IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF THE CO-OPERATIVE REPUBLIC OF GUYANA

Appeal No GYCV2021/001
GY Civil Appeal No 4 of 2014

BETWEEN

GUYANA GEOLOGY AND MINES COMMISSION **APPELLANT**

AND

BK INTERNATIONAL INC. **RESPONDENTS**
CHUNILALL BABOOLALL

And

CCJ Appeal No GYCV2021/003
GY Civil Appeal No 3 of 2014

BETWEEN

CHUNILALL BABOOLALL **APPELLANT**

AND

BK INTERNATIONAL INC. **RESPONDENTS**
GUYANA GEOLOGY AND MINES COMMISSION

[Consolidated by order of the Court dated 4 March 2021]

Before the Honourable: **Mr Justice Saunders, PCCJ**
Mr Justice Wit, JCCJ
Mr Justice Anderson, JCCJ
Mr Justice Barrow, JCCJ
Mr Justice Jamadar, JCCJ

Appearances:

Mr Nikhil Ramkarran and Ms Rebecca Khan for the Guyana Geology and Mines Commission

Mr Edward Luckhoo SC and Mr Robin Stoby SC for BK International Inc

Mr Chandrapratesh Satram, Mr Roopnarine Satram and Mr Ron Motilall for Mr Chunilall Baboolall

Administrative law – Judicial Review – Procuring entity – Agency of Government or private agency in law – Whether Guyana Geology and Mines Commission is an agency of Government and therefore "procuring entity" under Procurement Act Cap 73:05; Whether GGMC complied with Procurement Act – Public function – Whether judicial review was available to challenge GGMC's decision – Legitimate Expectation.

Rule of Law – Caribbean constitutionalism – Viewing judicial review through lens of Caribbean constitutionalism.

SUMMARY

By public advertisement in or around June 2013, GGMC invited bids for the rehabilitation of the Aremu Road in Region 7. The advertisement expressly stated that bidding would be subject to the National Competitive Bidding procedures, specified in the Procurement Act. The GGMC shortlisted four "prequalified" entities as contenders to submit bids but only three responded to the Invitation For Bids (IFB): CB&R Mining (CB&R); MMC Inc; and BK International Inc ("BK"). In its bid, CB&R submitted neither its National Insurance Scheme ("NIS") nor its Guyana Revenue Authority ("GRA") tax compliance certificates, nor other information required by the Procurement Act. Notwithstanding these deficiencies CB&R was awarded the tender even though BK had submitted the lowest bid along with submitting the required documentation. BK expressed its discontentment with the GGMC's decision, but GGMC nevertheless executed a contract with the Appellant Chunilall Baboolall, the alleged owner of CB&R.

BK applied for a writ of certiorari to quash the decision of the GGMC to award the contract and a nisi order of certiorari was granted. Baboolall was joined as a party to those proceedings. The GGMC argued that it was not a procuring entity under the Procurement Act, and that the statement in the IFB that the Procurement Act applied, was not legally binding. The GGMC also relied on the clause in the IFB which gave it the right to reject a bid without providing reasons. Chang CJ (ag) rejected those arguments. He held that the GGMC was an agency under the Ministry of Natural Resources and the Environment and therefore fell within the meaning of a "procuring entity" under the Procurement Act. This culminated in two sets of appeals: one from the GGMC and the other from Baboolall. The Court of Appeal upheld the decision of the Chief Justice but with one minor distinction, which was that the GGMC was not an agency of the Ministry of Natural Resources and the Environment but rather of the Government, falling under the purview of that Ministry.

Both the GGMC and Baboolall filed Notices of Appeal to this Court which were consolidated. The thrust of the GGMC's argument was that it was a private agency in law

and not a Government agency subject to the Procurement Act. CB&R argued, *inter alia*, that the provisions of the Procurement Act were not applicable to the GGMC and that the matter should have been presented for administrative review under the Procurement Act as opposed to judicial review.

The main questions for this Court's determination were: (1) whether the GGMC was subject to the Procurement Act; (2) whether judicial review was available to challenge the GGMC's decision to award the road rehabilitation contract; and (3) if judicial review was available, whether the GGMC complied with the Procurement Act. This Court dismissed the appeal on 4 June 2021 and issued a costs order on 10 June 2021 in favour of BK International Inc. Anderson JCCJ delivered the reasons for the Court's decision, while Wit and Jamadar JJCCJ delivered concurring opinions.

Anderson JCCJ prefaced his judgment by pointing out that under Caribbean Constitutions the exercise of governmental power and function must always comply with the provisions of the Constitution and with any relevant statute or regulation. The Court exercises its custodian power to guard the integrity of the Constitution and laws primarily through the avenue of judicial review. In relation to the first issue, the Justice found that the GGMC was an agency of the Government and subject to compliance with the Procurement Act due to three main factors; the nature of the functions it performs, such as the construction of roads (s 4 of the GGMC Act); the extensive ministerial control exercisable over it (s 31(1), (2), (4), and (5) of the GGMC Act); and the source of its funding which included the Government. The definition of a "procuring entity" in s 2 of the Procurement Act includes Government agencies and therefore, the GGMC as an agency of the Government was a procuring entity which was subject to the provisions of the Procurement Act. Alternatively, even if the GGMC could not have been considered a procuring entity it had created a legitimate expectation that it would abide by the Procurement Act with its public advertisement that the bidding process would be conducted through the National Competitive Bidding procedures, specified in the Procurement Act.

In relation to the second issue, Anderson JCCJ highlighted Part VII which provides for an administrative review of the tendering process by a dissatisfied bidder. The question is, if that process exists, was judicial review available to BK as a form of redress? The Justice answered this in the positive, reasoning that the nature of the complaints in the instant case would not have been satisfactorily answered by the administrative review process as the complaints were complex and related not only to adequacy of CB&R's bid, but also to the

legality of the procurement process. The Justice acknowledged that not every decision of a statutory corporation would be amenable to judicial review. For review to be available, the decision or omission had to be one which has a public law element, and in that regard, the Court would look at: 1. the source of the power exercised; 2. the nature of the power exercised; the object of the act or omission; 3. the consequences of the act or omission not being subject to judicial review; and 4. other matters the court sees fit to consider. Anderson JCCJ found that the present case was a strong one for judicial review because the GGMC, as an agent of the Government, was engaged in the carrying out of a public function; a road rehabilitation project, where the source of the funding was the Government. Furthermore, the representations made by GGMC created a legitimate expectation that it would abide by the terms of the Procurement Act.

In relation to the third issue, Anderson JCCJ found that there were several respects in which the instant tendering process did not conform with the Procurement Act. First, the GGMC by its own admission misapplied the Standard Bidding Documents to the procurement process because they were meant to apply to contracts of less than $40 million, whereas the contract in this case, was well over a few hundred million dollars. Secondly, the only criterion used by the GGMC for determining which contractors were prequalified was that of the "technical and financial capacity" of the bidder. The GGMC provided no documentary evidence or other information provided to it by CB&R to support its bid to be selected as a prequalified bidder. As was rightfully said by Chang CJ "when and how were the pre-qualification selection made remain a mystery." Anderson JCCJ then addressed cl 33.1 in the IFB which stated that the GGMC reserved the right "to accept or reject any or all bids without giving reasons." The Justice reasoned that the right to reject the bid had to be exercised in accordance with the Procurement Act since cl 33.1 of the IFB expressly so stated (via a footnote). Therefore, the rejection of BK's bid had to be restricted to the circumstances specified in the Procurement Act. Since none of those circumstances existed, the GGMC could not lawfully use cl 33.1 as a valid justification for rejecting BK's bid.

Wit JCCJ, in a concurring opinion, expressed his agreement with the judgments of Anderson and Jamadar JJCCJ. In the Commonwealth Caribbean, review of administrative decisions is done by using the traditional methods developed by English courts. Those courts, however, function in a parliamentary democracy whereas Commonwealth Caribbean courts function in a constitutional democracy; a completely different "kettle of

fish". In a constitutional democracy, the political and the judicial branches are co-equal, all deriving their powers from the Constitution. The Constitution provides the overarching content to the law and the interpretation and application of statutory law is thereby brought under the inescapable influence of constitutional law. Constitutional values and principles permeate the entire legal order. As such, judicial review in a constitutional democracy must necessarily be broader and richer than that in a parliamentary democracy.

Jamadar JCCJ in a concurring opinion expressed his agreement with the outcomes arrived at in the main opinion of the court. Additionally, and imperatively, he emphasised the centrality of Caribbean constitutionalism to the rule of law. In Guyana, as in most Caribbean States that have written constitutions with supremacy clauses, judicial review of administrative actions and decisions has, as its source of jurisdiction and power, the core constitutional value and imperative of the rule of law. Therefore, in jurisdictions where there is constitutional supremacy, courts must ensure that administrative decisions conform with fundamental constitutional and human rights values and principles. Viewing judicial review through the lens of Caribbean constitutionalism can: (a) broaden the scope of inquiry bringing it squarely under the umbrella of constitutionalism and the rule of law; and (b) influence the nature of the inquiry, making it a more primary form of inquiry. This reorientation is by no means an abandonment of the existing grounds for judicial review. They are all encompassed and included under the umbrella of constitutionalism and the rule of law.

Cases referred to

A-G v Joseph [2006] CCJ 3 (AJ) (BB), (2006) 69 WIR 104; *Air Services Ltd v A-G* [2021] CCJ 3 (AJ) GY; *Belize International Services Ltd v A-G of Belize* [2020] CCJ 9 (AJ) BZ, [2021] 1 LRC 36; *Benjamin v A-G* (Antigua and Barbuda HC, 13 March 2007); *Bisnauth v Shewprashad* [2009] CCJ 8 (AJ) (GY), (2009) 79 WIR 339; *Charles v Jones* (Jamaica SC, 25 April 2008); *Chue v A-G of Guyana* (2006) 72 WIR 213 (CA); *Commissioner of the Guyana Geology and Mines Commission v Pharsalus Inc* [2013] CCJ 10 (AJ) (GY), (2013) 83 WIR 401; *Gilharry v Transport Board* [2017] CCJ 11 (AJ) (BZ); *Griffith v Guyana Revenue Authority* [2006] CCJ 2 (AJ) (GY), (2006) 69 WIR 320, [2007] 3 LRC 324; *Harley Development Inc v Commissioner of Inland Revenue* [1996] 1 WLR 727; *Industrial Risks Consultants Ltd v Petroleum Company of Trinidad and Tobago Ltd* (Trinidad and Tobago HC, 14 February 1997); *Lucas v Chief Education Officer* [2015] CCJ 6 (AJ) (BZ), (2015) 86 WIR 100; *Marin v R* [2021] CCJ 6 (AJ) BZ; *Medical Council of Guyana v Ocampo Trueba* [2018] CCJ 8 (AJ) (GY), (2018) 93 WIR 318; *National Contractors Ltd v National Development Corporation* (Saint Lucia HC, 9 April 2000); *NH International (Caribbean) Ltd v Urban Development Corporation of Trinidad and Tobago Ltd* (Trinidad and Tobago CA, 17 March 2006); *Northern Jamaica Conservation Association v Natural Resources Conservation* (Jamaica SC, 16 May 2006); *Northern Jamaica Conservation Association v Natural Resources Conservation Authority* (Jamaica

SC, 23 June 2006); *Paponette v A-G* [2010] UKPC 32, (2010) 78 WIR 474 (TT); *Perch v A-G* [2003] UKPC 17, (2003) 62 WIR 461 (TT); *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] QB 424; *R v Civil Service Appeal Board, ex p Bruce* [1988] 3 All ER 686; *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864; *R v Mid-Worcestershire Justices, ex p Hart* The Times, 17 December 1988; *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213; *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815; *R v Secretary of State for Education Employment, ex p Begbie* [2000] 1 WLR 1115; *R v Secretary of State for the Home Department, ex p Swati* [1986] 1 WLR 477; *Rafferty v A-G* (1993) 50 WIR 258 (GY CA).

Legislation referred to

Barbados – Supreme Court (Civil Procedure Rules) 2008; **Bahamas**, The – Rules of the Supreme Court 1978; **Belize** – Supreme Court (Civil Procedure) Rules 2005; **Guyana** – Business Names (Registration) Act, Rev Ed 2011, Cap 90:05, Civil Procedure Rules 2016, Companies Act, Rev Ed 2011, Cap 89:01, Constitution of the Co-operative Republic of Guyana Act, Rev Ed 2011, Cap 1:01, Guyana Geology and Mines Act Rev Ed 1979, Cap 65:09, Judicial Review Act (Commencement) Order 2018, 2018/28, Judicial Review Act, Rev Ed 2011, Cap 3:06, Procurement Act, Rev Ed 2011, Cap 73:05, Procurement Regulations 2004; **Jamaica** – Civil Procedure Rules 2002; **Trinidad and Tobago** – Civil Proceedings Rules 1998.

Other Sources referred to

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REASONS FOR DECISION
of
The Honourable Mr Justice Saunders, President and The Honourable Justices Wit, Anderson, Barrow and Jamadar

Delivered by

The Honourable Mr Justice Anderson
and
CONCURRING REASONS
of
The Honourable Mr Justice Wit
and
The Honourable Mr Justice Jamadar

Delivered on
28 December 2021

JUDGMENT OF THE HONOURABLE MR JUSTICE ANDERSON, JCCJ:

Introduction

[1] This consolidated appeal raises issues in Public Law that are of significance for the transparent and efficient procurement of goods and services in Guyana. The central question is whether the Guyana Geology and Mines Commission (the "GGMC" or the "Commission"), a statutory body corporate, is subject to the Procurement Act[1] (the "Procurement Act") in respect of its award of a contract for road rehabilitation in July 2013. If it was so subject, the further question arises as to whether the challenge to its decision to award the road rehabilitation contract ought to be made through the administrative review process provided for under the Procurement Act rather than by way of judicial review. If judicial review is available, the final question concerns whether the Commission complied with the Procurement Act. The resolution of these questions could have implications for what this Court was advised are thousands of procurement contracts awarded by statutory corporations which as a matter of practice do not consider themselves as strictly bound by the provisions of the Procurement Act.[2]

Background

[2] In or around April 2013, The Aremu Road Rehabilitation Project was conceived following a meeting at the Ministry of Natural Resources where miners raised concerns over the poor state of the road and several of its bridges in Region 7. A site visit by officials of the GGMC's Special Projects Unit ("GGMC's SPU") corroborated that the road was badly deteriorated and that some bridges needed urgent repair. The Hinterland Infrastructure Committee ("HIC"), consisting of representatives from the Ministry of Local Government, the Ministry of Natural Resources and the Environment, Guyana Forestry Commission, Guyana Gold and Diamond Miners Association, and the GGMC, recommended the undertaking of the rehabilitation of the road.

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[1] Cap 73:05.
[2] Chunilall Baboolall, 'Submisssions of the Appellant' Submission in *Baboolall v BK International Inc*, GYCV2021/003, 6 April 2021, [8].

[3] There are competing narratives as to what happened next. According to the submissions of the Appellant CB&R Mining ("CB&R") to this Court, the GGMC commenced a selective tendering process in which four contractors – CB&R, MMC Inc, BK International Inc ("BK"), and R&A Construction – were "prequalified" on account of their technical and financial competence. That prequalification process ultimately resulted in the selection of CB&R for the award of the tender although the Appellant conceded that BK had submitted the lowest bid. The Appellant also accepted that the bid by CB&R did not contain several relevant pieces of information.

[4] Contrary to that version of events by the Appellant, the findings of the learned trial judge, which were substantially accepted by the Court of Appeal, were that in or around June 2013, the GGMC invited bids for the rehabilitation of the Aremu Road by way of public advertisement which specifically stated that: "Bidding will be conducted through the National Competitive Bidding procedures, specified in the Procurement Act 2003…". In the Invitation For Bids ("IFB"), the GGMC shortlisted four entities as contenders to submit bids – CB&R, MMC Inc, BK, and R&A Construction. Three bidders responded to the IFB: CB&R, MMC Inc, and BK International Inc. The bids were opened and read at the office of the Commissioner of the GGMC on, or about 10am on 11 June 2013. It was then discovered that CB&R had submitted neither its National Insurance Scheme ("NIS") nor its Guyana Revenue Authority ("GRA") tax compliance certificates, nor other information required by the Procurement Act in relation, for example, to experience, personnel, and equipment capabilities, cash in hand, and lines of credit, or its legal status. Notwithstanding these deficiencies, CB&R was awarded the tender, even though BK had submitted the lowest of the three bids and had submitted the required documentation with its bid.

[5] It is not necessary to resolve any differences between these two versions, though if it were, the judicial findings of fact, which were not seriously challenged before us, must obviously be preferred. There is common ground that BK was dissatisfied with the GGMC's decision. BK considered that they ought to have been awarded the contract because, according to them: (1) BK submitted the lowest bid and should therefore have automatically been the awardee in accordance with s 42(1) of the Procurement Act; (2) CB&R did not submit the relevant documents with

their bid as is required by the Procurement Act and should therefore have been automatically disqualified; and (3) upon checking the Deeds Registry, it was ascertained that CB&R was not registered as a company under the Companies Act,[3] or a business name under the Business Names (Registration) Act.[4] BK lodged a complaint with Mr Robert Persaud, the then Minister of Natural Resources and the Environment[5] and the Minister engaged the services of Caribbean Engineering Managing Consultants Inc to conduct an independent investigation into the matter. The Consultants confirmed the deficiency of the bid by CB&R. Nevertheless, on 19 July 2013, the GGMC executed a contract with the Appellant, Chunilall Baboolal ("CB"), the alleged owner of CB&R,[6] and CB commenced rehabilitation of the Aremu Road.

High Court

[6] On 16 September 2013, BK applied for a writ of certiorari to quash the decision of the GGMC to award the contract to CB&R and to direct that the award be made to BK as the lowest bidder. A nisi order of certiorari was granted on the said 16 September calling on the GGMC to show cause why the decision to award the contract to CB&R should not be quashed. CB applied to be joined as a party and was heard by way of his affidavit and submissions on his behalf.

[7] It was deposed on behalf of the GGMC that the GGMC was not a procuring entity as defined in the Procurement Act and that the statement in the IFB that the bidding procedures and the Procurement Act applied was not legally binding. It was also contended that the national bidding procedures based on which GGMC undertook to conduct the bidding, were not referred to in the Procurement Act or Regulations and that in any event the provisions of the Procurement Act had been substantially complied with by CB&R. The GGMC also relied on the clause in the bid documents that as employer it reserved the right to accept or reject any bid without giving reasons.

[8] The matter came on for hearing before Chang CJ (Ag). Having considered in some detail the cases of *National Contractors Ltd v National Development Corporation;*[7] *NH International Caribbean Ltd v Urban Development Corporation of Trinidad*

[3] Cap 89:01.
[4] Cap 90:05.
[5] Record of Appeal, 'Re BK International Inc (Guyana HC, 5 December 2013)' 262.
[6] Record of Appeal, 'Affidavit in Support of Motion by Chunilall Baboolall' 237.
[7] (Saint Lucia HC, 9 April 2000).

and Tobago;[8] and *Industrial Risks Consultants Ltd v Petroleum Company of Trinidad and Tobago Ltd,*[9] the Chief Justice held that GGMC was a procuring entity for the purposes of the Procurement Act and that the failure of the GGMC to comply with the provisions of that Act as regards the prequalification process and the award of the contract meant that it had acted ultra vires. Chang CJ therefore granted an order of certiorari quashing the decision of the GGMC to award the contract to CB&R on the ground that the said award was made in violation of the provisions of the Procurement Act, was "unlawful, unreasonable, arbitrary, capricious, irrational, procedurally improper, ultra vires, null and void, and of no legal effect". On 5 December 2013, the Judge ordered that the rule of *nisi certiorari* be made absolute.

[9] The Chief Justice did consider that CB&R had part performed the contract to the value of GY$37,560,600 but this was still less than 1/10 the estimated costs of rehabilitating the entire road. Accordingly, the Judge held that CB&R ought to be paid for work it had done on a *quantum meruit* basis.

Court of Appeal

[10] These decisions of Chang CJ prompted two sets of appeals. The first was an appeal by CB&R against the GGMC and BK (*Baboolall v BK International Inc*[10]) in which CB&R sought to enforce the validity of its contract with the GGMC and to prevent GGMC from awarding the contract for the rehabilitation of the Aremu Road to any other party. The second was an appeal by the GGMC against BK *(Guyana Geology and Mines Commission v BK International Inc*[11]) in which GGMC sought to establish that it was not a government agency but a private entity, and that as such, its decisions were not amenable to judicial review. The Court of Appeal consolidated those appeals.

[11] The Court of Appeal comprised George CJ (Ag), and Gregory and Persaud JJ. In a judgment delivered 13 February 2020, by George CJ, the court agreed with the decisions of Chang CJ but made the distinction that the GGMC was not a government agency under the Ministry of Natural Resources and the Environment; rather, it was an agency of the Government falling under the purview of that

[8] (Trinidad and Tobago CA, 17 March 2006).
[9] (Trinidad and Tobago HC, 14 February 1997).
[10] Civil Appeal No 3 of 2014.
[11] Civil Appeal No 4 of 2014.

Ministry. The court held that the advice to bidders that the Procurement Act would apply to the tendering process created a legitimate expectation that prevented the GGMC from subsequently claiming that it was not bound by that Act. Whilst acknowledging that BK should have invoked the prescribed administrative procedure set out in the Act, the court held that their failure to do so did not bar their claim for judicial review, as it was the court's duty to ensure procedural fairness and thereby the integrity of the tender process.

Caribbean Court of Justice

[12] Both the GGMC and CB&R filed Notices of Appeal against the decision of the Court of Appeal to the CCJ. By order dated 4 March 2021, this Court consolidated those appeals.

The GGMC

[13] The GGMC grounded its appeal in the argument that it was not a government or statutory agency subject to the Procurement Act and that, in any event, it had complied with the requirements of that Act. It also alleged that the Court of Appeal erred in accepting the evidence given at the High Court concerning the documents which had been submitted by CB&R in the bidding process. The GGMC highlighted that it was stated in the IFB that it reserved the right to accept or reject bids for any reason, and that the IFB only required updated documents to be provided from pre-qualified bidders. The Commission maintained that it was a private agency in law and did not fall within the definition of a "procuring entity" under s 2 of the Procurement Act. It was of the further view that the statements contained in the foreword of the Standard Bidding Documents that: the document "*has been prepared by the National Procurement and Tender Administration"*; and that it *"complies with the Procurement Act 2003 and the Procurement Regulations 2004*", were statements of fact of what had been done, and not commitments by the GGMC to comply with the provisions of the Procurement Act.

[14] The GGMC contended that it had not acted unfairly. The Special Projects Unit determined that BK's bid was 55 percent less than the Engineer's estimate for two items which formed most of the works, and that this had raised a concern as to the feasibility of the bid. The Special Projects Unit determined that CB&R had the technical and financial competence to execute the project most efficiently. The

Tender Evaluation Committee followed the recommendation of the Special Projects Unit. As such, the decision made was rational.

[15] The GGMC argued that this was not a case fit for judicial review as there were contested facts such as whether certain documents had been provided by CB&R. This could only be resolved by cross examination. The Commission quoted from W Wade and C Forsyth, *Administrative Law* (8th edn, Oxford University Press 2000) at page 637 where it was stated that, "A feature of prerogative remedy procedure which remains unaltered is that evidence is taken on affidavit, ie by sworn testimony in writing rather than orally … where the dispute turns on a question of fact, about which there is conflict of evidence, the court will generally decline to interfere." The Commission maintained that even after the 1977 reforms which allowed cross examination, the courts still regard affidavit evidence as the preferred method of leading evidence in judicial review proceedings.

CB&R

[16] CB&R appealed against the judgment of the Court of Appeal on the grounds that provisions of the Procurement Act did not apply to the tender in question and that any defects in the tendering process that had been the subject of the complaint by BK were not substantial. It was also alleged that the Court of Appeal placed excessive weight on matters which produced no identifiable unfairness to BK, such as the matter of whether the Appellant ought to have submitted the bid under his trading name. CB&R further alleged that the Court of Appeal erred in its interpretation of the scope of ss 52 and 53 of the Procurement Act which provided for administrative review in that the matters complained of could properly have been presented to that review process. Furthermore, CB&R argued that there were no grounds for judicial review as the GGMC had employed fair processes and BK had not shown how an "uneven playing field" had been created in respect of the material considerations of financial and technical capacity. Finally, Baboolall, in support of the grounds of appeal presented by CB&R, claimed to have completed works to the value of approximately GY$70,000,000 as of the date of the Order of the High Court. He stated that he traded as "CB&R Mining", but the GRA Tax Compliance was issued in his name, "Baboolall" for the purpose of tendering,[12] and concluded that there was no evidence that CB&R Mining was a separate entity.

[12] Record of Appeal, 'Tax Compliance' 140.

BK

[17] BK, following the principles established in *Chue v Attorney General of Guyana*[13] submitted that GGMC was an agency of the Government and as such was a procuring entity subject to the Procurement Act. There was no evidence that the prequalification proceedings were conducted in accordance with s 6 of the Procurement Act. Further the IFB had created a legitimate expectation that the bidding would be conducted in accordance with the National Bidding Procedures of the Procurement Act. There was no evidence produced at the lower court of a legal link between Baboolall and CB&R Mining. It would in any case have been contrary to s 12(1) of the Procurement Act to award the contract to someone other than CB&R, the purported bidder. BK further submitted that its failure to seek the administrative review remedies available under the Procurement Act did not bar it from pursuing judicial review, where the contention was that the GGMC acted arbitrarily, unlawfully, unfairly, and without good faith.

The Issues

[18] As foreshadowed in the introduction to this judgment, the submissions of the parties raise three main issues. The first is whether the GGMC, a statutory body corporate, was subject to the Procurement Act in respect of its award of the contract for road rehabilitation in July 2013, and therefore obliged to comply with the requirements of that Act. If the GGMC was so subject, the second issue arises as to whether the challenge to its decision to award the road rehabilitation contract ought to have been made through the administrative review process provided for under the Procurement Act rather than by way of judicial review that was pursued in this case. If judicial review was appropriate, the third issue is to consider whether the decision to award the contract ought to be upheld or struck down.

(i) **Was the GGMC Obliged to Comply with the Procurement Act?**

[19] It is trite law that under Caribbean Constitutions, the exercise of governmental power and function must always comply with the provisions of the supreme law in the Constitution and with any relevant statute or regulation. The court exercises its custodian power to guard the integrity of the Constitution and laws primarily

[13] (2006) 72 WIR 213 (CA) at 222.

through the avenue of judicial review. In the present case, the two possible bases on which the GGMC may have been obliged to comply with the relevant provisions of the Procurement Act are: (1) that it was a procuring entity within the meaning of the Procurement Act; and (2) that it created a legitimate expectation that bidding for the road rehabilitation project would be conducted in accordance with the Procurement Act.

Procuring Entity

[20] Whether an entity qualifies as a procuring entity and is therefore bound to comply with the relevant provisions of the Procurement Act is a matter of statutory interpretation. Section 2(l) of the Procurement Act defines a "procuring entity" as "… the procuring entity of any ministry, department, agency or other unit, or any subdivision thereof, of the Government, that engages in procurement." There are two main elements to this definition. First, the entity must be situated in a particular relationship with the Government and second, it must engage in procurement.

[21] The relationships that qualify an entity as a procuring entity are specified in s 2(l). A ministry, department, agency, or other unit of subdivision of Government is caught in the net of the Procurement Act. Chang CJ conducted a careful review of the constitutional and statutory provisions as well as the case law and concluded that GGMC was a statutory agency within the Ministry of Natural Resources and the Environment. The Court of Appeal agreed with the reasoning of the then Chief Justice but made the slight distinction that the GGMC was not an agency of the Ministry of Natural Resources and the Environment but rather it was an agency of the Government falling under the purview of that Ministry.

[22] This Court agrees. The GGMC was established as a body corporate under s 3 of the Guyana Geology and Mines Commission Act and conferred with the functions, among others, of constructing roads for the transport of minerals and mineral materials and of assisting in providing access to mineral areas (s 4).[14] Section 31(1) empowers the Minister of Natural Resources to give directions to the Commission of a general character as to the policy to be followed in the Commission in the performance of its functions and requires the Commission to give effect to those directions. The Commission is also required to carry out such measures of reorganisation or such works of development as involve a capital outlay on capital

[14] Rev Ed 1979, Cap 65:09.

account in accordance with a general programme prepared by the Minister (s 31(2)); provide to the Minister information requested by him and the means of verification of that information (s 31(4), (5)). The Minister has statutory power to give directions to the Commission regarding the disposal of capital assets and the application of proceeds of such disposals (s 31(6)).

[23] The deliberate establishment of the Commission outside the strictures of the formal governmental apparatus means that it cannot be regarded as a department, unit, or sub-division of any ministry of Government: see *Rafferty v Attorney General* [15]*; Chue v Attorney General of Guyana*[16]*; Perch v Attorney General* [17]*; and Griffith v Guyana Revenue Authority*[18]. However, the nature of the functions that it performs and the extensive ministerial control exercisable over it, strongly suggest that it is to be regarded as an agency of the Government. It is useful to recall that the Aremu Road Rehabilitation Project emerged from recommendations of the Hinterland Infrastructure Committee which comprised representatives of two ministries of government and the Forestry Commission concerned with governance and improvement of the interior together with the Commission and the Gold and Diamond Miners Association. Government funds were to be used in the road rehabilitation exercise.

[24] I consider that Chang CJ was entirely correct in drawing attention to the distinction between s 99(1) of the Constitution of Guyana which vests executive authority in the President, and s 99(2) which does not prevent Parliament from conferring functional authority on persons or authorities other than the President. In the present case, the executive authority remained vested in the executive government in the persons of the President or the Minister to whom the President assigned executive responsibility for the specific governmental functions of constructing roads and of assisting in providing access to mineral areas. Functional authority over these activities were conferred by Parliament on the GGMC by s 4 of the Geology and Mines Commission Act.[19]

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[15] (1993) 50 WIR 258 (GY CA).
[16] *Chue* (n 14).
[17] [2003] UKPC 17, (2003) 62 WIR 461 (TT).
[18] [2006] CCJ 1 (AJ) (GY), (2006) 69 WIR 320.
[19] Rev Ed 1979, Cap 65:09.

[25] The distinction between government agencies and government departments was addressed in *Chue v Attorney General of Guyana.*[20] The Honourable Justice of Appeal stated that:

> Article 99(1) vested executive *authority* in the President while art 99(2) conferred upon Parliament power to confer any executive *function* upon any person or authority other than the President. The intrinsically governmental *authority* was never removed from central government headed by the President though any executive *function* could be conferred by Parliament upon a person or body who or which performed such function not as a servant (intrinsic or organic to the central government) but rather as agent (extrinsic to the central government).

[26] In the present case, the effect of privatisation was that the power once held by the Guyana Geology and Mines Department had been delegated to the Guyana Geology and Mines Commission. The result is that the GGMC has been transformed from a servant of the Government to an agency of the Government, endowed with numerous governmental functions.

[27] As an agency of government, the GGMC was clearly "a procuring entity" that engaged in "procurement" and therefore came within the governance of the Procurement Act. That Act governs the public procurement process and is underpinned by three fundamental principles: equal treatment or non-discrimination; transparency; and confidentiality of tenders.[21] The administrative structure for public procurement is set out in s 16 of the Procurement Act. The National Procurement and Tender Administration, established by s 16(1) is managed by the National Procurement and Tender Board ("NPTB"). That Board is responsible for making regulations governing procurement and determining the forms of documents relating to it, such as standard bidding documents, prequalification documents and manuals.[22] Since the enactment of the Procurement Act, the Procurement Regulations 2004 have been established and this forms part of the *legal* framework. Several guides, handbooks and manuals have also been established by the NPTB and these provide a commentary to the Act and form part of the *policy* framework.[23]

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[20] *Chue* (n 14).
[21] See long title of the Act.
[22] Section 17(2).
[23] For example: National Procurement and Tender Administration, 'Independent Administrative Procurement Complaints System'; National Procurement and Tender Administration, 'The Guyana National Tender Board Procedure Manual' (February 2009); National Procurement and Tender Administration, 'Standard Evaluation Criteria Handbook for Prequalification and Bidding: Procurement of

[28] Under s 2(j) of the Act, "procurement" is defined, *inter alia*, as "the acquisition of construction, consulting and other services", which is precisely the activity undertaken by the GGMC when it sought to secure a contractor to rehabilitate the Aremu Road in Region 7. Section 4 of the Procurement Act expressly provides, in respect of procurement by a procuring entity that, "The provisions of this Act shall apply to any procurement unless they conflict with any provisions made applicable by virtue of any international agreement." This is further to the general purpose of the Act, to provide for the regulation of the procurement of goods, services, and the execution of works, to promote competition among suppliers and contractors and to promote fairness and transparency in the procurement process. As a matter of statutory interpretation, therefore, it may be concluded the GGMC was obliged to comply with the relevant provisions of the Procurement Act.

[29] The Court is mindful of the concerns expressed by Counsel for the Appellant that a finding that the Commission is a procuring entity within the meaning of the Procurement Act could have implications for scores of tendering contracts by statutory bodies which may not have considered themselves bound by the Act. This Court can only deal with the case before it and makes no decision regarding the contract of any statutory body not party to these proceedings. It should be said, however, that the nature of the statutory function being performed, the relationship of the statutory body to the Government, and the source of funding for the project in question will be significant in deciding whether a body is to be properly recognised as an agency of government and a procuring entity under the Procurement Act.

Legitimate Expectation

[30] An alternative basis for grounding the obligation to comply with the provisions of the Procurement Act is the doctrine of legitimate expectation. That doctrine is firmly established in the jurisprudence of this Court. In *Attorney General v Joseph (Joseph & Boyce)* [24] this Court held that legitimate expectation applied in the context of human rights; a condemned man could rely on a legitimate expectation that the State would not, absent undue delay, execute him while his application was

Goods Works and Services (except Consulting Services)' (May 2009); National Procurement and Tender Administration, 'The Guyana Legal and Policy Framework for Public Procurement: Guide to the Public Procurement Procedures' (May 2009); National Procurement and Tender Administration, 'Guyana Procurement Planning Manual' (September 2010); Award of the Bid Protest Committee; and the National Procurement and Tender Administration Bid Process Committee Rules 2016.

[24] [2006] CCJ 1 (AJ) (BB), (2006) 69 WIR 104.

pending before an international body. The State was not entitled to act in a manner inconsistent with that expectation which the State itself had created. This Court has also upheld application of legitimate expectations in other contexts. In *Air Services Ltd v Attorney General*[25] we did not demur from the claim that a Minister could create a legitimate expectation of consultation by making a promise to consult but held that there was no need to go into this as the question was simply one of procedural fairness which "gains nothing by being cast in terms of legitimate expectation." *Commissioner of the Guyana Geology and Mines Commission v Pharsalus Inc*[26] concerned a substantive (as opposed to procedural) legitimate expectation which this Court held required, "a clear and unambiguous representation, devoid of relevant qualification" so that effect can be given to such representation. In *Gilharry v Transport Board* [27] this Court agreed that a promise to renew the licences of bus operators could be the subject of a legitimate expectation provided such an expectation was not based on something contrary to the law. In none of these cases was the claim for legitimate expectation upheld.

[31] In the present case, the invitation by way of public advertisement for bids to rehabilitate the Aremu Road specifically stated that, "Bidding will be conducted through the National Competitive Bidding procedures, specified in the Procurement Act 2003 …". This did not, by itself, mean that the Commission became a procuring entity within the meaning of s 2(l) of the Procurement Act. Especially since it was admitted by Deputy Commissioner Newell Dennison in his Affidavit in Answer that the National Competitive Bidding Procedures, based on which the GGMC undertook to rely in conducting its bidding process, are not referred to in the Procurement Act or the Procurement Regulations. It did mean, however, that the Commission held out in its IFB that it would be bound by the provisions of the Act and the National Bidding Procedures. For the GGMC to resile from that representation, without lawful justification, would lead to the frustration of the legitimate expectation of bidders on it.

[32] This Court, therefore, is of the view that even if GGMC could not be considered a procuring entity within the meaning of the statute, the Commission had created a legitimate expectation that it would abide by the relevant provisions of the Act and

[25] [2021] CCJ 3 (AJ) GY.
[26] [2013] CCJ 10 (AJ) (GY), (2013) 83 WIR 401.
[27] [2017] CCJ 11 (AJ) (BZ).

the Commission could not be permitted to resile from meeting that expectation without affording an opportunity to (BK and the other bidders) to be heard.

(ii) **Should the Challenge have been made through the Administrative Review Process?**

[33] Part VII of the Procurement Act provides for administrative review of the tendering process. A bidder, whose tender or proposal has been rejected, may submit a written protest to the procuring entity within five business days following publication of the contract award decision (s 52). The protest must be reviewed within a further five business days failing which the bidder may request a review by the Public Procurement Board (or, pending its establishment, the National Board) of the decision by the procuring entity (s 53(1)). The Board must conduct the bid protest review through an independent, three person Bid Protest Committee which must issue its written decision within fifteen business days of the conclusion of the review. The decision of the Bid Protest Committee is final and immediately binding on the procuring entity (s 53(2)). Cabinet has the right to review all procurements which exceed fifteen million Guyana dollars (s 54) but did not exercise this right in the present case.

[34] A clear advantage of the administrative review process is the very strict timelines that must be observed. It is not possible to give a definitive termination date because the maximum duration of the review, the fourth element of the process, is not stated. However, the three other elements must be concluded within a maximum of twenty-five business days, and it is noteworthy that the review by the procuring entity must be conducted within five days. Final contract award is suspended during the review process.

[35] A further advantage of engaging the administrative review process is the apparently broad range of redress that may be granted by the Bid Protest Committee. Section 53(5) requires the Committee to state the reasons for its decision, "and the remedies granted". However, restricting the generality of this discretion, the provision further specifies that, "Damages may include only compensation to recover the cost of the bid preparation."

[36] As a general principle, this Court is reluctant to permit judicial review in circumstances where the dissatisfied bidder could have invoked administrative review process specifically ordained by statute. The special statutorily ordained

procedure for redress must, as a rule, be observed. However, in this case, it does appear that the nature of the complaints meant that they may not have been satisfactorily answered in the administrative review process. The administrative review process contemplates "core procurement matters", namely, those relating to the prequalification or tendering proceedings or to the method of procurement selected by the procuring entity.[28] It is for this reason that the persons selected to conduct the review are professionals who are "particularly competent in the field of procurement", as opposed, for example, to professionals competent in the field of law or adjudication.[29] The issues raised by BK are complex, they relate not only to the adequacy of Baboolall's bid, but also the legality of the procurement process, and specifically, whether the GGMC was a procuring entity subject to the Procurement Act. Such a question of legality is not one contemplated by the administrative review process under the Procurement Act. Only a court of law can effectively determine that question.

[37] Judicial review was available to challenge the decision of the GGMC to award this contract for the Aremu Road Rehabilitation Project. Chang CJ examined several authorities to establish the proposition that in seeking to procure services for the public or statutory purpose of the road rehabilitation and in subsequently awarding a contract to do so, the GGMC was engaging in an activity and was exercising a power which did not derive from statute but from the common law power to contract in private law: *National Contractors Limited v National Development Corporation;*[30] *NH International Caribbean Limited v Urban Development Corporation;*[31] *Industrial Risks Consultants Limited v Petroleum Company of Trinidad and Tobago Ltd*.[32] The Chief Justice concluded that the procurement process and the award of the contract attracted judicial review because there was "statutory underpinning" in the Procurement Act to the exercise of this contractual power. The Court of Appeal also agreed that ordinarily the matter would have been classified as a commercial activity but by applying *NH International (Caribbean) Ltd v Urban Development Corporation of Trinidad and Tobago,*[33] that court found

[28] Procurement Act, Rev Ed 2011, Cap 73:05, s 52(2).
[29] ibid s 53(4).
[30] *National Contractors* (n 7).
[31] *NH International* (n 8).
[32] *Industrial Risks Consultants* (n 9).
[33] *NH International* (n 8).

that there was 'a statutory underpinning' which made public law principles applicable.

[38] Not every decision of a statutory corporation will be amenable to judicial review. Where the decision is commercial in nature, such as the purchase of goods or services in consequence of a tender process; or is not subject to duties imposed by statute; or there is no allegation of fraud, judicial review will not normally be appropriate, and a claimant will usually be left to the remedies in private law, if any. However, where there is a sufficient public law element or flavour, judicial review will lie. The Judicial Review Act, Cap 3:06 ("JRA"),[34] which entered into force in 2018,[35] legislates that the act or omission against which judicial review is sought must have a public element in the sense that it must affect public law rights, obligations, or expectations. In considering whether an act or omission has a public element the Court is obliged to have regard to the following matters:[36]

(a) The source of the power or duty exercised.

(b) The nature of the power or duty exercised.

(c) The object or purpose of the act or omission.

(d) The consequences of the act or omission not being amenable to judicial review.

(e) Any other matter the Court sees fit to consider.

[39] These are the factors that dictate whether judicial review is applicable. The present case is a particularly strong one for judicial review because of the significant statutory underpinning of the decision of the GGMC as a statutory body. The public law dimension was especially evident here by virtue of the nature of the relationship between government and this statutory body. In circumstances where the statutory body, as an agent of government, was engaged in the carrying out of the public functions of a road rehabilitation project, and where the source of funding of the project was the Government of Guyana, there was, in my view, an undoubtedly sufficient public law flavour to justify application of public law principles of judicial review.

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[34] Section 3(1).
[35] Judicial Review Act (Commencement) Order 2018, 2018/28.
[36] Judicial Review Act (n 35) s 3(3).

[40] At common law judicial review was always discretionary and there is a wealth of cases which establish that judicial review may not be allowed where there are alternative remedies available: see *R v Chief Constable of the Merseyside Police, ex p Calveley*[37]; *R v Secretary of State for the Home Department, ex p Swati* [38]; *R v Mid-Worcestershire Justices, ex p Hart*[39]; *R v Civil Service Appeal Board, ex p Bruce*[40]; and *Harley Development Inc v Commissioner of Inland Revenue*[41]. Section 9 of the Judicial Review Act appears to reverse this discretion by providing that the court "shall not refuse judicial review of a decision where any other written law provides an alternative procedure to question review or appeal that decision." In *Medical Council of Guyana v Ocampo Trueba*[42] this Court did not contradict the assertion of counsel that a court is not free to act inconsistently with section 9 of the Act by refusing an application for judicial review because of the presence of an alternative remedy.

[41] Even if this provision is to be interpreted literally as eliminating judicial discretion to disallow judicial review because of the availability of alternative remedies, it is the case that the Act makes other tools available to the court. Section 6 allows the court to suspend the judicial review proceedings and appoint a person to investigate the complaint and submit findings to the court and the parties to the application. Section 17 provides that the court may, at any stage, direct that judicial review proceedings shall be stayed until further order or on any terms and conditions as the court may direct. In *Medical Council of Guyana v Ocampo Trueba*[43]this Court also noted that under s 11 of the JRA a court may direct that a claim for judicial review that is not amenable to that remedy should continue as an ordinary private law action.

(iii) **Did GGMC Comply with the Act?**

[42] Section 3(1) of the Procurement Act 2003 states that it applies "to all procurement by procuring entities except as otherwise provided in subsection (2)". The exceptions in sub-s 2 are not relevant in this case. Section 3(4) makes the Act

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[37] [1986] QB 424 at 433.
[38] [1986] 1 WLR 477, CA.
[39] The Times, 17 December 1988.
[40] [1988] 3 All ER 686.
[41] [1996] 1 WLR 727.
[42] [2018] CCJ 8 (AJ) (GY), (2018) 93 WIR 318.
[43] [2018] CCJ 8 (AJ) (GY), (2018) 93 WIR 318.

applicable, *mutatis mutandis*, to a supplier or contractor who is a person as it does to a supplier or contractor who is a body of persons, corporate or incorporate." There are several respects in which the instant tendering process appears not to have complied with the Procurement Act.

Standard Bidding Documents

[43] While disputing that GGMC was a procuring entity, Deputy Commissioner Newell Dennison asserted that GGMC nevertheless acted in compliance with the provisions of the Procurement Act. In his affidavit before the High Court Mr Dennison stated that the GGMC relied on the "Standard Bidding Documents" which states in its Foreword that it was prepared by the National Procurement and Tender Administration and that it "complies with the Procurement Act 2003 and the Procurement Regulations." It is germane that the Foreword also states:

> The Bidding documents for Procurement of Works - smaller contracts valued less than G$40 million has been prepared by the National Procurement and Tender Administration, for use in Guyana for small civil works using 1DA's May 2004 version of SBD for Procurement of works (small contracts). This document complies with the provisions of the Procurement Act 2003 and the Procurement Regulations 2004. The same document can be used for the procurement of small works funded by other financial agencies with minor modifications.

[44] I do not make a finding on whether the "Standard Bidding Documents were indeed compliant with the Procurement Act or Regulations. What is clear is that the "Standard Bidding Documents" were apparently meant to apply to contracts of less than G$40 million whereas the contract in this case was well over a few hundred million dollars. By its own admission, therefore, the GGMC misapplied the "Standard Bidding Documents" to the procurement process in this case. To the extent that those documents were, as asserted by the GGMC, in compliance with the Procurement Act 2003 and the Procurement Regulations 2004, that misapplication suggests that the procurement process appears to have been carried out in breach of the statutory framework.

The Pre-qualification Process

[45] The Procurement Act specifies procedures that are to be met by persons desirous of participating in the procurement process. Section 5(1) provides:

> Every supplier or contractor wanting to participate in procurement proceedings must qualify by meeting such of the following criteria as the procuring entity considers appropriate:
>
> (i) that possesses or has access to the technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and reputation, and the personnel, to perform the contract.
>
> (ii) that it has legal capacity to enter into the contract.
>
> (iii) that it is not insolvent, in receivership, bankrupt or being wound up, its affairs are not administered by a court or a judicial officer, its business activities have not been suspended, and it is not the subject of legal proceedings for the foregoing.
>
> (iv) that it has fulfilled its obligation to pay taxes and social security contributions to its employees.
>
> …
>
> (vi) that its past performance substantiated by documentary evidence would commend it for serious consideration for the award of the contract.

[46] Where the procuring entity engages in pre-qualification, there are specific requirements to be met. Section 6(2) provides:

> If the procuring entity engages in pre-qualification proceedings, it shall provide on payment therefor, a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify.

Section 6(3) states:

> The prequalification documents shall include the following information…
>
> (a) ...
>
> (b) …
>
> (c) any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications.

[47] The only criterion used by the GGMC (through its Special Project Unit) for determining which contractors were prequalified to participate in the bidding process was that of "the technical and financial capacity" of the bidder. The GGMC admitted that the Standard Bidding Documents did not address the bidder pre-qualification process *per se*. And even though BK International specifically challenged the decision of GGMC to identify CB&R as a prequalified bidder the

Commission provided no documentary evidence or other form of information provided to it by CB&R to support its bid to be selected as a prequalified bidder.

[48] In short, the GGMC made no attempt to show that it had complied with the Procurement Act in the conduct of the prequalification process. No documentary evidence or other information required to be submitted by the suppliers or contractors under s 6 (3)(c) of the Procurement Act as part of the prequalification documents in proof of the suppliers' or contractors' compliance with the prequalification procurement procedure was disclosed to the court. There was no explanation of the inconsistency in the IFB's statement that bidding was open to selective bidders while not stating the criteria on which bidders would be selected as prequalified. Nor was there any explanation of what Chang CJ described as the "incomprehensible" procedure of the GGMC inviting sealed bids from eligible and qualified bidders on the basis that bidding would be open to selective bidders when the Commission had already identified four pre-qualified bidders. As the Chief Justice said, "when and how were the pre-qualification selection made remains a mystery."

[49] Under s 6(1), prequalification under the Act must be initiated by a procuring entity causing an invitation to prequalify to be published in the newspapers. Based on the evidence produced at the lower courts, the GGMC did not follow that procedure. The Special Projects Unit of the GGMC simply met and discreetly selected four contractors who they thought had the "technical and financial" capacity to execute the works. [44] This was in clear disregard of the seminal notions of transparency and competition which underpin the prequalification process.

[50] Assuming the prequalification process had been properly complied with, there would ordinarily have been no necessity for Baboolall to produce tax compliance documents or evidence of legal status unless requested by the GGMC.[45] This is because the prequalification process would have already caused Baboolall to submit those documents.[46] Again assuming compliance with the prequalification process, the GGMC was required to select the lowest evaluated tender in accordance with s 39(1) of the Procurement Act. It is important to note here the distinction between "lowest tender" and "lowest evaluated tender". The former

[44] Record of Appeal, 'Affidavit in Answer of Mr Dennison' 120 at [7].
[45] Procurement Act (n 1) s 6(9).
[46] Information for Bids (IFB) cl 5.2.

simply means the bidder with lowest bidding price while the latter encompasses the twin requirements of (1) substantial responsiveness to the bidding documents; and (2) lowest evaluated bid price.[47] A substantially responsive bid is one that conforms to the terms, conditions, and specifics of the Bidding documents[48] without material deviation.[49] It is undisputed that BK submitted the lowest bid price, and therefore, satisfied one of the requirements. There was inadequate investigation of the issue of substantial responsiveness in the courts below but based on the Evaluation Report prepared by the GGMC it appears that the Commission may have taken irrelevant considerations into account in considering such factors as (i) the feasibility of BK's bid, and (ii) CB&R's maintenance of the road for the past fifteen years in determining the issue of "substantial responsiveness". The evidence of Brian Tiwarie on behalf of BK[50] was to the effect that BK was substantially responsive but again, this issue did not receive fulsome investigation in the court below.

[51] It is the case that the Invitation for Bids specified that the Commission reserved the right "to accept or reject any or all bids without giving reasons." However, this right must necessarily be in accordance with the Procurement Act since, as Chang CJ pointed out, "a right could not be exercised in contravention of the provisions of the said Act." Section 5(1) allowed the GGMC as the procuring entity to consider which of the procurement criteria was or were appropriate for determining pre-qualification. However, s 6(3) required the GGMC to include in its pre-qualification documents documentary evidence or other information relevant to that or those appropriate criteria. Clause 33.1 of IFB, which expresses the power to reject a bid, footnotes the words, "Employers shall not reject any bids… except as permitted in the Procurement Act". Tenders are only rejected in the following circumstances: if the contractor/supplier is not qualified;[51] if the contractor/supplier does not accept correction of an arithmetical error;[52] inducement from contractors/suppliers;[53] rejection of all tenders prior to the acceptance of any tender.[54] It follows that the

[47] ibid cl 32.1.
[48] ibid cl 9 sets out the bidding documents: the IFB, Bidding Data Sheet, Eligible Countries, Forms of Bid, Qualification Information, Letter of Acceptance, Agreement, General Conditions of Contract, Special Conditions of Contract, Specifications, Drawings, Bills of Quantities, and Forms of Securities.
[49] ibid cl 27.2.
[50] Record of Appeal 103.
[51] Procurement Act (n 1) s 39(5).
[52] ibid.
[53] ibid s 12.
[54] ibid s 40(1).

rejection of BK's bid in accordance with cl 33.1 had to be restricted to those circumstances. Since none of those circumstances existed, the GGMC could not lawfully use cl 33.1 as a valid justification for rejecting BK's bid.

Conclusion

[52] The GGMC was obliged to comply with the relevant provisions of the Procurement Act because (1) it was a procuring entity within the meaning of the Procurement Act; and (2) it created a legitimate expectation that bidding for the road rehabilitation project would be conducted in accordance with the Procurement Act. There are clear advantages to bringing challenges to the procurement process under the administrative review processes available under the Act and the Court will normally be astute to ensure that this is done. However, in the present case, the nature of the complaints justified recourse to judicial review as provided for under the Judicial Review Act. The GGMC misapplied the "Standard Bidding Documents" to the procurement process in this case, given the value of the contract. Further, and more substantially, it failed to comply with the prequalification process specified in the Act.

It is for these reasons that this Court issued two orders on 4 June 2021 dismissing the appeal and directing the payment of costs to the Respondent, BK International Inc.

JUDGMENT OF THE HONOURABLE MR JUSTICE WIT, JCCJ:

"The world is filled with law" – Aharon Barak[55]

[53] I fully agree with the judgment of Anderson JCCJ. At the same time, I wish to express my support for the line of thought developed by Jamadar JCCJ in his concurring (a better term would perhaps be supplemental) judgment. Much of our judicial review of administrative decisions is done by using the traditional methods developed in, and inspired by, the case law of English courts. These courts, however, function in what is called a parliamentary democracy where Parliament is sovereign. This is not the case in Guyana or any other Commonwealth Caribbean state for that matter. Here we have a constitutional democracy, which constitutes

[55] A Barak, 'Judicial Philosophy and Judicial Activism' (1993) 17 Tel Aviv U L Rev 475, 477, 485.

the political and the judicial branches as co-equal, all deriving their powers from the Constitution. As I have indicated before, a constitutional democracy is not a parliamentary democracy with some additional constitutional "gadgets" (like a Supremacy Clause and a Chapter on fundamental rights and freedoms).[56] It is, if I may use that expression, a fundamentally different kettle of fish.

[54] Without diminishing anything with respect to the traditional methods and grounds of judicial review, this realisation of functioning in a fundamentally different legal order should bring us to the understanding that judicial review in a constitutional democracy must necessarily be broader and richer than such a review could ever be in a parliamentary democracy. Not only judicial review would be enhanced, though. A proper understanding of what a constitutional democracy is must also have consequences for the methods and the scope of statutory interpretation. For example, whatever Parliament intends to achieve through legislation remains important for a proper construction of such legislation, but Parliamentary intent must of course be consistent with the values and principles, expressly or inherently, enshrined in the Constitution. If it is not, the legislation cannot stand, however clear the intention.

[55] This is so because these constitutional values and principles, being part of the Supreme Law, permeate the entire Guyanese legal order. Consequently, in Guyana (as in other constitutional democracies) the interpretation and application of statutory law is thereby brought under the inescapable influence of constitutional law. This is not limited to public law; private law also requires to be looked at through a constitutional lens.[57] And not only written law but also "unwritten" common law cannot escape the scrutiny of constitutional law. Also, the common law, judge made as it is, must be interpreted and, if need be, further developed to meet the challenges of both the times and the Constitution.[58]

[56] As Justice Barak stated, the world is filled with law. In Guyana this is no different. But the law must be in tune with the Constitution, which not only imbues the law with meaning but also commands that it must be complied with. If the law is not complied with, it must offer effective remedies. It is an essential feature of the law

[56] *Joseph & Boyce* (n 25) at [15].
[57] *Bisnauth v Shewprashad* [2009] CCJ 8 (AJ) (GY), (2009) 79 WIR 339 at [53].
[58] *Lucas v Chief Education Officer* [2015] CCJ 6 (AJ) (BZ), (2015) 86 WIR 100 at [181]-[183].

that it protects against any infringement because, thus the Constitution ordains, the law must rule[59]. And it is the duty of the courts to put it into effect. The Constitution, therefore, provides overarching content to the law, requiring it to be practical and workable and mandating the courts to make it work.

JUDGMENT OF THE HONOURABLE MR JUSTICE JAMADAR, JCCJ:

"The Rule of Law as an Interpretative Tool in Judicial Review Proceedings."

Introduction

'Aequum et bonum est lex legum' – Domitius Ulpian[60]

[57] Judicial review of administrative actions plays a vital function in all democratic societies. This is especially so in developing democracies. Recognition of this is evidenced in the Caribbean region where some jurisdictions have placed judicial review of administrative actions on a statutory footing.[61] Many Caribbean jurisdictions also have procedural rules that facilitate it.[62] Guyana is one jurisdiction that has both a statute and procedural rules underpinning judicial review of administrative actions. The importance of this public law review mechanism for administrative decisions and actions in Guyana is beyond question. This opinion explores its scope.

[58] In the first half of 2013 it was recognised that the Aremu Road, located in a mining district of Region 7 in Guyana, needed to be rehabilitated because of its poor condition. In June 2013 the Guyana Geology and Mines Commission (the "GGMC"), a state corporation established by statute, awarded a contract to repair the road to Chunilall Baboolall. BK International Inc had also bid to repair the road, and its tender was in fact the lowest received by the GGMC. Dissatisfied, BK International Inc commenced judicial review proceedings against the GGMC seeking to quash its decision to award the contract to Baboolall.

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[59] *Joseph & Boyce* (n 25) at [20].
[60] 'What is good and equal is the law of laws.' Attributed to the Roman jurist Domitius Ulpian, 2nd Century CE. Ulpian is considered by some one of the earliest pioneers of human rights. See Pamela Slotte, *Revisiting the Origins of Human Rights* (Cambridge University Press 2015).
[61] Judicial Review Act, Chap 7:08 (TT); Administrative Justice Act, Cap 109B (BB); Judicial Review Act, Cap 3:06 (GY) (in force from 2018).
[62] RSC 1978 Ord 53 (BS); CPR 1998 Pt 56 (TT); CPR 2000 Pt 56 (ECSC); CPR 2002 Pt 56 (JM); CPR 2005 Pt 56 (BZ); CPR 2008 Pt 56 (BB); CPR 2016 Pt 56 (GY).

[59] BK International Inc succeeded both at the High Court and Court of Appeal. The GGMC and Baboolall have appealed to this Court, contending, among other things, that in the circumstances of this case the GGMC is not amenable to judicial review and that the contract is a private contract not subject to public law scrutiny. The precise contention is that the GGMC is not a government agency in relation to this contract for road repairs and is thus not subject to the provisions of the Procurement Act in relation to the tendering for and selection of a contractor to repair the Aremu Road.

[60] This appeal therefore raises frontally issues as to the reach of judicial review in relation to the administrative actions of state corporations, created by statute and vested with powers to administer and operationalise what have historically been state functions. The GGMC is established by statute[63] as a body corporate whose main objectives are to promote and develop mining and mineral research, exploration, production, utilisation, and marketing in Guyana.[64] Its powers include carrying out all activities supportive of and ancillary to those primary objectives.[65]

[61] There is no dispute that pursuant to s 4 of the GGMC Act, the GGMC was acting *intra vires* its statutory powers to take steps to solicit, receive bids for, and select a contractor to repair the Aremu Road. What is in dispute is whether in doing so the GGMC was acting as a public authority, amenable to public law scrutiny and supervision, and so susceptible to judicial review of its decisions in this regard.

General Disposition

[62] I agree with the outcomes arrived at in the main opinion of the Court, and with the broad contours of the analysis undertaken. However, there are some aspects of the issues raised in this appeal that I consider of seminal importance to this area of the law. In this opinion, I propose to share my views on those aspects. I do not propose to set out in any greater detail the material facts, as they are adequately outlined in the main opinion of the Court. Nor do I propose to unnecessarily dwell upon matters of law that are largely uncontroversial in these proceedings.

[63] Established by the Guyana Geology and Mines Commission Act, Cap 65:09.
[64] ibid s 4(1).
[65] ibid s 4(1)(f).

[63] In Caribbean constitutionalism the rule of law is central to administrative law. It governs it. In jurisdictions where there is constitutional supremacy, courts must ensure that administrative decisions conform and comply with fundamental constitutional and human rights values and principles. These standards and values, therefore, apply to judicial review of administrative actions. This requires a re-orientation in how judicial review is approached by the public, lawyers, and the courts. This is so because of the conceptual and practical implications that distinguish states governed by Parliamentary supremacy from those governed by Constitutional supremacy.

[64] The impact of Constitutional supremacy on judicial review of administrative actions can a) broaden the scope of inquiry, bringing it squarely under the umbrella of constitutionalism and the rule of law, and as well b) influence the nature of the inquiry, making it a more primary form of inquiry. The pivotal re-orientation is that judicial review of administrative actions is unavoidably anchored in Caribbean constitutionalism and human rights values and principles.[66]

[65] To quell any rising angst, this re-orientation is not an abandonment of the grounds that exist for judicial review. They are all encompassed and included under the umbrella of constitutionalism and the rule of law. It is not a matter of either/or, but rather of both/and, with the clear understanding that constitutional values, the rule of law, are the primary set and existing grounds a sub-set. This re-orientation can change in significant ways our approaches to judicial review of administrative actions. We need to reimagine judicial review through the lenses of constitutionalism. To see that as the primary lens, though not exclusively so. Traditional approaches are invaluable sub-sets of this, and not the other way around. Their value is not eroded, only enlarged and expanded. They remain critical and at times more useful for giving clarity and direction to administrators and for holding them accountable.[67]

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[66] For a South African perspective see Kate O'Regan,'The Constitution and Administrative Law: Insights from South Africa's Constitutional Journey' (Admin Law Blog, 12 April 2017) <adminlawblog.org/2017/04/12/kate-oregan-the-constitution-and-administrative-law-insights-from-south-africas-constitutional-journey/> accessed 25 October 2021; and Cora Hoexter, 'South African Administrative Law at a Crossroads: The PAJA and the Principle of Legality, (Admin Law Blog, 28 April 2017) <adminlawblog.org/2017/04/28/cora-hoexter-south-african-administrative-law-at-a-crossroads-the-paja-and-the-principle-of-legality/> accessed 25 October 2021. For an Indian perspective and a critique see, Farrah Ahmed and Swati Jhaveri, 'Reclaiming Indian Administrative Law' (Admin Law Blog, 10 April 2019) <https://adminlawblog.org/2019/04/10/farrah-ahmed-and-swati-jhaveri-reclaiming-indian-administrative-law/> accessed 25 October 2021.

[67] See Ahmed and Jhaveri 'Reclaiming Indian Administrative Law' (n 66).

Issues Considered

[66] First, whether the GGMC as statutorily constituted is a government agency and as such is generally to be considered a public authority for the purposes of public law judicial review proceedings. In developing this issue, the following *a priori* sub-issues will be explored: (i) judicial review and the rule of law; (ii) judicial review in the context of human rights; and (iii) implications for the GGMC. Second, if the GGMC is such a public authority, is it a procuring entity for the purposes of the Procurement Act, and as such subject to the provisions of that Act. Third, whether the GGMC's decision to procure and evaluate bids, then award the contract to repair the Aremu Road to Baboolall has sufficient public law flavour[68] to attract judicial review.

[67] In my opinion all three issues raised above are to be answered in the affirmative. The focus of this opinion will however be on the first issue, as the second and third issues are adequately dealt with in the main opinion of the Court. To the extent that there are intersections in the analyses, these will be covered briefly.

Analysis

Is the GGMC a Public Authority Amenable to Judicial Review?

[68] To adequately resolve this issue requires an exploration of some fundamental public law principles applicable to administrative law in the Caribbean context.

(i) *Judicial Review and the Rule of Law: Discovering a Firm Foundation*

[69] In administrative law, philosophically, the principle of legality lies at the heart of all conceptions of the rule of law. However, looked at another way, the rule of law encompasses the principle of legality as a central tenet.[69] A lot depends on whether one's perspective is based on the principle of parliamentary supremacy or of constitutional supremacy. The principle of legality is central to democratic governance and is based on the experiential insight that a government of laws provides the best protection against arbitrariness, including on the part of the

[68] *NH International* (n 8) at [7] (Kangaloo J).
[69] See *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ), (2019) 94 WIR 332 at [46] to [49] (Saunders PCCJ, Wit and Barrow JJCCJ) as well as at [125] (Rajnauth-Lee JCCJ).

executive and governmental agencies. Thus no one is entitled to disregard the law, and all governmental actions and decisions should be justifiable according to law, but which law?

[70] The principle of legal certainty, as a facet of the rule of law, requires that laws and rules are clear and precise enough to allow persons to ascertain their rights and responsibilities. Certainty and predictability go together. Even as this is so and the principle of legality eschews decisions and actions outside (*ultra vires*) the powers of a public authority, there is also a recognition of the principle of flexibility which permits discretion and changes within (*intra vires*) the exercise of such powers.

[71] In conventional legal theory, the principle of legality has evolved as a rule of statutory construction, that the use of general words in a statute will not be interpreted or applied to permit an unjustifiable or excessive intrusion into fundamental rights, or the ousting of basic common law norms.[70] It is a basis upon which courts may exercise a supervisory jurisdiction over the exercise of statutory powers. As Lady Hale would put it, the principle of legality 'mandates a minimum intrusion upon fundamental rights.'[71]

[72] The Constitution as the supreme law enjoys what may be analogously and uncontrovertibly be described as the status of *Lex Supremus*[72] in relation to all other laws, and as such it is also very much the *summus princeps*[73] in relation to all branches of government. In relation to its core principles and values, including fundamental rights enshrined in it, the principle of legality applies in similar fashion, though arguably with enhanced reach and compulsion.[74]What this means, is that the principles of legality, certainty, and flexibility are all now to be also approached through constitutional, rule of law, lenses.[75]

[73] In the Co-operative Republic of Guyana constitutional supremacy reigns, and not parliamentary supremacy. Guyana is a constitutional democratic sovereign state.[76]

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[70] See Jason N E Varuhas, 'The Principle of Legality' (2020) 79(3) Cambridge LJ 578.
[71] Lady Hale, 'Principle and Pragmatism in Public Law' (Sir David Williams Lecture 2019, 18 October 2019) 12-15 <https://www.supremecourt.uk/docs/speech-191018.pdf> accessed 25 October 2021.
The principle of legality can also mean that laws should be clear, ascertainable and non-retrospective. See *McEwan* (n 69) at [125] (Rajnauth-Lee JCCJ).
[72] That is, the Supreme Law.
[73] Literally, the Supreme Ruler.
[74] See also, Varuhas (n 70).
[75] For a South African perspective see O'Regan and Hoexter (n 66); For an Indian perspective and a critique see Ahmed and Jhaveri (n 66).
[76] See s 1, Constitution of Guyana.

The three main branches of government (parliamentary, executive, judicial) co-exist as autonomous, inter-related, and complementary institutions in the context of the separation of powers arrangement and do so proximally as constituted authorities under the constitutive authority of the Constitution.[77]

[74] Administrative law and judicial review of administrative decisions in the Caribbean must take cognisance of this distinction between constitutional and parliamentary supremacy. This is because the British evolution and development of administrative law is premised on parliamentary supremacy and consequently judicial review has been historically located in the doctrine of *ultra vires* in the context of parliamentary intent.[78] In the Caribbean context, where written constitutions prevail and in which supremacy clauses are standard,[79] the primary underpinning of judicial jurisdiction and power to review administrative decisions and actions is fundamentally located elsewhere.

[75] In Guyana, as in most Caribbean States that have written constitutions with supremacy clauses, judicial review of administrative actions and decisions has as its source of jurisdiction and power, the core constitutional value and imperative of the rule of law. [80] The rule of law is part of the inviolable basic deep structure of Guyanese constitutionalism.[81] It is the true foundation upon which judicial review of administrative actions and decisions in Guyana is premised.[82] This is not rendered irrelevant by the passage of the Judicial Review Act. Indeed, the Judicial Review Act endorses its underpinning functionality and allows for its continuing efficacy as both an interpretative methodology and a substantive standard bearing source for thresholds in judicial review.

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[77] See Preamble and ss 1, 8 and 9, Constitution of Guyana.

[78] It is now widely accepted that this basis may no longer be sufficient. See T R S Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry' (2002) 61 Cambridge LJ 87; and Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing 2001).

[79] See s 8, Constitution of Guyana.

[80] See the Preamble to the Constitution of Guyana: 'WE THE GUYANESE PEOPLE, … proclaim this Constitution in order to: … Forge a system of governance … based on democratic values, social justice, fundamental human rights, and the rule of law.' Elliott (n 78) 252 also makes the point, after a comprehensive interrogation of the sources and foundations of judicial review, that in the context of the UK: 'The impetus for judicial review is therefore constant, being based on the rule of law doctrine which abhors the abuse of power.' In Guyana, which jurisprudentially has civil law origins, the notion of rule of law is thus also that of *preeminence du droit* (pre-eminence/ supremacy of law), and not the more limited and formalistic *preeminence des lois* (pre-eminence/ supremacy of the law, as written rules). See also, Council of Europe (Parliamentary Assembly), 'Report of the Committee on Legal Affairs and Human Rights: The Principle of the Rule of Law' (Doc No 11343, 6 July 2007).

[81] See Belize *International Services Ltd v A-G of Belize* [2020] CCJ 9 (AJ) BZ, [2021] 1 LRC 36 at [332] to [333] (Jamadar JCCJ).

[82] See, for a Caribbean view, Northern *Jamaica Conservation Association v Natural Resources Conservation* (Jamaica SC, 16 May 2006) at [25].

[76] As a core constitutional and democratic value and principle, the rule of law mandates the principle of legality – the requirement of 'government according to law'.[83] That is all governmental actions and/or decisions that are intended to have legal effects must be sourced in and based on legal powers, if what is decided or actioned is to be lawful. In the case of actions and/or decisions based in statutory authority, the traditional *vires* doctrine seeks to locate that source and basis in the relevant statute. If they are found to be outwith the statutory powers, they are therefore *ultra vires* and potentially reviewable (justiciable). In this case these questions arise in the context of the GGMC Act. In a democracy based on parliamentary supremacy, the reason for this approach is self-evident.

[77] However, in a constitutional democracy the true source of justiciability is the rule of law. This is the primary lens through which the interpretative and evaluative process must be initiated and carried out, even as one interrogates the underpinning legislation for source, basis, and ambit (exercise) of power - *vires*. Thus, the rule of law permits an interrogation on its own terms, both in relation to methodology and substance, that transcends (even as it encompasses) the principle of statutory legality *per se* and includes basic rule of law norms such as fairness, certainty, reasonableness, good faith, even proportionality and so on. It functions as an interpretative tool in judicial review. When core constitutional values or fundamental rights are implicated, the standard of scrutiny is high and anxious, and the review is direct.[84]Also, traditional approaches to the principle of legality have to be re-imagined to accommodate this. Indeed, in civil law jurisdictions juridic approaches to the notion of legality can be relatively broad and encompassing.[85] Guyana's antecedents in this regard are noteworthy.

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[83] John Adams, Novanglus letters to the Revolutionary cause, No VII: '…define a republic to be a government of laws, and not of men.' Adams was instrumental in co-authoring The Constitution of Massachusetts, 1780, Chapter II, The Frame of Government: 'In the government of the Commonwealth of Massachusetts, the legislative, executive, and judicial power shall be placed in separate departments, to the end that it might be a government of laws, and not of men.' He was the second President of the United States of America (1797 – 1801) and served as the first Vice President under President George Washington.

[84] Even in the UK, where parliamentary supremacy prevails, there are shifting standards of scrutiny and more direct approaches to review where common-law norms of human rights are implicated. See, Varuhas (n 70).

[85] In some civil law jurisdictions, the principle of legality has evolved into a broad principle. The French refer to it as the *bloc de la légalité*. See Maurice Hauriou, *Précis Élémentaire de Droit Administratif* (5th edn, Recueil Sirey 1943) 230. Renato Costa calls it 'the principle of "jurisdicity". As he explains: 'That is why it is known as the 'block' of legality in its French iteration; because it contains in itself a whole 'block' of principles that add to the meaning of legality. The principle of jurisdicity (*bloc de la légalité*) allows for executive actions to be aligned with values beyond (but not apart from) what is established by positive, statutory laws (*la loi*) but assume into its conception the dictates of law in its broader sense (*le droit*). Some principles encompassed by jurisdicity are justice, proportionality, economy, good governance, reasonability, impartiality, fairness, transparency, ethics, finality, rationality, and accountability.' And further: 'The principle of jurisdicity incorporates societal values, principles and objectives by submitting the exercise of executive powers not only to the scrutiny of the (constitutional, statutory or common) law, but to the fundamental, normative

[78] The overarching rationale being, from a rule of law perspective, judicial review is constitutionally warranted to ensure that all governmental power is exercised (and therefore supervised) in accordance with norms that are constitutionally fundamental. Constitutional supremacy suggests that legislation must conform with these standards, and consequently, all governmental action, whether by statutory authority or otherwise, must do so likewise. This then is the true basis for judicial review of administrative actions and decisions in Guyana.

[79] To be clear, this approach to judicial review does not abandon traditional grounds of review, such as illegality, irrationality, unreasonableness, procedural impropriety, natural justice, abuse of power, legitimate expectation and so on. Neither does it abandon the principle of statutory legality. Rather it locates these common law grounds and statutory standards, maybe best understood as legal standards,[86] within the broader concept of the rule of law. Indeed, these common law grounds and the courts' ancient and at the time nascent common law power to issue prerogative writs, [87]are all based in the rule of law which abhors governmental arbitrariness, abuse of power, illegality, and all things that undermine the idea of 'a government of laws, and not of men'.[88] The same reasoning and approach follows and is true in relation to statutory grounds where judicial review statutes exist.

[80] However, by locating these within a rule of law framework, judicial review of governmental administrative actions and decisions is liberated from a myriad of boxes and hoops which all too often obscure the true purpose and value of public law judicial review, and which bears the imprimatur of constitutionality. Which is, the constitutional imperative to subject all governmental administrative actions and decisions to the rule of law. What is suggested may thus be best described as an integrated, context sensitive, rule of law approach to judicial review.

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precepts that direct the whole of the social structure.' Renato Costa, 'Substantive Values in Administrative Law – A Principle of "Jurisdicity" to complement the Principle of Legality' (adminblogorg, 1 September 2021) <https://adminlawblog.org/2021/09/01/renato-saeger-magalhaes-costa-substantive-values-in-administrative-law-a-principle-of-jurisdicity-to-complement-the-principle-of-legality/> accessed 25 October 2021.

[86] That is to say, in the exercise of statutory power governmental agencies are required to meet certain legal standards that conform to the rule of law, such as standards of legality, rationality, reasonableness, procedural propriety, natural justice, fairness, certainty, proportionality etc. See also, Sir John Laws, 'Concluding Comments: Judicial Review's Constitutional Home' in Christopher Forsyth, Mark Elliott and Anne Scully-Hill (eds), '*Effective Judicial Review: A Cornerstone of Good Governance*' (Oxford University Press 2010) 434 – 444.

[87] The prerogative writs, such as habeas corpus, mandamus, prohibition, certiorari, were issued on the strength of the inherent powers of the court to enforce its orders and to do justice. See S A de Smith, 'The Prerogative Writs' (1951) 11 Cambridge LJ 40.

[88] See Lord Justice Sedley, *Freedom, Law and Justice* (Hamlyn Lectures, Sweet & Maxwell 1999) 33: 'What public law is about, at heart, is the restraint of abuses of power'.

[81] It is an approach that frees the interpretative principle of *vires* to roam in the encompassing sphere of the rule of law, and in so doing it simultaneously reshapes the application of *ultra vires*; and does the same as well for the interpretative principle of legality. It also liberates judicial review from its often stifling limitations and frees it to be applied, when justifiable, as a substantive review process anchored in the supra-constitutional and/or particularised values/principles that constitute the rule of law.[89] This approach, I suggest, offers coherence in the development and application of public administrative law across the board, and releases it from some of the strictures of formalism, that all too often perplex as much as puzzle administrators, lawyers, and judges alike.

[82] What ought to be beyond dispute in Guyana, as in most Anglo-Caribbean states with written constitutions, is that courts, in furtherance of constitutional democracy and by way of constitutional warrant, now properly enforce values and principles considered to be inherent in Caribbean constitutionalism. These values arise from both the basic deep structures and the texts of these constitutions, and form part of the essential framework of their democratic organisational models.[90] Parliamentary and statutory intent and meaning are sub-sets of this broader ethos, subject to it, and intentionally to be aligned with its values and principles.

[83] Certain caveats are apposite. Clearly it is not the primary role or function of courts to make prescriptive evaluations of what is substantively necessary or best for the public good. That is pre-eminently the province of the legislature. Equally so, in relation to the execution of executive policy and function, whether directly or indirectly through governmental ministries, departments, organs, agencies and the like. This accords with the organisation of the democratic state according to a separation of powers. Hence the historical inclination to restrict judicial review to matters of procedure and process, rather than of substance or merits. And the approach that judicial review of statutory discretion, as in this case, begins with an assessment of *vires* - of the statutory powers conferred by the legislative scheme, with the exercise of appropriate margins of appreciation. [91] Truth be told however, courts have everywhere crossed the proverbial rubicon and exercised their

[89] See, for a critique of the limitations of traditional approaches to judicial review, *Charles v Jones* (Jamaica SC, 25 April 2008); *Northern Jamaica Conservation Association v Natural Resources Conservation* (Jamaica SC, 16 May 2006); and *Northern Jamaica Conservation Association v Natural Resources Conservation Authority* (Jamaica SC, 23 June 2006).
[90] *See Marin v R* [2021] CCJ 6 (AJ) BZ and *Belize International Services Ltd* (n 81).
[91] See Jeffery Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' [1999] PL 448.

discretionary powers of judicial review in relation to substance and merits, if only as a matter of the degree of intrusiveness.[92]

[84] However, the edict of constitutional supremacy in the Caribbean and its accompanying principle of inconsistency also introduces constitutional *vires* as an interpretative methodology and substantive criteria into statutory interpretation and the exercise of statutory powers. The courts are the final arbiters of what are the appropriate standards and scope of legality that govern statutory bodies exercising governmental functions. At the same time, where the exercise of administrative power is conferred by legislation, it is done pursuant to a constitutional warrant to Parliament to 'make laws for the peace, order and good government' of the State.[93] Yet enabling legislation will not always give clear guidance as to all relevant considerations for the exercise of statutory discretion. Often, such legislation only prescribes the powers of the governmental agency and defines functionally its spheres of action. Judicial review is the mechanism that may be utilised to fill the gaps.

[85] Nevertheless, the political principle of constitutional comity that the separation of powers arrangement expects provides for a check and balance on judicial overreach into the exercise of discretion by statutorily created governmental agencies, which if over zealously exercised can impede the agencies' ability to achieve their legislative objectives. The purpose and intention of statutory powers are material considerations in the exercise of judicial review of governmental administrative actions and decisions. Judicial review must thus be consistent with both constitutional and legislative purpose and intent. It is in this sense a co-operative undertaking. First, there is a sort of dual sovereignty at play, whereby the legislature has sovereign power to make laws and the judiciary equally sovereign power to

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[92] Wednesbury unreasonableness is one known basis. In *R v Secretary of State for Education Employment, ex p Begbie* [2000] 1 WLR 1115 at 1130, it was said that the Wednesbury ground is: '… a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake'. The traditionally narrow restriction to decisions that may be considered absurd or outrageous in their defiance of logic or accepted moral standards, such that no reasonable decision maker could have arrived at the impugned decision, no longer dictates a court's intervention. Caribbean courts will now also apply as bases of review a) the error of precedent fact principle which allows for the interrogation of evidence informing the propriety of the decision – see, *Charles* (n 89) at 55 – 56; and b) elements of proportionality, see, *Benjamin v A-G* (Antigua and Barbuda HC, 13 March 2007) at [207], and *Northern Jamaica Conservation Association* (n 89) at [37] and [122]. The evolution of the concept of substantive legitimate expectation is another example of judicial review moving from a review of pure process into aspects of substance. In ordinary cases of legitimate expectations, a decision could be arrived at by a lawful process but challenged because of its unfairness based on the existence of a legitimate expectation. See, *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213 (Lorde Woolf). The case of *Paponette v A-G* [2010] UKPC 32, (2010) 78 WIR 474 (TT) at [49], is a leading Caribbean illustration of a finding of substantive legitimate expectation. The further development of legitimate expectation as a basis for constitutional review in Caribbean contexts emphasises the point. See, Eddy Ventose, *Commonwealth Caribbean Administrative Law* (Routledge 2013) 280 citing *Paponette*, and *Joseph & Boyce* (n 25), where 'the concept of legitimate expectations (has been placed) right at the heart of the due process and protection of the law clauses of Commonwealth Caribbean constitutions.'

[93] See s 65(1), Constitution of Guyana.

interpret and apply those laws. Secondly, it is an exercise that must also consider the roles of the executive and its agencies in executing and realising statutory intent and meaning. And all to be done in the context of constitutional supremacy – hence the primacy of the rule of law, and the roles of courts in this regard.

[86] This case highlights this balancing exercise that judicial review demands, as it involves a consideration of legislative intent, executive action, statutory administrative action, and judicial supervision.

(ii) ***Judicial Review in the Context of Human Rights: Essential Standards***

[87] It is now well accepted that in Caribbean constitutionalism the rule of law encompasses as integral among its plethora of composite values, fundamental rights and freedoms.[94] Indeed, in English constitutional law this *a priori* status of fundamental rights is also accepted: '… fundamental rights are "not a consequence of the democratic process but logically prior to it"'.[95] In Guyana, by virtue of Article 153 of the Constitution, the enshrined fundamental rights and freedoms can be enforced and vindicated in the courts. Viewed in the wider context of the supremacy of the Constitution, the upholding and protection of fundamental rights is unavoidably included in any judicial review of governmental administrative actions and decisions.[96]

[88] This is not to say that fundamental rights are absolute. Rather, it is to say that any statutory infringement or restriction or limitation of such rights that are outwith the Constitution of Guyana, may be open and subject to judicial review. And additionally, all statutory authority ought generally to be exercised consistent with the fundamental rights and freedoms enshrined in the Constitution. Indeed, the more fundamental the right (in the hierarchy of rights) the greater the imperative to ensure that this is so and potentially the more stringent the scrutiny. These approaches are part of the essential constitutional context that informs the *vires* of statutory based meaning and actions, and also, the interpretive principle of legality.

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[94] See *Belize International Services Ltd* (n 81) at [325], Jamadar JCCJ explained: 'the basic structure doctrine is at bottom the affirmation of the supremacy of the Constitution in the context of fundamental rights.' He identified six features of the basic 'deep' structure of Belizean constitutionalism, to wit, Belize is a sovereign, democratic state, the Constitution is supreme, enshrined fundamental rights demand protection, the separation of powers, the limitation of legislative powers, and, most importantly, the rule of law.'

[95] Allan (n 78).

[96] See *Joseph & Boyce* (n 25). See also, Ventose (n 92) ch 11, 277, 279-280.

Approaches that are aligned with core constitutional values. Indeed, all part of a rule of law approach to judicial review.

[89] Put another way, Parliament is presumed to legislate and empower/enable actions consistent with the Constitution. In this case, as we shall see, the fundamental values of protection of the law, due process[97], equality of treatment, and fairness are all potentially implicated.

[90] In Guyana, all statutory power is thus also properly understood to be conferred to be exercisable in good faith and in furtherance of what the Constitution expresses to be for the public good. Chapter II, which deals with 'principles and bases of the political, economic and social system', is apposite. These, particularly the goal of economic development and the State's duty to 'mitigate any deleterious effects of competition' mandated in Article 15; when read in the context of a) the Preambular values of social justice and the creation of 'a republican community … in which all must engage and from which all must benefit', b) the general value of non-discrimination in relation to the protection of the law, [98] as well as c) the right to equality of treatment [99], place at the heart of Guyanese constitutionalism the fundamental values of protection of the law, due process, equality of treatment and fairness.

[91] Judicial review of governmental administrative actions and decisions can properly take account of these values, both procedurally and substantively. A rule of law approach to judicial review requires this to be done. In terms of judicial review, the fundamental rights values constitute substantive standards of legality that comprise the rule of law. These rights do not prohibit decision-making but, properly understood, are an aid to defining the ambit and application of statutory powers.

[92] One may think of this as 'human rights review' within the context of judicial review in public administrative law. While not separate from the latter, there are certain features of human rights review that are worth noting. Statutory powers are often expressed in general terms. Traditional judicial review in public administrative law is largely supervisory, concerned mainly with the scrutiny and regulation of how

[97] As intended to protect against arbitrary and capricious governance, it aims to provide an assurance of non-arbitrariness by requiring those who exercise authority to justify actions and decisions.
[98] Article 40(1), Constitution of Guyana.
[99] As inherent in the rule of law, and as encompassed in several provisions including ss 149D, 149E, and 149F.

these administrative decisions are made. That is, with the decision-making process. The reviewable grounds tend to focus attention on this aspect of the matter, and less on the merits of decisions or actions which underpin the review.

[93] Human rights review, by its very nature, shifts the focus away from solely a preoccupation with procedural norms, towards a greater emphasis also being placed on substance and merits. This is inevitable, as human rights are substantive rights, and human rights review is thus about the upholding and protection of substantive values – albeit in the context of administrative decision-making. Thus, such a review entails an examination of both process and content. The process by which the impugned decision was made, or action was taken, as well as the content and impact of the decision or action. To determine *vires* or legality, such a review may necessarily also incorporate, at least, a preliminary aims-means assessment. That is, an evaluation of whether the aim of the decision or action was for a legitimate and lawful purpose, and whether the means used to achieve it was justifiable, necessary, and proportionate. [100]

[94] To be clear, this approach is not novel. Traditional approaches to judicial review in public administrative law have always included, in certain contexts, scrutiny of both process and content. For example, Wednesbury unreasonableness is directed towards the content of decisions and not just the process. However, the inquiry by the courts is a secondary review, as to whether the decision maker on the material before them could reasonably have come to the challenged decision. That is, courts apply the principle of rationality as a secondary assessment of the *vires* of the actions or decisions under review. Once the action or decision is within the range of possible decisions that are deemed reasonable, and not such as to outrageously defy logic or relevant acceptable standards, courts will generally decline to intervene.

[95] What is different, is that in human rights review, the content of substantive rights is the basis of scrutiny and therefore content is brought directly (and not secondarily) into play. Hence, analyses based on proportionality and objective

[100] Note the distinction between this approach and one based on traditional grounds which would assess, say, the Wednesbury reasonableness of the decision. See *Charles* (n 89); *Northern Jamaica Conservation Association*; and *Northern Jamaica Conservation Association* (n 89) ('Proportionality is a more refined technique of judicial review that enables the Court to examine executive action in a more comprehensive manner without trespassing on the domain of the executive.'). See also Ventose (n 92) 251-257.

justification can feature. The inquiry is no longer simply whether the actions or decisions are within the range of possible decisions that are deemed reasonable or rational. It becomes also, if not primarily, an assessment of justifiability (and not just of rationality). That is, were the actions or decisions in pursuit of legitimate aims and were the means used proportionate to the objectives being pursued, analysed in a human rights context. This is a more intrusive inquiry, more akin to a primary inquiry.

[96] To put it another way, the review of discretionary power where human rights are implicated, no longer proceeds on a presumption of immunity once the decision maker acted within the range of responses open to a reasonable decision maker. What is required is a stricter and more stringent test than the more 'generous' rationality standard. It is a test that demands that administrators demonstrate to a court, that the actions or decisions under review are objectively justifiable by reference to legitimate aims and proportionate means. It thus becomes a pure matter of *vires* for the court to determine in the context of human rights standards of propriety.

[97] It is the constitutional role of courts in the organisational arrangements of Caribbean states to supervise governmental administrative actions and decisions and to ensure that they are rule of law compliant. This constitutional impetus to judicial review of administrative action is driven by the rule of law principle that abhors the abuse or misuse of governmental powers and insists that such powers be exercised in a rights compliant manner. Indeed, such an approach places on a firmer foundation the extension of judicial review into the actions and decisions of public non-statutory bodies (which is not the subject matter of this case). It has the potential to add consistency and coherency to this area of the law. It is consistent with constitutional democracy, which declares certain values, rights and freedoms to be fundamental, and with the doctrines of the separation of powers, and the rule of law.

(iii) ***Implications for the GGMC: Of Powers and Principalities***

[98] Standards are also at the heart of judicial review of governmental administrative actions and decisions. In the exercise of statutory power, governmental agencies are required to meet certain legal standards that conform to statutory intent and

meaning in the context of the rule of law. These include the traditional judicial review standards - legality, rationality, reasonableness, procedural propriety, natural justice, and fairness. Where fundamental rights are implicated, these standards also include objective justification and proportionality in relation to the implicated rights. And all of these standards are to be applied in the broader context of both a) the more general values of the rule of law as a supra-constitutional basic deep structure and b) the more particularised rule of law values in Guyanese constitutionalism.

[99] But before one can get to the application of standards, one must cross certain thresholds. These concern, who can sue? And, who can be sued?

[100] To answer the first question, one must ask whether the Respondent in this case has sufficient standing (*locus standi*) to institute these judicial review proceedings. In this matter this has not been disputed. To use the traditional language, the Respondent is a person with sufficient interest in these proceedings, as well as one adversely affected by the outcome of the decision to award the Aremu Road contract to Baboolall. On the facts this is self-evident.

[101] The second question is hotly disputed by the Appellants, but erroneously so. They contend that the GGMC is not amenable to public law judicial review for its administrative actions or decisions. It is not however disputed that a public authority can be sued. Which begs the question, is the GGMC a public authority for the purposes of public administrative law?

[102] The test for justiciability in judicial review is contextually flexible and fluid. The traditional approach seeks, in a principled way, to determine whether an entity is a public authority by considering and evaluating a variety of factors, including, statutory underpinnings, nature of powers and functions, sources of funding, and degree and extent of autonomy and control.

[103] If an entity is exercising its powers in relation to public functions, it is presumed susceptible to judicial review. And as such falls under the supervisory jurisdiction of the courts.

[104] However, that is not the end of the matter, because not all actions or decisions of public authorities are susceptible to judicial review. Thus, one looks a) first to

discover its general powers and functions and decide whether it is a public authority, and then b) specifically at the actions or decisions sought to be reviewed and to determine whether they have a sufficient public law flavour to render them reviewable. The context, circumstances, and factual matrices that inform the impugned actions or decisions are all relevant considerations.

[105] What is the starting point in determining whether a statutory body is a public authority amenable to judicial review? Since 1967, in *R v Criminal Injuries Board, ex p Lain,* [101]it was explained that courts 'have … reached the position when the ambit of *certiorari* can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially.' The *locus classicus* in relation to this liberal approach in the modern era is to be found in the 1987 opinion of Sir John Donaldson in *R v Panel on Take-overs and Mergers, ex p Datafin plc* , [102] 'the only essential elements … are what can be described as a public element, which can take many different forms …'.

[106] Which begs the question, what constitutes a sufficient 'public element'? The answer that has emerged over time is an amenability requirement for some form of governmental interest. In the *Datafin* case itself, this was explained as the exercise of *de facto* power that is governmental in nature, interpreted in a pragmatic and realistic way to 'recognise the realities of executive power' unclouded by 'the subtlety and sometimes complexity of the ways in which it can be exerted.'[103]

[107] Looking therefore at the general powers and functions of the GGMC, it is clear that it is a public authority exercising public functions as an incorporated statutory body. Sections 4 (functions), 6 (funding), 7 (borrowing), 8 (investments), 9 (guarantee of borrowings), 20 (reserve fund), 22 (reporting), 31 (Ministerial directions), and Schedule 1 (appointment of chair and commissioners) of the parent Act, all demonstrate the extent to which the GGMC is unequivocally governmental in character, dependent on state resources, exercising powers that are governmental in nature, and subject to governmental supervision and control. It is, therefore, a public authority generally amenable to judicial review.

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[101] [1967] 2 QB 864 at 882.
[102] [1987] QB 815 at 838.
[103] ibid at 835 – 839.

[108] However, this is not the end of the matter. Even if the GGMC is such a public authority, were the specific undertakings and decisions relative to the repairing of the Aremu Road susceptible to judicial review?

[109] This question in turn, leads to two further questions. Whether the undertaking of road repairs is of a sufficient public flavour to be reviewable? And whether the GGMC is a procurement entity for the purposes of the Procurement Act, and as such subject to the provisions of that Act. Since the first of these questions can only be implicated in this case if the second question is answered in the affirmative, I will deal with the latter first.

(iv) ***If the GGMC is a Public Authority, is it a Procuring Entity for the Purposes of the Procurement Act, and as such subject to the Provisions of that Act.***

[111] This issue has been comprehensively dealt with in the main opinion of the Court. It is a relatively straightforward matter of statutory interpretation.

[112] Section 2(l) of the Procurement Act defines a "procuring entity" as "… the procuring entity of any ministry, department, agency or other unit, or any subdivision thereof, of the Government, that engages in procurement." And s 2(j) of the Act, defines procurement as including "the acquisition of construction, consulting and other services.

[113] In the rule of law and human rights contexts described above, and given that the GGMC is clearly a public authority utilising public funds for public purposes - in this case public road repairs, the approach to interpretation must be informed by the intention and purpose of establishing the GGMC (and its consequent status) and the intention and purpose of the Procurement Act. The former is to execute through a statutory entity governmental function, and the latter is to ensure a prescribed, predictable, transparent, and accountable process for the utilisation of State funds. A more liberal, and less technical, approach is therefore appropriate. This is more so because inherent in the statutorily prescribed processes of procurement are fundamental principles of equality of treatment, fairness, due process, and the

protection of the law.[104] Principles which even if not statutorily prescribed, could plausibly be implied in a rule of law model for judicial review. It is therefore plain to see that for the purposes of the Aremu Road project, GGMC was and is an agency of Government engaged in procurement. The Procurement Act applies to the process engaged by GGMC.

[114] Given the issues raised in the courts below and before this Court, especially those in relation to the status of GGMC and its amenability to an administrative law action, as well as whether GGMC was a procuring entity, judicial review was an appropriate originating process to challenge the actions of GGMC in this case. The public law and public interest elements have already been explored and are self-evident, and the public law flavour of the specific decision in relation to the Aremu Road project will be discussed briefly below.

(v) *Whether the GGMC's Decision to Procure and Evaluate Bids, then Award the Contract to Repair the Aremu Road to Baboolall has Sufficient Public Law Flavour to Attract Judicial Review*

[115] The factual matrix, especially when looked at through rule of law and human rights lenses, allow the public law flavour to be easily seen. The GGMC, as a statutory body carrying out a governmental function and utilising State funds for the purpose, is required in the public interest to ensure that its procurement processes: a) treated all potential bidders equally, b) followed due process, in this case the requirements of the Procurement Act[105], c) demonstrated objective fairness in its tendering, evaluation, and decision-making processes, and d) ensured that all parties enjoyed the benefits of the protection of the law that this decision engaged.

[116] As the main judgment explains, '[t]here are several respects in which the instant tendering process appears not to have complied with the Procurement Act.'[106] These failures are sufficiently substantive to render the impugned process and decisions of the GGMC both *ultra vires* the powers and duties of the GGMC and the provisions of the Procurement Act. These failures are also not rule of law compliant, as they infringe the principles of equality, fairness, due process, and the

[104] See the Preamble to the Procurement Act: 'WHEREAS it is considered desirable … to promote the objective of - … (d) providing for the fair and equitable treatment of all suppliers and contractors, (e) promoting the integrity of, and fairness and public confidence in, the procurement process; and (f) achieving transparency in the procedures relating to procurement'.
[105] See s 3(1) and (4) of the Act.
[106] See [42] – [51].

protection of the law. However, because the traditional approaches give the necessary administrative guidance for good governance, hold the GGMC sufficiently to account, and provide effective remedies, there is no need in this case for a broader inquiry or a more intrusive approach.

Postscript

[117] The rule of law can be a stumbling block, a dividing line, between and among reasonably minded jurists. Ironic, given that all readily agree that it is the foundation stone of liberal democratic governance. The problem lies, I think, less in definitions but more so in usages, or really in imagined fears about the latter.

[118] In fact, in the area of judicial review, the rule of law is the primary principle from which has sprung forth, firstly the ancient medieval prerogative writs, then the Common Law rules governing its jurisdiction and reach, and most recently, its statutory recognition and underpinnings. In relation to the first two, they are all judge-made, evolving and adapting over time to meet and respond to changing circumstances. The latter, the product of the people's will exercised for the same purpose. All done to further democratic development, and to curb unlawful, arbitrary, and excessive exercises of power by governmental and public authorities.

[119] That unfolding process has not ended. Witness the dynamism of the common law and of legislative intent to continuously change to meet new circumstances. To aspire towards, what in Caribbean constitutionalism Simeon Mc Intosh would call, 'the good life'.[107] A phenomenon in liberal and socialist democracies, that is deeply rooted in the rule of law. Newness always brings a measure of uncertainty, of fear, even when it is prescient. Hence the perennial ambivalence and hesitancy about embracing the rule of law, a principle that cannot be easily controlled, but instead readily exercises influence over all that it inspires.

[120] There should therefore be little surprise at the recoil in certain quarters, if one were to say that the rule of law can function as both an interpretative as well as a substantive standard for judicial review of public administrative actions and

[107] Simeon McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity* (The Caribbean Law Publishing Co 2002) 37 – 38, 228, and 236 – 240.

decisions. The traditionalists cry, heresy, and brandish words turned into swords. The true liberals, celebrate, arms upraised in embrace. What divides them? Vision. Maybe. But to my mind, more an understanding, or misunderstanding, of democracy. Thus, the competition for turf, and battles over power and control. And herein lies the rub, both are somewhat right and somewhat wrong, and neither entirely so, for in the end it is all a matter of balance. And that is the special challenge of democratic systems, which are orchestrated around a separation of powers, such as we have in these Caribbean States.[108]

/s/ A Saunders

Hon Mr Justice Saunders (President)

/s/ J Wit

Hon Mr Justice Wit

/s/ W Anderson

Hon Mr Justice Anderson

/s/ D Barrow

Hon Mr Justice Barrow

/s/ P Jamadar

Hon Mr Justice Jamadar

[108] Maybe the root problem lies partially in nomenclature. To speak about separation of powers conjures up division, and encourages competition. It is the language of od Empire, of colonial ideologies, that divide to rule. In Caribbean states, where for the majority populations, ancestrally, structured bases of governance were at times premised on consultative and collaborative models, as in Tribal Councils and in the Panchayat raj, we may be better served to speak about a principle of the 'sharing of powers'.