

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 18 OF 1991

IN THE MATTER OF THE CONTRACTOR-GENERAL
ACT

A N D

IN THE MATTER OF monitoring projects and
contracts in The Ministry of Construction
(Works).

BETWEEN	JOHN LAWRENCE	PLAINTIFF
A N D	THE MINISTRY OF CONSTRUCTION (WORKS)	FIRST DEFENDANT
A N D	ATTORNEY GENERAL	SECOND DEFENDANT

Dr. Lloyd Barnett and Mr. Derrick McKoy for the Plaintiff.

Messrs. Douglas Leys and David Johnson for the second Defendant.

HEARD IN CHAMBERS: 6TH AND 7TH JUNE, 1991.

CORAM: COURTENAY ORR, J.

The Plaintiff John Lawrence is the Acting Contractor-General. He seeks by this originating summons a determination by the Court of the following question:

"Whether the Contractor-General is empowered by the Contractor-General Act to monitor the pre-contract stages of government contracts and/or to obtain information from public bodies relating to the pre-contract stages of the award of such contracts."

The functions of the Contractor-General are set out in the Contractor-General Act, Section 4 of which reads as follows:

"4.-(1) 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.

(2) For the purpose of the discharge of his functions under this Act a Contractor-General shall be entitled -

- (a) to be advised of the award and, where applicable, the variation of any government contract by the public body responsible for such contract;
- (b) subject to section 19, to have access to all books, records, documents, stores or other property belonging to government, whether in the possession of any officer of a public body or a contractor or any other person;
- (c) to have access to any premises or location where work on a government contract has been, is being or is to be carried out;
- (d) to have access to all books, records, documents or other property used in connection with the grant, issue, suspension or revocation of any prescribed licence whether in the possession of any public officer or any other person;
- (e) to have access to any premises or location where he has reason to believe that any such books, records, documents or other property as are referred to in paragraph (d) or any property which is the subject of a prescribed licence, may be found;
- (f) to enter any premises occupied by any person in order to make such enquiries or to inspect such document, record or property as he considers necessary to any matter being investigated by him; and
- (g) without prejudice to the provisions of section 18 and 19, to retain any such document, record or other property referred to in paragraph (f).

(3) For the purposes of subsection (2) the Contractor-General shall have power to require any public body to furnish in such manner and at such times as may be specified by the Contractor-General, information with regard to the award of any contract and such other information in relation thereto as the Contractor-General considers desirable."

"(4) For the purposes of paragraphs (d) and (e) of subsection (2) the Contractor-General shall have power to require any public officer or any other person to furnish in such manner and at such times as may be specified by the Contractor-General, information with regard to the grant, issue, suspension or revocation of any prescribed licence and such other information in relation thereto as the Contractor-General considers desirable."

In his affidavit in support of this summons the Plaintiff states that the First Defendant is the Minister responsible for the Ministry of Construction (Works) which is a ministry, department or agency of government and as such is a public body within the meaning of the Contractor-General Act.

The circumstances which prompted the filing of this summons are that the Plaintiff in his capacity as Contractor-General wrote to the Permanent Secretary in the Ministry of Construction (Works) requesting a listing of all projects planned and being executed by the Ministry and involving the award of contracts.

His request met with the response that the Ministry is not legally obligated to provide such information to the Contractor-General prior to the award of a contract and this position is supported by an opinion of the Attorney-General - an opinion which the plaintiff exhibited in the affidavit.

In keeping with a notice of Preliminary Objection, Mr. Leys sought to argue two preliminary points, as follows:

- "1. That the Plaintiff John Lawrence has no locus standi to present and maintain the action;
2. That the action against the First Defendant be struck out as the First Defendant is not an entity known to law."

Dr. Barnett for the Plaintiff objected to Mr. Leys' arguing the second point on the basis that no appearance had been filed by the First Defendant and therefore Mr. Leys could not speak on behalf of someone whom he did not represent.

I upheld Dr. Barnett's objection and so Mr. Leys confined himself, at that stage, to the first point.

Mr. Leys submitted that the matter though filed by the Plaintiff in

his own name affected the office of Contractor-General, which being a commission of Parliament, is a public office. Hence there can be no private right of the Contractor-General, if he is seeking a declaration concerning his office.

He further suggested that the scheme of the Act shows that the functions of the Contractor-General are carefully circumscribed by Parliament: he acts on behalf of Parliament and is required to report to Parliament after conducting investigations on behalf of Parliament.

Mr. Leys further argued that there is no provision in the Contractor-General Act making the Contractor-General a juridical person: the provisions were so circumscribed that no such intention express or implied could be gleaned from the Act. Hence, if the Contractor-General seeks to bring an action as a public body enforcing a public right, he must do so by a relator action; and since he had not done so, the action cannot be maintained in its present form.

Dr. Barnett argued that a discussion of relator actions was irrelevant in that such actions are concerned with an individual having no special interest in seeking to assert a public right; and therein lay the fundamental distinction between such cases and the instant proceedings.

In support of the proposition that the Plaintiff did have locus standi he put forward the following points:

The Plaintiff is the only person with the statutory right to exercise the powers conferred on the Contractor-General by the Contractor-General Act. There was no absence of special interest on the part of the Plaintiff. In fact, the office of Contractor-General was established on the basis that it must be independent, and therefore it would be inconsistent with the purpose of the Statute to say that in order to have his rights defined, the plaintiff must seek the consent of the Attorney General. Any government could then easily stultify and nullify the office.

I agreed with the submissions of Dr. Barnett and held that the Plaintiff did have locus standi in that he was the only person empowered to exercise the functions of the Contractor-General; he therefore had a special interest in

having the declaration sought in that the affidavit clearly showed a dispute between the Plaintiff and the Defendants as to the scope of his powers.

Before dealing with the relief sought in the summons, I wish to point out that at the close of the arguments on the substantive issue, Mr. Leys sought to enter an appearance on behalf of the First Defendant and to argue the second point in his Notice of Preliminary Objection. I refused to give him leave to do so on the basis that the reason offered for his failure to do so was insufficient.

On the substantive issue, Dr. Barnett submitted that the functions of the Contractor-General were couched in very broad terms, and he pointed to Section 4. to substantiate this. Thus the Contractor-General was by Section 4 (2) entitled to be advised of an award, or the variation of a government contract, to have access to premises where a government contract is being carried out, and may retain documents relating to an award, and so on. In particular, he reminded the Court that by Sections 4(3) and 4(4) the Contractor-General may require any public body to furnish to him at such times and in such manner as he may direct information with regard to the award of any contract (Section 4(3)) or the grant, issue, suspension or revocation of any prescribed licence (Section 4(4)).

Dr. Barnett suggested that one of the central issues in this matter is whether the Contractor-General has a merely ex post facto reviewing role or whether he has a monitoring role.

Dr. Barnett also maintained that two factors which appear in the Act are of significance:

- (1) The fact that Section 3(1) constitutes the Contractor-General as a Commission of Parliament and
- (ii) that Section 4(1)(a) provides that the Contractor-General to monitor the award and implementation of contracts "with a view to ensuring" a number of objectives. (*italics mine*)

He argued that this is more so in view of the constitutional position of ministers who exercise executive authority and are members of the Cabinet

which is the principal source of policy and which exercises a general control of government, including the award of contracts and expenditure of large sums of money. Therefore, the Contractor-General is an instrument created by Parliament to make more effective the answerability of the executive which is answerable to Parliament.

Dr. Barnett also noted that by Sections 15 and 16 the Statute gave the Contractor-General a wide discretion as to when he carries out his investigations.

He also submitted that Section 4(i) showed that the monitoring function of the Contractor-General is a continuing and purposive one. It is not merely to check whether government contracts have been properly awarded but to ensure that they are awarded properly. Specifically, he has a duty to monitor the awards to ensure that each contract is awarded or terminated without impropriety or irregularity. The grammatical construction of these provisions as well as the nature of the mischief being sought to be remedied strongly imply that the Contractor-General is empowered to monitor pre-award stages of government contracts. He added that monitoring involves warning, supervision, as well as admonition.

Dr. Barnett urged that the construction suggested by him is that construction which conduces to ensuring the desired result based on the language of the Statute, but would also be appropriate if one acted on the principle of construing the statute to avoid absurdity. He also argued that such construction harmonises with the context and promotes in the fullest manner the policy and object of the legislature. A different construction would greatly curtail and even undermine the effectiveness of the office.

Mr. Leys for the Second Defendant argued that the meaning and intent of the Statute can be gleaned from the Statute itself and there was no need to look at other principles of interpretation. He submitted that the words conclusively precluded the Contractor-General monitoring pre-contract stages of government contracts, or obtaining from public bodies information relating to the pre-contract stages of an award.

He suggested that the ultimate source of the power of the Contractor-

General is Parliament, on whose behalf he acts. His ultimate responsibility is to Parliament, to whom he must report. Moreover, the Contractor-General cannot prevent the executive from entering into a contract. This last point he suggested, was borne out by Section 29 which sets out the penalties for obstructing the Contractor-General, and by Section 2 which defines a "government contract" as follows:

" 'government contract' includes any licence, permit or other concession or authority issued by a public body or 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." (emphasis added)

Mr. Leys argued that the only logical interpretation of Section 4 was that it has only an ex post facto effect on awards. He submitted that Section 4(1)(b) refers to something issued, not something to be issued, and that Section 4(2) (a) which says that the Contractor General is entitled to be advised of an award contemplates the existence of an award.

Mr. Leys also submitted that the definition of contractor in Section 2 and the wording of Section 4(2)(b) support the ex post facto theory. They read as follows:

Section 2:

" '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;"

Section 4(2)(b):

"For the purpose of the discharge of his functions under this Act a Contractor-General shall be entitled -

(a)

(b) Subject to Section 19, to have access to all books, records, documents, stores or other property belonging to government, whether in the possession of any officer of a public body or a contractor or other person;"

Mr. Leys also referred to Section 4(3) which empowers the Contractor-General to request a public body to furnish in such manner and at such times

as he may specify, information with regard to the award of any contract and such other information as he considers desirable. He submitted that both Section 4(2)(b) and Section 4(3), "hinge on the requirements that a contract has already been awarded to a specified contractor and that an agreement has already been entered into; the latter provision is wide enough to entitle the Contractor-General to request information pertaining to the planning stage, that is, after the contract has been awarded".

He also urged that it is the prerogative of the executive to award a contract to whom they will.

I accept the arguments of Dr. Barnett that his interpretation is the correct one, whether looked at from the point of view of avoiding absurdity, or that of ensuring the desired result based on the language used, or that of carrying out the policy and object of the legislature.

I hold that the proper interpretation of the Act is one which empowers the Contractor-General to monitor the pre-contract stages of government contracts and to obtain information from public bodies prior to the award of such contracts. I am of opinion that the ordinary meaning of the words of the statute in light of the context and grammar suggest no other interpretation.

In this regard, I wish to advert to the meanings of a few of the important words used in the Statute. The Shorter Oxford English Dictionary defines them as follows:

"Ensure":

"To guarantee. To make certain."

"Circumstances":

"That which stands around or surrounds. The state of affairs surrounding and affecting an agent."

"Monitor":

"To guide as a monitor, i.e., a senior pupil in a school with special powers of keeping order."

Cassell's Modern Guide to Synonyms and Related Words at page 408 says this

"monitoring is also the word used to designate a kind of observation or surveillance kept by a person or by a camera".

Finally, my little concise Oxford Dictionary gives an interesting meaning of the word monitor when used as a noun. I find this meaning most appropriate and regard it as summing up the role of the Contractor-General. It is this:

"a lizard supposed to give a warning of the approach of crocodiles".

To be effective the Contractor-General must be able to give a warning before the event. He cannot monitor the award and implementation of government contracts, and the grant, issue, suspension or revocation of prescribed licences in the manner required by the Statute unless he is enabled to be privy to the pre-contract stages of the award of government contracts before they are granted.

I therefore answer the question posed in the summons,

"Whether the Contractor-General is empowered by the Contractor-General Act to monitor the pre-contract stages of government contracts and/or to obtain information from public bodies relating to the pre-contract stages of the award of such contract",

in the affirmative.

Declaration accordingly.

Costs to the Plaintiff to be agreed or taxed.