the defendant on the standards, aesthetics and systems necessary for the Hotel's operations, but was not paid for the provision of those services. In the defence filed, a cheque for $15,712,506.00 in proof of payment was produced and then the claimant amended the claim, to include among other things a claim for interest. This claim was ended by a joint notice of discontinuance dated and filed March 10, 2008;

(ii) In claim no. 2005HCV05059 Gorstew Ltd & Sandals Whitehouse Management Ltd v UDC NIBJ and ANDCo Ltd it was alleged that there were breaches of the Heads of Agreement, Technical Services Agreement and Lease Agreement which led to overruns, delayed completion and substandard construction with damages being one of the reliefs sought. The Defence included that the overruns were due to change of design by the 1st claimant and

that in relation to the FF&E the 1st claimant was instrumental in selecting and supplying the goods. This claim was adjourned *sine die* on April 21, 2011 five days before the completion of the sale agreement.

(iii) In the third claim no. 2005HCV02914 Appliance Traders Limited v ANDCo Ltd. which was consolidated with claim no. 2005HCV02911 Gorstew v ANDCo Ltd., Appliance Traders claimed sums owed for goods supplied to the Sandals Whitehouse. The Defence was that these sums were paid and the cheque produced. This suit, as was the one with which it was consolidated, was ended by a joint notice of discontinuance dated and field March 10, 2008.

[51] In seeking to make the link between the agreements and services provided, the lawsuits and the ultimate sale, counsel submitted in summary that, wearing the "Akendown hat" the claimant Gorstew Ltd was heavily involved in the construction of the hotel as a shareholder of ANDCo. Ltd; while in its own and individual capacity as Gorstew Ltd, it was involved in providing technical services for the construction. Therefore counsel argued from the "right" or "left" hand there were service contracts the OCG could inquire into and the sale of land was a device or mechanism to settle the outstanding claims.

[52] Counsel maintained that to the extent that money passed in exchange for the land, buildings and FF&E, absent any other consideration or factor it could be depicted as without more a sale. However counsel contended that the documents show that the money passing was not the only "consideration" but that in fact the transfer of the hotel (land, structure and FF&E) was in exchange for and to settle claims made by the first claimant and its affiliate regarding services rendered to the public body. Therefore counsel submitted that the argument was two fold; even if the transaction was seen as being in exchange for abandoning the law suits the transaction could not be separated from what the lawsuit was for.

[53] Based on the above submissions counsel highlighted, as examples, particular questions contained in the Requisition and submitted that they addressed a number of matters relevant to the investigations as follows:

(i) The genesis of the sale

1. Question 3, which dealt with the date on which negotiations for the sale/purchase of the hotel commenced, was relevant, as the 2nd claimant spoke in his affidavit to litigation being undertaken by him, it being discontinued and the resolution of the dispute through mediation — the so called secret talks which the media reported — that reignited the interest of the OCG. The 2nd claimant in his affidavit indicated the sale was completed on April 26, 2011. The records in claim 2005HCV05095 revealed the matters were adjourned *sine die* on April 21, 2011. The Agreement for Sale established more closely the link between the resolution of the cases and the sale.
2. Question 9 concerned a lease agreement dated July 7, 2004 which was endorsed on the title to the property, and its relationship to the eventual sale;
3. Question 12 related to all meetings held in relation to the sale/purchase of the hotel. These would encompass the "secret talks" and likely include the mediation, the terms of which were not public. If this question were answered and those terms disclosed, that would assist the court to say if what was termed a "sale" was really a consideration for the value of services rendered which had been the subject of litigation in the court.
4. Question 18 (in particular sub-paragraphs c and d) was relevant as the answers would show any link between the lawsuits, the negotiations and the eventual sale price.
5. Question 30 addressed the issue of whether any direct or indirect benefit flowed to any relatives, friends or associates of the 2nd claimant based on the negotiation of

the sale. Counsel submitted that the answer to this question would have left no doubt concerning the relationship between Appliance Traders Limited and the claimants.

(ii) Conditions precedent:

6. Counsel noted that the way question 5 was worded concerning any Government policy regarding conditions precedent for the "sale/purchase" of the hotel "to/by" Gorstew Limited/or its nominee was entirely appropriate as the hotel was being sold by Ackendown the 2nd major shareholder of which was Gorstew Limited and the hotel was being sold to Gorstew Limited.

7. Question 7 queried whether or not GOJ, ANDCO, UDC and/or DBJ initiated negotiations for the sale and contained several sub-parts contingent on an affirmative response.

(iii)The Terms and Conditions

8. Questions 5, 7 (d) & (e) and 12 were also relevant to the issue of the terms and conditions of the sale. Question 13 which requested copies of all correspondence exchanged between Gorstew Limited and GOJ, ANDCO, UDC and/or DBJ or any entity or person acting on their behalf concerning the sale/purchase of the hotel was also highlighted by counsel under this head.

(iv) Valuation

9. Counsel highlighted question 17d which sought particulars of any valuation of the hotel obtained by Gorstew Limited. It should be noted as well that question 16 queried whether the 2nd claimant was aware if the GOJ, ANDCO, UDC and/or DBJ considered certain other private sector valuation reports in the determination of the reserve or sale price. This in a context where the sale price of US$40M was well below the cost of construction excluding the value of the land.

[54] Counsel also invited the court to reference what was termed the "Agreement for Sale". Counsel maintained that it was important to note the date of the agreement, the definition of FF&E, and the numerous references to FF&E (including for example pages 7, 8, 11, 13, 14, 15 and 16). Counsel highlighted that at no point was the hotel and the FF&E disaggregated or separated. Counsel also submitted the court should take into consideration that:

(i) The sale price is noted as $40,000,000.00 whereas it is noted that the cost of construction was $111,500,000.00;

(ii) The Debenture also refers to the sale of Sandals White House Hotel to include the FF&E;

(iii) The Mortgage Agreement which provided for the GOJ to provide some of the financing for the purchase affirmed that the parties were aware of and anticipated the Contractor-General's legitimate interest in the transactions. Counsel submitted the parties knew that this was not a sale simpliciter as in ***Wright's*** case, but that it related to compensation for the supply of goods;

(iv) Reference should be made to the Registered Titles and the passage of the ownership of the property of the adjoining lots for the hotel. Lot 1 – through firstly Gorstew (2000) then Ackendown (2004), and then a lease registered in favour of Gorstew (2005) Lot 2 - ;

(v) The Affidavit of Craig Beresford and the letter from the Contractor-General to the Hon. Prime Minister should be noted. This letter clearly shows the relationship between the goods and services on the one hand and the ultimate sale on the other; and in fact the inextricable link between them. It records the "coincidence" of the discontinuation of the claims with the sale of the Sandals White House Hotel.

[55] Counsel maintained that from the material presented the unavoidable inference was that the claimants were and would have been aware that there was an undeniable connection between the claims previously filed

and their application for Judicial Review. Counsel argued that the following are relevant in this regard:

(i) The Contractor-General's previous investigation;

(ii) The media releases as exhibited;

(iii) The second claimant's admission that he was aware of the Contractor-General's interest;

(iv) The establishment of mediation proceedings referred to;

(v) The connection between the claim, mediation, cost of services and goods supplied/received and the terms of the settlement to which the claimants and not the defendant were privy; and

(vi) The direct reference to the Office of the Contractor-General in the mortgage of February 7, 2011.

[56] Counsel further submitted that there is a duty of disclosure under the Civil Procedure Rules (CPR) (see rule 28.17 (2) & (3)), which exists even moreso in judicial review proceedings, where relief is not as of right, but at the court's discretion. Counsel outlined that as indicated in the affidavit of Aleisha Martin she wrote to the claimants' attorney-at-law requesting the claim numbers and a copy of the files in relation to the claims referred to in paragraph 4 of the first affidavit of the 2nd claimant. Counsel indicated that two claim numbers were provided 2005HCV02911 and 2005HCV05059 and it was not until during the hearing that the third claim 2005HCV02914 was disclosed.

[57] In response to a query from the court counsel indicated that no application for specific disclosure was made as pursuant to rule 28.17 of the CPR the letter of request sent satisfied the requirement.

[58] Therefore counsel argued bearing in mind, among other things the conduct of the applicants particularly as it relates to candour, the prerogative remedies sought ought not to be granted. Counsel argued that this is so as when the court comes to consider how it should exercise its discretion it should be fully informed. Counsel maintained that the duty of candour extends from the application stage to closing

submissions and beyond, even to an appeal. Counsel cited in support the cases of ***R v Leeds City Council ex p. Hendry*** (1994) 6 Admin LR 439; 621 Times Jan. 20; ***I and others v Secretary of State for the Home Department*** [2010] EWCA Civil 727; ***R (on the application of MS (A Child) v Secretary of State for the Home Department*** [2010] EWHC 2400 (Admin) law and ***The Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Limited*** [2002] EWCA Civ 1409.

[59] Counsel maintained that this court would have to consider whether in the application for the grant of leave the learned judge had been given a true and comprehensive account of the way what has been described as an agreement for sale came about. Counsel also advanced that this court will have to decide on all the relevant material provided what was the true nature of the transaction and whether it fell within any of the several powers conveyed to the OCG by statute.

[60] Having regard to the late disclosure and the duty of candour, counsel further submitted that the court should not grant any of the judicial review reliefs, though the court may wish, based on the importance of the matter, to make a declaration.

[61] Turning to the construction of the **Contractor General's Act** counsel contended that the transaction falls within the scope of the Act as the interpretation of "*government contracts*" should be inclusive rather than exclusive. Counsel argued that the use of the word "*includes*" in relation to government contracts was deliberate and in contradistinction to the wording in other definitions where terms being defined are expressed to "mean" and not to include.

[62] Counsel submitted that the definition of "*government contract*" in the Act does not limit the natural and literal meaning of contract as it is clearly referring to a specie of contract in relation to which established

procedures of tender and award apply; but it does not *ipso facto* exclude other contracts embraced by the Act.

[63] Counsel maintained that beyond the definition section, and on a consideration of the Act as a whole the following was evident:

(i) The purpose of the statute is to establish an anti-corruption body not limited to contracts of any particular specie;

(ii) Were the term "*government contract*" to be given the limited meaning contended by the claimants, the effect would be to defeat the very purpose of the Act and to allow for a window of corruption and opaqueness not contemplated by the statute;

(iii) Sections 4 and 15 do not operate to limit the meaning of "*government contract*" as the claimant's contend, as from its subsections, it is plain that different types of contracts including for the sale of land are contemplated;

(iv) The 1999 amendments established a discrete separate and autonomous body with specific and limited functions which provide no assistance as to the general scope of the Act; and

(v) Accordingly, there is no basis to depart from the natural meaning of "*includes*" and how it is generally used in interpretation clauses.

[64] Counsel also contended that an examination of the affidavits and exhibits attached, in particular the Agreement for Sale, shows that the subject matter of the sale included realty, i.e., the property contracted therein as well as goods and chattels referred to as fixtures, fittings, furniture and equipment. Thus, even if the contention of the claimants that "government contracts" are to be restricted to contracts for the "supply of goods and services", the subject matter of the Requisition clearly fell within the limited definition contended for by the claimants. Counsel argued that the agreement was equally for the supply of "goods" as for a sale of land. The parties to the agreement made no attempt to disaggregate the one from the other in entering into the agreement and it was too late to attempt to do so now.

[65] Counsel additionally highlighted that in expressly including goods and services in the definition of "*government contract*" there was no distinction made between the supply by and supply to the government of these goods and services.

[66] Counsel advanced that it is trite law that the statutory extension of the meaning of a word does not operate to exclude its ordinary meaning. Counsel relied on the authorities of ***George Robinson v The Local Board for the District of Barton Eccles et. al.*** (1883) 8AC 798***; London School Board v. Jackson*** (1881) 7 QB 502; and ***Nutter v Accrington Local Board*** (1879) 4 QBD 375.

[67] Counsel therefore maintained that the Act could incorporate into the meaning of the word, "contract" arrangements for which the exchange of "consideration" do not arise. For example, it could incorporate entirely gratuitous gifts, permits, concessions or other "arrangements" for the supply of goods and services which are not *stricto senso* contractual.

[68] Counsel submitted that this basic principle of interpretation was acknowledged in ***Wright's*** case by Wolfe J. Counsel further submitted that the cases of ***Unwin v Hanson*** [1891] 2 KB 115/119 and ***Fisher v Bell*** [1961] 1 QB 394, relied on by the claimants in their application for leave, establish the principle that, in interpreting a statute, words used must be interpreted having regard to the aim of the statute and the area of law with which it is concerned. Adopting that principle, counsel argued that the Act, being designed to ensure good governance, probity and to guard against corruption by and of public bodies, a restrictive meaning would not be in keeping with these aims and considerations. Therefore the incorporation of the word "include" was to ensure that it served its expansive purpose and would not be restricted to contracts in a technical sense.

[69] Counsel also relied on the definition of sale by tender from **Stroud's Judicial Dictionary** (7th edition) and the definition of "award" in **Jowitt's Dictionary of English Law** (2nd Edition) and **Webster's College Dictionary**, 2001 (revised edition). In respect of the use of the word "award" counsel submitted that while its use in the context of construction law may be a term of art of limited meaning, in an anti-corruption statute it bears much wider application.

[70] In summary counsel submitted that:

(i) The Contractor-General's anticorruption powers extend to the monitoring and investigations of contracts for the sale of land and supply of goods and services.

(ii) The subject matter of the requisitions includes land as well as goods.

(iii) The Contactor-General had properly exercised these functions in issuing the requisitions to the claimants.

(iv) In light of the above the claim ought to be dismissed and the reliefs sought denied and costs be awarded to the respondent.

The Submissions of Counsel for the Claimants in reply

[71] In relation to the submission that concern about goods and services supplied during construction were the genesis of the sale, counsel for the claimant Mr. Braham QC commented that the skeleton submissions of the claimants did not foreshadow such treatment and neither was that the approach adopted at the leave stage; at which time it was argued that the FF&E did not involve the general supply of goods and services.

[72] Counsel remarked that all the arguments made concerning the pre-sale arrangements were "brilliant" but addressed the wrong question. He contended that the Letter of Requisition (LOR) dated June 20, 2012, which was what was sent to the 2nd claimant, had nothing to do with the construction and the goods supplied during the construction. He referred to paragraphs 1 and 3 of the LOR. He also maintained that the requisitions each said that the Contractor-General was investigating the

sale and that “sale” in law and business means the purchase and sale of an asset; nothing less and nothing more. He contended that if the Contractor-General intended more he should have said so, in a context where the citizen should not be left to assume what is required where there is a criminal penalty and threatened prosecution for non-compliance.

[73] Counsel submitted that the contention of the Contractor-General that the investigations concerned the pre sale construction and supply of goods and services was insincere. He referred to the letter dated January 19, 2011 sent to The Hon. Prime Minister Golding and the Permanent Secretary in the Office of the Prime Minister, and contended that it shows that the issues relating to the construction and the supply of goods and services were already gone into by the OCG and the Contractor-General had issued a report to parliament in which he made findings.

[74] Regarding the allegation that the 2nd claimant had exhibited a lack of candour, in a riposte, counsel argued that the OCG had not disclosed the investigative report of 2006 in relation to the construction of the hotel, supply of goods and services and cost overruns alleged by Gorstew Ltd. Counsel submitted it was unimportant and its absence supported the claimants’ argument that those matters were not a part of the OCG’s current investigations.

[75] Counsel also argued that the OCG had failed to disclose the requisitions sent to other persons and their responses in relation to the sale, which if relevant, would have shown to the court what information resided in the knowledge of the OCG, based on the responses. Counsel advanced that there was a high duty on a public authority to be candid to the court, and that there had been no breach by the claimants of rule 28.17 of the Civil Procedure Rules (CPR) which addresses documents referred to in statements of case, etc. Counsel also argued that there was no continued obligation of disclosure as such a duty only arises where there is an order either for standard or specific disclosure, and there was no

such order in this case. Counsel cited rules 28.4 *(Standard disclosure)*, 28.6 *(Specific disclosure)*, 28.13(1) *(Where order for standard or specific disclosure made duty of disclosure continues until proceedings concluded)* and 56.13(2)(a)(iii) of the CPR *(Power of judge to order disclosure of documents during first hearing of the judicial review claim)*.

[76] Counsel submitted that the purpose of disclosure was to assist the court in coming to a proper determination of the issues before the court. In this case the issue concerns a determination as to whether this particular sale is subject to the authority of the OCG. In that context what was properly put before the court was the sale agreement and the relevant contracts to enable the court to make a determination of what was done.

[77] Counsel further submitted that for the court to determine whether there is a breach it would have to be considered whether the action was intentional; and whether it was intentional or not would depend on the issue before the court and the statutory framework. Counsel maintained that given how the issue was framed and placed before the court the documentation provided had to be seen in that light, and if it turns out the issue was misread the claimants should not be penalised. Counsel also advanced that, as the submissions on behalf of the defendant that the requisitions concerned more than a sale, were initially based on the documents relied on from the first hearing even before the additional documents were submitted, that made the point that there was enough information before the court.

[78] Counsel maintained that the purpose of the court is not to discipline or punish parties but to ensure it has enough information to make the appropriate decision. With all the initial information and the subsequent material provided, counsel argued that the defendant suffered no prejudice in advancing its arguments.

[79] Commenting on the case of ***The Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Limited*** counsel stated

that the court in that case did not indicate that where there was a disclosure breach the sanction was that judicial review remedies should be refused but that the court could draw adverse inferences against the party in breach. He indicated that the case demonstrated that what is significant is the effect of the failure to disclose and not that the court should punish the litigant in default. Further he noted that the case established that the duty of disclosure exists on both sides and the higher duty rests on the public authority.

[80] In relation to the case of ***R v Leeds City Council ex p. Hendry*** counsel argued that the emphasis in that case was the failure to supply material documents. Counsel submitted that applying that principle to the instant case it could not be reasonable to supply all the information concerning the construction to include invoices and all other documents. He also argued that there was no evidence that the claimants had withheld any material documents. He further noted that the decision in ***ex p. Hendry*** was not only based on the lack of candour, but also on the fact that the applicant had failed to establish all that he had to.

[81] Concerning ***I and others v Secretary of State for the Home Department*** counsel intimated that the case could not assist as it concerned a matter where it was the state that had failed to provide key documents necessary to determine the matter, which was not the situation in the instant case.

[82] Regarding ***R (on the application of MS (A Child) v Secretary of State for the Home Department*** counsel sought to summarily dismiss it as unhelpful, as it concerned a without notice application which was not the case here.

[83] Counsel therefore in summary, advanced that for the reasons outlined the case should be decided on its merits and the contention that there was a lack of candour on the part of the claimants should be rejected.

[84] In relation to particular documents which were provided to the court during the hearing counsel made the following comments:

(i) The Terms of Reference of Facilitator to assist in discussions regarding the proposed sale of the Sandals Whitehouse property dated 25th June 2010 which was to guide the facilitator the Hon. R. Danvers Williams O.J. showed that

1. Paragraphs – 1 and 2 focused on the attainment of a fair market price; and
2. Paragraph 4 – the facilitator was given plenipotentiary powers and could decide to have public auction if no agreement was reached within a specified time with a reserve price to be set by ANDCo. Ltd in such an event.

(ii) The Ackendown Newton Development Company Limited (ANDCO) Discussion Paper Regarding Sale of the Hotel to Gorstew dated November 11, 2010:

1. The emphasis was the price and why the sale may be beneficial to ANDCo. Now why would it benefit Gorstew. Valuation of hotel was US$40.2M (Ernst and Young valuation). (ANDCO identified corrections that would increase value to US$42.9M) Property was sold for US$40M. See page 2,3,4,5

(iii) The Email Thread between the facilitator, Mr. Joseph Matalon Chairman of the ANDCO Board and Prime Minister Golding between December 9 – 10, 2010 including the final email which shows approval for the sale from the ANDCO board and acceptance by Gorstew.

[85] Counsel submitted that all these documents demonstrated was that the issues dealing with cost overruns, and supply of goods and services were not of any relevance in the negotiations in relation to

the sale price. Counsel maintained that all the documents demonstrated was that this was a genuine sale which included FF&E.

[86] Mr. Spencer for the claimants added the case of ***R v George Green*** (1969) 14 W.I.R. 204 to the arsenal of cases in support of the claimants' advocacy of a limited interpretation of word "include" in the Act.

DISCUSSION AND ANALYSIS

Issue 1: The meaning and compass of the Contractor-General Act in particular the term "government contract".

[87] Central to the dispute in this matter is the question of the extent of the jurisdiction conferred on the Contractor-General by the Act. The claimants maintain that the OCG is not a dedicated anticorruption body. Rather they contend that the jurisdiction of the Contractor-General is limited to overseeing and promoting the integrity and fairness of the procurement procedures and systems that are related to the supply of goods and services and the carrying out of building or other works by a public body. The claimants also contend that based on the scope of the Act the Contractor-General does not have any jurisdiction regarding the divestment of state assets.

[88] The claimants also argued that particularly in relation to questions 22-38 of the Requisition, the Contractor-General had sought to assume powers in relation to corruption and conflict of interest under the CPA that belong to the Corruption Prevention Commission (See sections 2 and 14 of the CPA).

[89] The defendant on the other hand maintains that the purpose of the Act was to establish a dedicated anti-corruption body not limited to monitoring or overseeing contracts of any particular specie. Accordingly the OCG does have jurisdiction to oversee the divestment of state assets.

[90] What is the true scope of the Act? It will be necessary to examine several sections and definitions in the Act and the interrelation between them, in pursuit of the answer. The Contractor-General as a Commission of Parliament derives all his powers and authority from the Act. The Contractor-General has two principal functions, namely:

1. To monitor the award and implementation of Government contracts (Section 4); and

2. The carrying out of investigations in certain specific circumstances (Section 15).

[91] In relation to the Contractor-General's function of monitoring, section 4(1) states:

> Subject to the provisions of this Act, it shall be the function of a Contractor-General, on behalf of Parliament-
>
> (a) to monitor the award and the implementation of government contracts with a view to ensuring that-
>
> (i) such contracts are awarded impartially and on merit;
>
> (ii) the circumstances in which each contract is awarded or, as the case may be, terminated, do not involve impropriety or irregularity;
>
> (iii) without prejudice to the functions of any public body in relation to any contract, the implementation of each such contract conforms to the terms thereof; and
>
> (b) to monitor the grant, issue, suspension or revocation of any prescribed licence, with a view to ensuring that the circumstances of such grant, issue, suspension or revocation do not involve impropriety or irregularity and, where appropriate, to examine whether such licence is used in accordance with the terms and conditions thereof.

[92] With regard to the investigatory powers granted by the Act, the Contractor-General, in his discretion, is entitled to conduct investigations into matters listed in Section 15(1) which provides that:

Subject to subsection (2), a Contractor-General may, if he considers it necessary or desirable, conduct an investigation into any or all of the following matters-

(a) the registration of contractors;
(b) tender procedures relating to contracts awarded by public bodies;
(c) the award of any government contract;
(d) the implementation of the terms of any government contract;
(e) the circumstances of the grant, issue, use, suspension or revocation of any prescribed licence;
(f) the practice and procedures relating to the grant, issue suspension or revocation of prescribed licences.

[93] The following definitions contained in section 2 of the Act are critical to the determination of its scope:

(v) ""government contract" includes any licence, permit, or other concession or authority issued by a public body or any agreement entered into by a public body for the carrying out of building or other works or for the supply of any goods or services".

(vi) ""contractor" means any person, firm or entity with whom a public body enters into any agreement for the carrying out of any building or other works or for the supply of any goods or services and includes a person who carries out such works or supplies such goods or services for or on behalf of any public body pursuant to a licence, permit or other concession or authority issued or granted to that person by a public body"

(vii) ""public body" means—

(a) a Ministry, department or agency of government;

(b) a statutory body or authority;

(c) any company registered under the Companies Act, being a company in which the Government or an agency of the Government, whether by the holding of shares or by other financial input, is in a position to influence the policy of the company".

[94] Concerning the 1999 amendment of the Act which introduced the Natural Contracts Commission, both the claimants and defendant agree

that it does not provide a basis for an interpretation of the Act which holds that it extends to cover the divestment of State assets. This agreement is however based on different grounds for each. The claimants argue that the procedures under Part IIIA are only an emphatic refinement of the procedures for the procurement of goods and services and contracts for building and other works. The defendant on the other hand submitted that Part IIIA established a discretely separate and autonomous body with specific and limited functions and provided no assistance as to the general scope of the Act.

[95] It is clear that the actual words used for the definition of "government contract" do not specifically mention a sale or divestment. The question is does the use of the word "includes" in the definition expand it in a manner that would allow it to embrace contracts involving a sale or divestment or should "includes" be read to mean "means" or "means and includes".

[96] **Cross Statutory Interpretation** (3rd Edition) at pages 119 -120 in discussing interpretation sections, outlines the usual view that use of the word "includes" to define a word or phrase in a statute is regarded as expanding the meaning of the particular word or phrase to capture not only the ordinary meaning of the word or phrase, but also the specific meaning ascribed by the definition section. This rule is however not absolute. If the legislation has a contrary intention the particular definition must be subject to the legislative intent. (See **Halsbury's Laws of England** (5th Ed) Vol. 96 paragraph 1204 and **Bennion on Statutory Interpretation** (5th Ed) page 561).

[97] Four cases were relied on by counsel for the claimant as supporting the limited interpretation of the word "includes" in the definition of government contracts advanced by them. In ***Dilworth and Others v The Commissioner of Stamps; Dilworth and Others v The Commissioner for Land and Income Tax***, one of the issues that arose was whether the use of the word "includes" in the definition of charitable

purposes expanded the definition beyond the words used in the definition. The House of Lords ultimately decided that it was unnecessary to determine whether the definition was expanded or was exhaustive as they found the particular bequest which was the subject of the litigation, fell within the words actually used in the definition. They however opined that they were willing to assume that the definition was exhaustive. Lord Watson delivering the judgment of the House had this to say about the use of the word includes at pages 105 -106,

> The word “include” is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word “include” is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to shew that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to “mean and include,” and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.

[98] In ***Inland Revenue Commissioners v Joiner*** one issue was the effect of defining “transaction in securities” using the word includes. At pages 1060-1061 Lord Diplock said,

> An interpretation clause in a statute may serve two different purposes. If it states at greater length what an expression used in other provisions in the statute 'means', it is no more than a drafting device to promote economy of language. It is a direction to the reader: 'Wherever you see this shorter expression in the statute you must treat it as being shorthand for the longer one.' Alternatively an interpretation clause may be used by the draftsman not to define the meaning of an expression appearing in the statute but to extend it beyond the ordinary meaning which it would otherwise bear. An indication that this *may* be its purpose is given if it purports to state what the expression 'includes' instead of what it 'means'; but the substitution of the one verb for the other is not conclusive of its being a direction to the reader: 'Wherever you see this shorter expression in the statute you may treat it as bearing either its ordinary meaning or this other meaning which it would not ordinarily bear.' Where

> the words used in the shorter expression are in themselves too imprecise to give a clear indication of what is included in it, an explanation of their meaning which is introduced by the verb 'includes' may be intended to do no more than state at greater length and with more precision what the shorter expression means.

[99] The House of Lords went on to hold that though transaction in securities was defined through the use of the word “includes”, as it spoke of transactions of whatever description, relating to securities and referred to particular examples of such transactions, it was so extensive that there was no transaction which could sensibly be described as a transaction in securities which did not already fall within the definition outlined. Accordingly the court found that the expression did not include the liquidation of a company — a term of legal art.

[100] The third case was ***Y.Z. Finance Company PTY. Limited v Cummings***. In this case in subsection 24 (2) of the **Money-lenders and Infants Loan Act** (MLILA) “security” was defined for the purposes of that section as: *“includes bill of sale, mortgage, lien, and charge of any real or personal property, and any assignment, conveyance, transfer or dealing with any real or personal property to secure the repayment of any loan.”* The issue was whether a promissory note was a security within the section. The High Court of Australia in a majority 4 to 1 decision, held that it was not included as the definition of security in that section was exhaustive. It was readily recognised however that the meaning of “security” elsewhere in the MLILA was not limited by section 24 (2).

[101] It will be useful for subsequent analysis to quote from a section of the judgment of Kitto J which addresses both the particular subsection being interpreted as well as an argument concerning the draftsman’s general intent in choosing between the uses of “means” and “includes”, in defining particular words or phrases in other sections of the MLILA. At pages 403 to 404 he stated,

> It seems to me the necessary conclusion that sub-s. (2) is enacted not in order to provide a glimpse of the obvious but in order to describe the whole extent of the inclusiveness of "security" for the purpose of the section, and by so doing to perform the very necessary work of precluding the inference which otherwise might have been drawn from the fact that the word is used in a wider sense elsewhere in the Act. A suggestion was made in argument that ss. 3 and 52 disclose a careful course of draftsmanship in which "includes" is used where the intention is to make a non-exclusive provision as to the intended scope of an expression, and "means" is used for an exclusive provision. I do not think that a careful reading of the sections bears this out. In s. 3, provisions are made as to the words "company", "loan", and "money-lender", in which "includes" is the verb that is employed; but in each instance what follows seems to be a complete statement of the meaning of the expression. The same is true of the provision in s. 52 with respect to the expression "cash order". The draftsman does indeed appear to have exercised in each section a careful discrimination between "means" and "includes", but not because he has regarded "includes" as appropriate only for making an addition to the ordinary meaning of an expression. Using "means" where his purpose has been to impose upon an expression an artificial meaning to the exclusion of any other, he has used "includes" where his purpose has been to choose one out of two or more otherwise possible meanings by specifying the intended coverage.

[102] Finally, there was the case of ***R v George Green*** which was added belatedly. In that case the issue was whether the definition of ganja in the **Dangerous Drugs Law** extended to the staminate part of the plant known as *cannabis sativa.* The definition of ganja in section 2 of that law provided that:

> "'ganja' includes all parts of the pistillate plant known as cannabis sativa from which the resin has not been extracted and includes any resin obtained from the plant but does not include medicinal preparations made from that plant."

[103] It was held by a majority that the term ganja as defined was referable only to the pistillate plant known as cannabis sativa and did not include any part of the staminate plant. This case is of somewhat limited utility in this situation, given that the **Dangerous Drugs Law** was a penal statute and necessarily needed to be strictly construed. The court is

however also mindful of the contention of the claimants that the Requisition threatened criminal sanctions for failure to comply with its requests and to that extent the CGA should also be strictly construed.

[104] There are of course other cases, relied on by counsel for the defendant which hold otherwise. Cases that embrace the usual view that the use of "includes" in a definition is meant to expand it. ***George Robinson v The Local Board for the District of Barton Eccles et. al.*** provides support for the proposition that an interpretation clause that extends the meaning of a word does not take away its ordinary meaning. At page 801 Lord Selbourne said: *"An interpretation clause of this kind is not meant to prevent the word receiving its ordinary, popular and natural sense, whenever that will be properly applicable but to enable the word as used in the Act... to be applied to some things to which it would not ordinarily be applicable".*

[105] In ***The School Board for London v. Jackson*** (1881) 7 QB 502, Jackson the mother of a child, was summoned for non-compliance with an Order under s. 11 of the **Elementary Education Act**, 1876 to educate a child of whom she was the parent. The issue was the meaning of the term "parent" which was defined to "include guardian and every person who is liable to maintain, or has the actual custody of any child." In holding that the term clearly included the mother Lord Coleridge CJ at page 504 stated,

> I am of opinion that the object being that children should be educated, parents are the first persons on whom the order should be made. The fact that the word parent includes by the interpretation clause other persons, guardians, persons liable to maintain, and persons who have the actual custody, if there be any such, does not appear to me to prevent the operation of the word "parent" in its primary and obvious sense where there is a person who comes under that description.

[106] Further in ***Nutter v Accrington Local Board*** (1879) 4 QBD 375 where the court had to consider an interpretation which provided that *"street"* shall apply to and *"include any highway not being a turnpike road."* the English Court of Appeal held that the effect of the inclusion was to

enlarge and not to restrict the meaning of *"street."* Therefore as Cotton LJ said at page 385, *"that which in ordinary language is properly a street does not cease to be so because it is part of a turnpike."*

[107] Counsel for the defendant also relied on the cases of ***Unwin v Hanson*** and ***Fisher v Bell*** which establish the principle that, in interpreting a statute, words used must be interpreted having regard to the aim of the statute and the area of law with which it is concerned. Therefore counsel argued that the Act, being designed to ensure good governance, probity and to guard against corruption by and of public bodies, a restrictive meaning would not be in keeping with these aims and considerations. In fact, the incorporation of the word "include" was to ensure that it serves its expansive purpose and not be restricted to contracts in a technical sense.

[108] At the risk of overstating the obvious, each statute is different. To that extent although some assistance can be garnered from the decisions made with regard to other statutes the Act itself under consideration has to be construed. The court has to determine from a construction of the Act as a whole what interpretation should be placed on the particular definition of "government contract" and the impact of the use of the word "includes" as opposed to the word "means".

[109] The ***Ashton Wright*** case is important to the determination of this issue. It is the only case to date which has sought to interpret the scope and compass of the term "government contract" and by extension what types of transactions are caught by that definition under the Act. The relevant facts of that case were that Telecommunications of Jamaica (TOJ) purchased two (2) parcels of land for a price of $49,189,200.00 from Development Properties Limited, a company controlled by the Chairman of TOJ. The then Contractor-General (Mr. Ashton Wright) sought to investigate the contract. TOJ refused to provide any information, and asserted that the Contractor-General, Mr. Wright, did not have the requisite authority to investigate the contract. The Contractor-General applied by Originating Summons to the Supreme Court to have certain

questions determined, namely: (a) Whether TOJ was a public body; (b) Whether the agreement by TOJ for the purchase of the two (2) parcels of land was a government contract within the purview of the **Contractor-General's Act;** (c) Whether the Contractor-General had jurisdiction in relation to the contract pursuant to the **Contractor-General's Act**.

[110] Wolfe J, (as he then was), found that TOJ was in fact a public body. On the issue as to whether the contract to purchase the two (2) parcels of land was a government contract, Wolfe J held that it was not. The learned judge found that the statutory definition of the term "government contract" created a distinction between the contracts entered by government *per se* and contracts entered into by public bodies being organs of government. His Lordship concluded:

> Not only has Parliament created a distinction between government per se and public body, but it has limited the agreements entered into by "public body" which may be regarded as a "government contract" by adding the words "for the carrying out of building or other works or for the supply of any goods or services."

[111] Further in considering the investigative powers of the Contractor-General under Section 15 of the Act, at page 414 letter H – I Wolfe J concluded that:

> A careful examination of Section 15 reveals that the Section is designed to deal with contracts which are in the nature of public works. Firstly, it speaks of the registration of contractor, then it speaks of the tender procedures relating to the award of contracts, then it refers to the actual award of government contracts, and finally of the implementation of the terms of any government contracts which are awarded.
>
> In particular, contracts between [TOJ] and [the seller] none of the elements referred to in paragraph 15 (1) (a)-(f) inclusive is present. Section 15 (1) (a)-(f) describes and limits the areas which are subject to investigation by the Contractor-General.

[112] At the end of his judgment at pages 414-415 Wolfe J stated:

> En passant I wish to observe that a keen reading of the Act clearly indicates that Parliament in promulgating this Act has only addressed the question of contracts which are in the nature of public works e.g. building contracts and the supply of goods and services to Government. It might very well be that Parliament intended otherwise but I make bold to say that if this was the intention it has not been achieved by the present legislation.
>
> The public interest demands that contracts such as the instant one should come within the ambit of the Contractor-General Act.

[113] Interestingly, both counsel for the claimants and counsel for the defendant took issue with aspects of the dicta of Wolfe J. While relying on the outcome of the case counsel for the claimants submitted that the *en passant* statements at the end were obiter. He stressed that Wolfe J did not state why parliament might have intended otherwise or why contracts such as that in ***Ashton Wright*** should fall under the scrutiny of the Act. Counsel went as far as positing that the final observations were contrary to the previous interpretation. Counsel for the defendant on the other hand submitted that having earlier recognised in accordance with the case of ***Ex parte Ferguson*** (1871) LR 6 QBD 280 approved by the Privy Council in the case of the ***Guantlett*** (1872) LR 4 PC 184 that the use of the word "include" tends to broaden the meaning of words defined, Wolfe J should not then have gone on to narrowly construe the meaning of "government contract".

[114] I see nothing to fault the analysis of Wolfe J, concerning the scope of the Act. I agree that the definition of "government contract" has "*limited the agreements entered into by "public body" which may be regarded as a "government contract" by adding the words "for the carrying out of building or other works or for the supply of any goods or services.""*" A careful review of the definitions set out in the Act discloses that as explained in the case of ***Y.Z. Finance Company PTY. Limited v Cummings*** the draftsman used *"means"* where his purpose has been to impose upon an expression an artificial meaning to the exclusion of any

other, and he has used *"includes"* where his purpose has been to choose one out of two or more otherwise possible meanings by specifying the intended coverage.

[115] If the Act does not cover the purchase of land by a public body, it stands to reason that it does not cover the divestment of land. That follows naturally if ***Ashton Wright*** was, as I have held, correctly decided. The *en passant* statements of Wolfe J made in 1989 have even greater force today. Government contracts involving public works are just a fraction of the contracts entered into by government and public bodies. For contracts involving divestments of state assets to be exempt from the scrutiny of the OCG did appear to be out of step with the increasing trend towards transparency in governance. As outlined in the submissions, successive governments had requested the OCG to scrutinise some divestments. Finally by the passage of the **Integrity Commission Act 2017** parliament enlarged the definition of "government contracts" to ensure that the sale or purchase of property by a public body, which is also widely defined, is subject to appropriate oversight.

[116] Before parting with this issue I should indicate that the way in which the word "award" is to be construed supports the conclusion arrived at concerning the scope of the Act. Counsel for the defendant submitted that while the use of the term "award" in the context of construction law may be a term of art of limited meaning, in an anti-corruption statute it bears much wider application.

[117] Citing **Jowitt's Dictionary of English Law,** 2nd Edition, London Sweet & Maxwell 1977 Vol.1, pages 169-170 counsel noted that in defining "*award",* it states, among other things, *"an award is accordingly in the first place the taking a matter into consideration and awarding judgment on it".* It further provides that*, "any words expressive of a decision, are an award."* The historical origin and devolution of the meaning of the word are traced in **Jowitt's** from provençal French where it meant; *"to inspect goods, and then to pronounce them good and marketable";* then

to, its application to an arbitrators decision; through to its modern day extension, to include *"any words expressive of a decision."*

[118] In the **Webster's College Dictionary**, 2001 Revised Edition, Random House New York page 94 counsel noted "award" is defined as follows; (1) to give as due or merited; assign or bestow: to award prizes. (2) to bestow or assign by judicial decree: the plaintiff was awarded damages of $100,000.-n. (3) something awarded, as a payment or medal. (4)(a) a judicial decision or sentence (b) the decision of arbitrators on a matter submitted to them.

[119] Counsel for the claimants on the other hand maintained that the contracts about which the Act is concerned are those that flow from a tender and award process; a process which was not engaged in this instance. There was on the contrary counsel argued specific evidence before the court that the dealings in relation to the sale and purchase of the hotel were as a result of the involvement of a mediator after court and potential arbitration proceedings. The sale was therefore not based on a tender and award process but based on a consensual approach between the parties. This was clear on an examination of the recitals of agreement in the Agreement for Sale.

[120] If the Act had been held to cover all contracts entered into by the government then of necessity "award" would have to be understood in the broader context as suggested by counsel for the defendant. However as I have agreed with Wolfe J that "government contract" as used in the Act was restricted in its scope and limited by the words, *"for the carrying out of building or other works or for the supply of any goods or services"*, then the narrower technical meaning of award is indicated. In this instance the meaning of the word does not assist to define the scope of the Act. Rather it is a definition of the scope of the Act, the entire Act having been considered, including the way in which the word award is used and the need for internal consistency in the legislation, that yields the true meaning to be ascribed to "award."

[121] I therefore agree with the submissions made by counsel for the claimants that the contracts about which the Act is concerned are those that flow from a tender and award process; which was not the process engaged in this instance. This therefore provides an additional basis for the finding that the Contractor-General is not empowered to investigate the sale.

Issue 2: The true and essential nature of the transaction dubbed by the nomenclature "Sale of Sandals White House"

[122] Counsel for the claimants submitted that the transactions being investigated concerned divestment. They focused on the sale and purchase of the hotel and to valuations in relation to that, as well as the lease. He noted that a lease in some circumstances can also be a divestment though not of the fee simple.

[123] Further while acknowledging that the Agreement for Sale does refer to the FF&E counsel maintained that the goods mentioned in the FF&E were part of the divestment as they were meant to go with the land. They do not come under the rubric "government contract" and were not subject to a tender and award process.

[124] Counsel for the defendant on the other hand maintained that the transaction was really an arrangement for the provision of goods and services albeit culminating in a sale. Counsel maintained that the genesis of the sale was relevant as what had been termed a sale was the culmination of the provision of goods and services, a dispute in relation thereto and the consideration for resolving the dispute was the sale. It was in that context that the questions asked by the Contractor-General had to be viewed.

[125] Given the decision on the first issue the court has to decide whether or not the circumstances surrounding the sale of the Hotel and the FF&E can be linked in such a way to prior contracts "for the carrying out of

building or other works or for the supply of goods or services" that it would or could be relevant to the question of, for example the implementation of a "government contract", which the OCG has jurisdiction to investigate. If so the argument of counsel for the defendant is that the fact that the sale of the Hotel and FF&E represented a divestment of assets would not negate the existence of jurisdiction of the OCG to investigate any "government contracts" which led to the creation, development or acquisition of those very assets that were divested.

[126] What is manifest is that at the time of the issuance of the LOR the Contractor-General was clearly of the view that the Act clothed the OCG with the authority to investigate divestments. That is evident from the heading of the LOR which indicated it was *"Re: Notice of Formal Requisition for Information and Documentation to be Supplied Under the Contractor General Act – Special Statutory Investigation – Concerning* ***Divestment*** *of Government of Jamaica Owned Assets – Allegations of Secret Talks for the* ***Sale*** *of Sandals Whitehouse Hotel to Gorstew Limited"*. (Emphasis added.)

[127] In the body of the Requisition introductory paragraphs 1 and 3 reference the sale. Turning to the individual requisitions/questions themselves they are all geared towards the determination of the propriety or otherwise of the sale. In fact, in all but a handful of the requisitions, there is direct reference and inquiry in relation to at least one of the following words: "sale", "purchase", "divestment" "negotiations", "selling price" or "valuation", all concerning the sale/purchase of the Sandals Whitehouse hotel. In the requisitions that do not contain at least one of those references the following is noted:

(i) Question 11 relates to the Notice of Renewal of Lease from Gorstew Ltd which was a follow up to a previous question concerning whether Gorstew was in full compliance with the terms of the Lease Agreement when negotiations for the sale commenced;

(ii) Questions 18 and 19 respectively seeks details of the substance of the lawsuits/arbitration proceedings between Gorstew Limited and the GOJ, ANDCO, UDC and/or DBJ;

(iii) Questions 20 and 21 respectively request details of the occupancy levels of Sandals Whitehouse from 2007 to January 2011 and information on any Hospitality/Tourism industry awards Sandals Whitehouse has ever been nominated for or won.

(iv) Question 22 queries whether any Officer(s), Official(s), and/or Employee(s) of the GOJ, ANDCO, UDC and/or DBJ were affiliated with or employed by Gorstew Limited.

(v) Question 25 asks whether the 2nd claimant or anyone acting on behalf of Gorstew Limited had offered any benefit or payment in cash or kind to any Officer(s), Official(s), and/or Employee(s) of the GOJ, ANDCO, UDC and/or DBJ or anyone acting on their behalf.

(vi) Question 33 asks whether there were any arrangements for any of the persons referenced in questions 21 - 32 to receive future benefits.

(vii) Question 36 queries whether any assistance was obtained to complete the Requisitions, question 37 concerned any consultation to complete the Requisition and question 38 allows for any additional information that might prove useful to the investigation to be added.

[128] The court also notes that even these later highlighted questions which do not contain any reference obviously relating to a sale, are supplementary to other questions which do. Thus the whole tenor, focus and intendment of the Requisition, is as the heading said, on the divestment and sale of the Government of Jamaica owned asset the Sandals Whitehouse Hotel. Much discussion has surrounded the question whether the OCG exceeded its remit in relation to questions 22 - 38 which appeared to treat with corruption issues that would fall under the CPA. The issue for the court is however what grounds the jurisdiction of the OCG. The first question to be determined is whether the OCG has

jurisdiction at all and it is only if that question is answered in the affirmative, the secondary question of the breadth of that jurisdiction comes into focus.

[129] The central consideration under this issue is whether by virtue of this Requisition the OCG has jurisdiction to inquire into any agreements that preceded the Agreement for Sale which qualify as "*agreements entered into by a public body for the carrying out of building or other works and for the supply of goods and services".* The argument of the defendant is that the transfer of the hotel (land, structure and FF&E) was in exchange for and to settle claims made by the first claimant and its affiliate regarding services rendered to the public body.

[130] The documentation clearly shows that the joint venture agreement to develop a hotel entered into by Gorstew Limited, NIBJ and UDC in March 2000 was over time governed by the following agreements which established particular relationships, and allocated responsibilities and benefits between the parties in relation to certain goods, services and lands:

(i) Heads of Agreement dated July 2, 2001;
(ii) Variation of Heads of Agreement dated October 29, 2003;
(iii) Technical Services Agreement dated November 1, 2001;
(iv) Shareholders Agreement dated December 19, 2003; and
(v) Lease Agreement dated July 7, 2004

[131] The evidence has also established that based on disputes concerning the fulfilment of obligations under one or more of those agreements, three separate lawsuits were launched being Claim no. 2005HCV02911 Gorstew v ANDCo Ltd, Claim no. 2005HCV05059 Gorstew Ltd & Sandals Whitehouse Management Ltd v UDC NIBJ & ANDCo Ltd; and Claim no. 2005HCV02914 Appliance Traders Limited v ANDCo. ANDCo, UDC & NIBJ also filed defences and counterclaims against Gorstew Ltd.

[132] The claims were stayed and the matters referred to arbitration by Hugh Small J (Bahamas) in June 2008. In March 2009 the Arbitration was suspended to allow for the pursuit of a negotiated settlement. In April 2010 the Hon. R. Danvers Williams was appointed facilitator pursuant to a Cabinet decision to negotiate an agreement acceptable to all parties for the sale of ANDCo's interest in the property to Gorstew Limited.

[133] This facilitation resulted in the Agreement for Sale dated February 7, 2011 as part of the conditions for which the lawsuits were discontinued. It is therefore manifest that there was a connection between the claims brought by Gorstew alleging breaches of various agreements *entered into by a public body for the carrying out of building or other works and for the supply of goods and services",* which were ultimately settled by the sale and the discontinuance of the lawsuits.

[134] However, we have to go back to the Requisition and remain mindful of the effect of ***Wright's*** case. The Requisition is focussed on the sale in respect of which the Contractor-General thought he had jurisdiction, but I have found he did not. It should also be highlighted that throughout the Requisition there is no mention of FF&E; references all relate to the hotel. The defendant has highlighted that there was no disaggregation of the sale of the hotel and the FF&E. But that supports the claimants' position that everything was bound up in the sale.

[135] Even without considering that some parts of the FF&E, in particular fixtures may be considered a part of the land, as there was no disaggregation the court finds it difficult to envision how negotiations in relation to the hotel could be differentiated from the issues related to the FF&E given the way the matter was addressed? Even if they could be separated, it could be queried how much value would an investigation into one half of that equation be? How could it be ultimately determined if the resolution of the law suits relating to issues which arose during the execution of the prior agreements was proper or improper without

including the Agreement for the sale and the factors which led to the sale price being arrived at and agreed?

[136] The same reasoning would apply concerning any agreement for services that the CG wished to investigate based on this requisition. 1) The Requisition only relates to the sale and 2) even if it could be extended to refer to other matters, which I hold it cannot, the resolution of those other matters could not be properly investigated without there also being an investigation of the sale.

[137] Accordingly the court holds that the Requisition dated June 20, 2012 does not empower the OCG to investigate the provision of goods and services prior to the Agreement for sale because i) the requisition was focussed on the sale which the CG does not have jurisdiction to investigate; and ii) in the context in which this Requisition arose, it would not be possible to properly investigate the resolution of any disputes related to the provision of goods and services without reference to the sale.

Issue 3: Were the claimants in breach of any duty of disclosure under the Civil Procedure Rules; and/or their obligation of candour in judicial review proceedings? If so should any breach preclude the granting of the reliefs sought by the claimants?

[138] Counsel for the defendant has argued that the lack of candour and failure of the claimants to disclose some documents until during the hearing, should cause the court to refuse the judicial review reliefs sought. The documents in question are a) Claim no. 2005HCV02914 Appliance Traders Limited v ANDCO Ltd; b) Copy Terms of Reference in the arbitration between Gorstew Ltd, Sandals Whitehouse Management Ltd, ANDCO Ltd, UDC and DBJ and Points of Claim dated July 31, 2008; c) Copy Deed made on February 7, 2011 by Gorstew Ltd, Sandals Whitehouse Management Ltd, ANDCO Ltd, UDC and DBJ outlining agreement between the parties to discontinue all claims in Claim No.

2005HCV05059 and the Arbitration proceedings; d) Terms of Reference of Facilitator to Assist Discussions Regarding the Proposed Sale of the Sandals Whitehouse Property dated June 25, 2010; e) Chain of emails between Joseph M. Matalon (Chairman of ANDCO) Hon. R. D. Williams (Facilitator) and Hon. Prime Minister Bruce Golding; and f) Letter dated November 11, 2010 from Milverton Reynolds (Managing Director, DBJ) to the Hon. Bruce Golding Prime Minister enclosing ANDCO Discussion Paper Regarding Sale of the Hotel to Gorstew also dated November 11, 2010.

[139] Counsel for the claimants resisted this submission on the bases that there was no intention to deprive the court of necessary material; the defendant was able to make submissions on the issues even before the additional documents were disclosed; the issue had to be viewed in the context of how the matter was framed; and the role of the court was not to punish parties but to ensure that there was adequate information before the court to enable the court to make the appropriate decision. Counsel also countered that the duty of disclosure was twofold and that a higher duty of disclosure was on the state.

[140] Rule 28. 17(2) & (3) of the CPR were relied on by the defendant. Rule 28.17 (1), (2), & (3) provide that:

> (1) A party may inspect an copy a document mentioned in:
> (a) …..;
> (d) an affidavit; …
> (2) A party who wishes to inspect and copy such a document must give written notice to the party who, or whose witness, mentioned the document.
> (3) The party to whom the notice is given must comply with the notice not more than 7 days after the date on which the notice is served.

[141] It is true that, as submitted by counsel for the claimants, no order for standard or specific disclosure was made. However rule 28.17 of the CPR does contemplate a request being made by one party of another, for disclosure of a document mentioned, in this case in an affidavit, without the need for a court order. Therefore having received a written

request for information on the claims referred to in paragraph 4 of the 2nd claimant's first affidavit, the omission by the claimants through counsel to inform counsel for the defendant of the third claim was a breach of that rule. Also as indicated in the first paragraph of analysis on this issue, a number of other documents that were previously undisclosed were made available during the course of the hearing as arguments ensued. In this case there was therefore late disclosure of some documents as opposed to non-disclosure, where documents that should have been disclosed are never provided. What then is the effect of this state of affairs on this claim?

[142] In the England and Wales Court of Appeal case of ***The Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Limited*** where the Secretary of State had been accused of late or non-disclosure of relevant material Johnathan Parker LJ stated at paragraph 50 that:

> [T]here is no duty of general disclosure in judicial review proceedings. However there is — of course — a very high duty of public authority respondents, not least central government, to assist the court with full and accurate explanations of all facts relevant to the issue the court must decide. The real question here is whether in the evidence put forward on his behalf the Secretary of State has given a true and comprehensive account of the way the relevant decisions in the case were arrived at. If the court has not be given a true and comprehensive account, but has had to tease the truth out of late discovery, it may be appropriate to draw inferences against the Secretary of State upon points which remain obscure: see Padfield [1968] AC 997, per Lord Upjohn at 1061G – 1062A.

[143] After reviewing instances of a want of frankness in relation to the material put forward by the Secretary of State, even though later commenting in paragraph 55 that the Secretary of State had in this case fallen short of the usual high standards of candour of government departments, Parker LJ posited earlier in paragraph 55 that:

> On this matter of disclosure we have, in my judgment, to bear in mind that what matters is the effect of any failure on our appreciation of the overall merits of the case; we are not concerned to discipline or penalize the Secretary of State.

[144] What is clear from this case is that non/late disclosure has to be assessed on a case by case basis depending on the nature of the breach and its effect on the tribunals "appreciation of the overall merits of the case".

[145] In ***Leeds City Council ex. p. Hendry***, the applicant for judicial review of a decision to refuse him a private hire licence failed to obtain that relief. One of the bases of that refusal was that he had made a very perfunctory application and failed to attach any relevant documents in support such as letters and other material available to his solicitors.

[146] ***I and others v Secretary of State for the Home Department*** was a case similar to ***The Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Limited,*** (which was cited with approval), where lack of disclosure by an agency of the State was criticised by the court, especially as in this case the liberty of individuals was at stake. Adverse inferences were drawn by the court from the lack of disclosure which was one of the reasons the claim succeeded.

[147] I agree with counsel for the claimants that the case of ***R (on the application of MS (A Child) v Secretary of State for the Home Department*** is not helpful as it concerns a without notice application in which it is well known that the duty of disclosure is paramount.

[148] In the instant case the documents that were the subject of late disclosure concerned a claim relating to a dispute over whether goods supplied by Appliance Traders to the Sandals Whitehouse Hotel were paid for, and to subsequent arbitration and negotiation efforts, which eventually resulted in the settlement of this and other disputes through the sale of the Hotel. What should be highlighted in relation to this issue is that the most significant factor which has determined the ruling of the court is the legal interpretation of the Act and the finding that the powers of the Contractor-General do not extend to the investigation of a sale or the agreements that were not the product of a tender and award process.

The court has also further found that both because of the nature of the Requisition as well as the manner in which the resolution of the disputes in relation to the execution of the previous agreements was inextricably bound up with the sale, the investigations could not proceed on the basis that that those prior "government contracts" could be investigated independently of the sale.

[149] In that context the late disclosure has not impacted the outcome of the matter nor affected the courts ability to appreciate the overall merits of the case. The late disclosure complained of is therefore not a basis to deny the claimants the relief they seek.

THE DELAY IN THE DELIVERY AND THE STATUS OF THE JUDGMENT

[150] There has been a very significant delay in the delivery of this judgment. It is not lost on the court that the effect of the delay is exacerbated by the fact that this being a claim for judicial review it should have been dealt with expeditiously, as it has implications for good governance. The reasons for the delay are multi-faceted, but are ultimately not excuses and they will not be put forward as such. The court offers its unreserved apology for the undoubted inconvenience occasioned to all parties. The court also acknowledges that institutional steps put in place to prevent such a recurrence, are already bearing fruit.

[151] One effect of the delay is that the president of the panel retired prior to this judgment being delivered. The court is mindful of the decision of the Court of Appeal in ***Paul Chen Young et al v Eagle Merchant Bank Jamaica Limited et al*** [2018] JMCA App 7, and conscious of the view that it could have implications for the validity of this decision. However, in handing down the judgment, the court bears in mind that the circumstances in the instant case are somewhat dissimilar from those in the ***Paul Chen Young et al*** matter, and also that that decision of the Court of Appeal is being appealed to the Judicial Committee of the Privy

Council. The ultimate status and effect of that decision therefore remains unsettled.

DISPOSITION

[152] In the premises I find the claimants are entitled to the following reliefs:

1. A declaration that on a proper construction of the **Contractor-General Act**, the Contractor-General is not permitted to initiate an investigation and/or special investigation in relation to a contract for sale or purchase of real estate to or from a public body as defined by the **Contractor-General Act**.
2. A declaration that the Agreement for Sale dated February 7, 2011 between Ackendown Newtown Development Company Limited, Gorstew Limited and Sandals Whitehouse Management Limited does not represent an award of a government contract for the purposes of the **Contractor-General Act.**
3. A declaration that on a proper construction of the **Contractor-General Act**, the contract for the sale of the Sandals Whitehouse Hotel, which incorporates provisions for the sale of chattels and/or goods used in connection with the said Hotel, is not a government contract for the purposes of the **Contractor-General Act** and as a consequence the Contractor-General is not permitted to initiate an investigation and/or special investigation in relation to that said contract.
4. A declaration that the letter of June 20, 2012 from the Contractor-General to the Honourable Gordon Stewart, O.J., Chairman, Gorstew Limited is illegal, void and of no effect.
5. A declaration that the commencement of the special investigation into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel is illegal, void and of no effect.
6. A declaration that the extension of the special investigation into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel to include

Gorstew Limited and/or the Honourable Gordon Stewart, O.J., is illegal, void and of no effect.

7. An order of certiorari quashing the letter dated June 20, 2012 from the Contractor-General to Honourable Gordon Stewart, Chairman, Gorstew Limited.
8. An order of certiorari quashing the Contractor-General's decision to commence the special investigations into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel.
9. An order of prohibition prohibiting the Contractor-General from taking any steps to compel or require the Claimants to comply with and or respond to the said letter or any question or direction contained therein.
10. An order of prohibition prohibiting the Contractor-General from continuing the special investigations into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel.
11. Costs to the claimants to be agreed or taxed.

Hibbert J

ORDER

1. The claimants are granted the following reliefs:
    a. A declaration that on a proper construction of the **Contractor-General Act**, the Contractor-General is not permitted to initiate an investigation and/or special investigation in relation to a contract for sale or purchase of real estate to or from a public body as defined by the **Contractor-General Act**;
    b. A declaration that the Agreement for Sale dated February 7, 2011 between Ackendown Newtown Development Company Limited, Gorstew Limited and Sandals Whitehouse Management Limited does not represent an award of a government contract for the purposes of the **Contractor-General Act**;
    c. A declaration that on a proper construction of the **Contractor-General Act**, the contract for the sale of the Sandals Whitehouse

Hotel, which incorporates provisions for the sale of chattels and/or goods used in connection with the said Hotel, is not a government contract for the purposes of the **Contractor-General Act** and as a consequence the Contractor-General is not permitted to initiate an investigation and/or special investigation in relation to that said contract;

d. A declaration that the letter of June 20, 2012 from the Contractor-General to the Honourable Gordon Stewart, O.J., Chairman, Gorstew Limited is illegal, void and of no effect;
e. A declaration that the commencement of the special investigation into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel is illegal, void and of no effect;
f. A declaration that the extension of the special investigation into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel to include Gorstew Limited and/or the Honourable Gordon Stewart, O.J., is illegal, void and of no effect;
g. An order of certiorari quashing the letter dated June 20, 2012 from the Contractor-General to Honourable Gordon Stewart, Chairman, Gorstew Limited;
h. An order of certiorari quashing the Contractor-General's decision to commence the special investigations into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel;
i. An order of prohibition prohibiting the Contractor-General from taking any steps to compel or require the Claimants to comply with and or respond to the said letter or any question or direction contained therein; and
j. An order of prohibition prohibiting the Contractor-General from continuing the special investigations into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel.

2. Costs to the claimants to be agreed or taxed.