Neutral Citation Number: [2024] CA (Bda) 23 Civ

Civil Appeal No. 56 of 2023

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. ACTING JUSTICE LARRY MUSSENDEN
CASE NUMBER 2021: No. 364

Sessions House
Hamilton, Bermuda HM 12

Date of hearing: 18/06/2024

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR ANTHONY SMELLIE
and
JUSTICE OF APPEAL IAN KAWALEY

- -

Between:

(1) THE MINISTER FOR THE CABINET OFFICE
(2) THE POSTMASTER GENERAL

Appellants

- and -

MAILBOXES UNLIMITED LTD

Respondent

Appearances:
Mr Eugene Johnston of the Attorney General's Chambers, for the Appellants
Mr Peter Sanderson of Beesmont Law Limited, for the Respondent

Hearing date(s): 18 June 2024
Draft Judgment circulated: 19 November 2024
Date of Judgment: 22 November 2024

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JUDGMENT

SMELLIE JA:

1. In dispute on this appeal is whether the First Appellant ("the Minister") in deciding to engage, through the Second Appellant, the Postmaster General ("PMG"), in a partnership with a provider of package consolidation and forwarding services from the United States (the "Decision" and the "Partnership", respectively), failed, unlawfully, to comply with an applicable procurement process and whether the Respondent ("Mailboxes"), a Bermuda company and local provider of similar services, has a sufficient interest to allow it standing to apply for judicial review of the Decision.

2. At the center of the dispute, is whether either the 2018 or 2020 Code of Practice for Project Management and Procurement (collectively 'the Code') issued pursuant to section 32B(4) of the Public Treasury (Administration and Payments) Act 1969 (the "1969 Act"), imposed duties upon the PMG with which, as a public officer, he failed to comply.

3. Further issues as to whether the Appellants were subject to a duty of candour which they failed to meet and whether the Respondent for its part, had delayed, impermissibly, in filing its application for judicial review, also arise for determination.

4. The issues were addressed in the Supreme Court by Mussenden J (as he then was) in two judgments.

5. In the first, ("Judgment 1") of 31 May 2022, the Judge dealt with the Minister's application to set aside the leave, which the Judge had himself earlier granted to Mailboxes, to file its application for judicial review of the Decision. The Minister's application to set aside leave was supported by the First Affidavit of the Second Appellant, Mr. Samuel Brangman and was based on the following grounds:

    a. *Mailboxes does not have sufficient interest in the matter to which (its) application for judicial review relates, as is required by section 64 (2) of the Supreme Court Act 1905 (the "1905 Act") and Rules of the Supreme Court ("RSC") and RSC Order 53 rule 3 (7) and*

    b. *Mailboxes did not make its application for leave to apply for judicial review promptly and/or within six months, as is required by section 68(1) of the 1905 Act and RSC Order 53 rule 4".*

6. By Judgment 1, the Judge refused the Minister's application. He held that Mailboxes had sufficient interest pursuant to section 64(2) of the 1905 Act and RSC 53 Order 3/7, to be granted standing to commence (and pursue) judicial review proceedings. Judgment 1 thus paved the way for the substantive hearing of Mailboxes' application.

7. Following that hearing, which was contested by the Minister, the Judge granted Mailboxes' application and the relief which it sought by way of a declaration that the Decision was unlawful. The judgment ("Judgment 2") is dated 1August 2023. The Judge adjourned, for the filing of further evidence and further hearing, Mailboxes' application for orders of prohibition restraining the Minister from continuing the Partnership and of certiorari, to quash the Decision. He also awarded Mailboxes its costs of the proceedings to be taxed if not agreed, subject to any further application by the Minister.

8. The invitation to file further evidence for the purposes of a hearing to consider further orders was not immediately pursued. Instead, the Minister and the PMG (hereinafter together "the Appellants") brought this appeal which was heard on 18 June 2024. This is the Judgment on the appeal.

9. By a consent order dated 26 April 2024 the Judge ordered that, if necessary, any hearing to determine whether Mailboxes should be awarded any relief in these proceedings should be set down in the Supreme Court after a final determination in this appeal.

Further relevant background

10. This can be gleaned from Judgment 2 and from the submissions of counsel on the appeal, citing (i) the First Affidavit of Mr. Samuel Brangman the PMG, filed in the Supreme Court in support of the Minister's set aside application (hereinafter "Brangman 1") and (ii) the First Affidavit of Mr.. Kenneth Thompson, a director of Mailboxes, filed in support of Mailboxes' response to that application ("Thompson 1").

11. In [3] of Brangman 1, the PMG gives the following account:

> "*In 2018, the Bermuda Post Office ("BPO") management team met about how to enhance BPO's services. These were important meetings. The volume of mail (letter post) that passes through BPO was shrinking around eight per cent year on year. BPO's revenue was also shrinking; and an enhancement of services was needed to arrest this trend.*
>
> *What BPO required most was an online presence and a warehousing facility which would act as an overseas shipping address for customers. These needs were the basis of a Request for Information ('RFI') published on 24 August 2018. Replies to the RFI were required by 21 September 2018. Mailboxes did*

> *not respond to the RFI. But even if Mailboxes did respond to the RFI, they would not have fulfilled the criteria BPO needed submissions to satisfy. To my knowledge, Mailboxes does not have an online presence, and they do not own an overseas shipping facility*."

12. On 24 August 2018, a document entitled "*Request for Information for Bermuda Post Office Online Shopping Initiative*" ("the RFI"), was indeed published on the Government website procurement platform[1]. The RFI was expressed to be "*for the purposes of gathering information about the marketplace in order to assist in the determination of future purchasing options for online cross border and global shopping. Respondents are asked to respond to the Government and provide the information requested below*". A submission deadline of Friday 21 September 2021 was given and in the terms of reference, it is expressly stated that "*The RFI ... will not necessarily result in any subsequent negotiations, direct contract award, invitational tendering process or open tendering process…*"

13. On 27 November 2020, a statement by the Minister presented the Bermuda Post Office and Business Plan 2020 to the House of Assembly. This statement was also published on the Government website. In his presentation, the Minister stated, inter alia, as follows:

> "*Mr. Speaker, the Bermuda Post Office is moving forward with a public-private partnership with an international consolidation company for package forwarding and consolidation services from the United States to start in early 2021. The partnership will enable local postal customers to take advantage of free shipping services and have their packages consolidated in the US and then forwarded to Bermuda. Customers using this service can opt to send those one-off items as a guest or set-up a My Bermuda Post account for frequent use. A single package can be expedited, or multiple packages can be consolidated to further reduce the overall shipping cost to Bermuda. Once a customer authorizes shipment of the item to Bermuda, the Bermuda post will SMS or e-mail the MyBermudaPost customer for customs duty payment and arrange for home delivery."*

14. On 12 March 2021, Hansard reported that the Minister, in his budget speech, speaking further on the subject, told the House of Assembly, among other things that[2]:

> " *as part of the Bermuda Post Office's strategic objective to increase revenue with e-commerce purchases and logistics, the department has recently concluded contract negotiations (or will [shortly]) for a public-private partnership with www.MyUS.com. for a white-label online shopping platform,*

[1] https://www.gov.bm/procurement/bermuda-post-office-online-shopping-initiative.
[2] At page 783 of the Official Hansard Report for that date.

> *www.MyBermudaPost.com. This service will allow our customers to purchase products in the US and have them delivered locally to the Bermuda Post Office's logistic network.*
> *The anticipated going-live date is mid-April 2021 once development and co-branding are complete on the new website interface. We will also be looking to increase revenue by extending our courier service and delivery of www.MyBermudaPost.com [website's] incoming packages, as well as using other logistic networks to provide local entrepreneurs and businesses an affordable local last-mile logistic service. So that is where $600,000 of additional revenue[3] will come from*."

15. On 24 September 2021, in a Statement to the House of Assembly, the Minister gave an update on the project, including that the online shopping platform MyBermudaPost powered by MyUS[4], was set to be implemented via a soft launch by September 30th, with an official start date in mid-October[5]. He also noted the Post Office's obligations to remain compliant with the Universal Postal Union's (UPU) standards, requirements and covenants regarding the transport and processing of mail.

16. On 9 October 2021, the Bermuda daily newspaper *The Royal Gazette*, in an article reported the Minister saying that, as nobody had responded to the RFI, no further steps needed to be taken.

17. In a further article on 30 October 2021, *The Royal Gazette* reported as follows:

> "*A controversial decision to set up a Bermuda Post Office online shopping service in a public-private partnership deal with a US courier firm was defended by the Government yesterday. Island-based shipping companies were furious after it was revealed that the contract was never put out to tender. But a spokesman for the Cabinet Office said last night that a request for proposal was not issued because the value of the contract was not high enough. The spokesman said: "At this time, it is essential to clarify that the Bermuda Post Office's MyBermudaPost service agreement is with Access USA Shipping LLC and valued at $24,000. It falls below the threshold that requires procurement and Cabinet approval.*
>
> *Wayne Furbert, the Minister for the Cabinet Office, confirmed the deal last month and (that) the service was expected to be up and running two weeks ago.*

[3] A sum earlier explained by the Minister (page 781 the Hansard Report) as to be realized as annual income from the www.MyBermudaPost.com. project.
[4] A platform provided by Access USA Shipping LLC, as emerges below.
[5] According to Thompson 1 at [11], this had not yet happened as at the date of its filing, 16 November 2021.

> *But one Island courier Mailboxes Unlimited, threatened to take legal action over the scheme, on the grounds that Bermudian companies should have been consulted before the deal was struck."*

18. Starting on 15 October 2021, correspondence was exchanged between Mailboxes by way of a "*Letter before Action*" from their lawyers at BeesMont Law Limited, per Mr. Sanderson; to Mr. Johnston of the Attorney General's Chambers, on behalf of the Minister. This letter requested disclosure of documentation by which, according to Thompson 1 at [12], Mailboxes could "*fully assess the merits of challenging the procurement, and to be able to identify what level of procurement this might be*." The letter also listed a number of "*concerns*" which Mailboxes had, including some which raised matters of policy but, some more pertinently to the present proceedings, went on to express concerns as follows:

> *"Our client believes that the decision to partner with MyUS may be in breach of procedural fairness and/or legitimate expectation that the Code of Practice for Project Management and Procurement ("the Code", with numbers in brackets in this correspondence referencing provisions of the Code) would be followed.*
>
> *We note your statement given during a press conference on the 8th October 2021 that, if nobody responds to a request for information, there is no need to go to the next steps under the Code. Respectfully, we do not see how this is the case. The.. (RFI) of August 2018 merely requested information from interested parties for the purposes of "gathering information about the marketplace". We do not see where this fits within the Code, nor do we see any indication in the Code that a lack of response to an RFI means that procurement policies no longer need to be followed. No reasonable person reading that RFI in 2018 would have concluded that it was their one and only opportunity to register their interest in this project. The starting point is that procurement should be by means of the Open Procedure (15.1)"*

19. The letter goes on to assert that based on statements made to the House of Assembly during the budget presentations for 2021/22, "*it appears that this project would fall within the category of "High Value Procurement". This would require the following steps to be taken, unless waived due to exceptional circumstances (6)*" (with the letter continuing in nine (9) bullet points to assert what the steps under the Code should have been).

20. The letter concluded as follows:

> "*Our client is considering its options in making (an) application to the Court. However, the merits and determination of such an application may hinge on review of the underlying documents. We therefore make a formal request for*

> *disclosure of the following documents [A list followed]. Our client acknowledges that such documents would be treated confidentially for the purposes of litigation, and not be used for any other purpose…. We look forward to hearing from you within fourteen days, failing which we are instructed to apply to the Court for leave to apply for judicial review*."

21. The Minister's response per Mr. Johnston, came on 29 October 2021, in the following terms:

> "*Good day Mr. Sanderson; I received your client, Mailboxes Unlimited Ltd's letter before claim, dated 15 October 2015. I represent the Minister for Cabinet Office ('the Minister'). The Minister intends to provide a response to your client's letter before claim; but, in order to do so, requires more time and more information. We would like seven days more. In the meantime, please (1) clarify how your client alleges the decision to engage MyUS was 'unfair'; and (2) say what type of legitimate expectation your client relies upon, and what specific representations ground that expectation. The Minister requires this information to assess his legal position and give instructions.*"

22. Mr. Sanderson responded on 1 November 2021 as follows:

> "*Dear Eugene, The seven extra days are fine. My letter referred to procedural unfairness/ legitimate expectation because there is significant overlap of these, and legitimate expectation emerged from the concept of procedural unfairness. It is on the basis that there is a general procedural legitimate expectation that public bodies will follow codes of practice that have been adopted, in this case the Procurement Code. However, the case can probably be viewed in a more straightforward sense that, if the Code was not followed (and I appreciate that you may say that it was in this case), it would be a straightforward breach of statutory duty not to follow a code that has been implemented by statute*."

23. According to Mr. Thompson in Thompson 1 at [12], the Minister subsequently declined to disclose anything, stating that Mailboxes' claim was without merit. Thus, it seems, the die was cast for litigation. Mailboxes filed its application for leave to apply for judicial review on 15 November 2021. As we have seen, Mailboxes was then required to show that it had standing to apply for judicial review of the Decision, with the Judge concluding in Judgment 1 that it did. Before turning to examine the Judge's reasoning, it is necessary to first identify the applicable legal framework.

Sufficient interest and standing

24. In Bermuda, the requirement of standing for the bringing of judicial review proceedings is a matter of jurisdiction prescribed by statute. In this regard, section 64[6] of the Supreme Court Act 1905 states as follows:

> "64 (1) *An application for judicial review may be made to the Court, in accordance with the Rules of Court*[7]*, for one or more of the following forms of relief, namely, an order of mandamus, prohibition or certiorari, a declaration or an injunction.*
> *(2) No application for judicial review shall be made unless the Court has first granted leave in accordance with the rules of Court to make the application, and leave may only be granted if the Court considers that the applicant has a sufficient interest in the matter to which the application relates".*

25. The requirement of a "*sufficient interest in the matter to which the application relates*" raises the question who should be regarded as having the legal authorization, entitlement or "capacity"[8] to launch proceedings to challenge the validity of decisions, actions or inactions of public officials, or of legislation or government policy. This suggests a very wide field and, as the case law has come to recognize, could range from measures which affect individual interests, to those which might affect special interests or pressure groups, to those which might affect the public in general[9].

26. The Rules of Court themselves give no guidance for determining what amounts to "*sufficient interest*". But given the array of circumstances in which a challenge by way of judicial review may properly be raised, the Courts have for many years taken the view that the modern requirement of standing, while placing a statutory limitation upon the individual's right to apply for judicial review, should not be too restrictively construed or applied. The seminal expression of this principle of practice comes from Lord Diplock in his judgment delivered on behalf of the House of Lords in *Regina v I.R.C., Ex p. Federation of Self-Employed and Small Business Ltd* [1982] A.C. 617. There, even while denying the Federation's claim of standing to challenge the IRC's determination in the particular circumstances of the case, Lord Diplock, in one of five powerful and concurring judgments, declared as follows:

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[6] Section 64 was added by amendment by Act 28 of 2009, section 4, effective 7 July 2009. It thus reflects the similar wording of the Senior Courts Act 1981, U.K, section 31(3), as required to be applied by the Courts of England and Wales.

[7] The corresponding Rules of Court are *in Rules of the Supreme Court 1985 Order 53 Rule 3*, in particular sub-rule (7) repeats the statutory requirement of standing.

[8] As posited by Mark Elliott, Professor of Public Law at the University of Cambridge and a Professorial Fellow of St Catherine's College, Cambridge, in his article: "*Standing, judicial review and the rule of law: why we all have a "direct interest" in government according to law*": www.publiclawforeveryone.com. July 29, 2013.

[9] Examples are legion. Several are identifiable from the cases cited on this appeal.

> *"It would be a grave lacuna in our system of public law if a pressure group like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. It is not a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are accountable to a court of justice for the lawfulness of what they do, and of that the court is the only judge."*

27. The requirement of standing is, as we have seen from the statute, linked, for the purposes of judicial review, to the requirement of leave to start proceedings, and some further insight into the significance of this link was also given by Lord Diplock (op. cit, p 642 H):

> "*The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations [which under the modern statutory regime may also be granted by way of judicial review]. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived*".

28. Still further guidance of applicability here, may be taken from all of their Lordships' judgments, as summarized in the first holding of the headnote as follows:

> "*It was unfortunate that the courts below had taken locus standi as a preliminary issue for whilst there might be simple cases where it is appropriate at the earliest stage to find that the applicant for judicial review had no interest at all, or no sufficient interest to support his application and therefore it was correct at the threshold to refuse leave to apply, in other cases, of which the present is one, that would not be so, and the question of sufficient interest must be taken together with the legal and factual context of the application, for R.S.C Ord. 53 r.3 (5) required sufficient interest in the matter to which the application related, and that matter in the present case necessarily included the whole question of the statutory duties of the revenue and the breach or failure of those duties of which the federation complained*."

29. What this means for the present case, is not that the Judge should not have considered whether there was sufficient interest for the grant of standing at the leave stage, as required by the statute and the Rules. Indeed, he was compelled to reconsider the matter in Judgment 1 because of the Minister's challenge. Rather, what this dictum from *Regina v I.R.C* establishes, is that in all but the simplest of cases, there will be an ongoing enquiry as to whether there is sufficient interest in the matter the subject of enquiry, to meet not only the threshold test of locus standi, but also to justify the grant of the relief sought.

30. Moreover, given the varied nature of the cases in which the question of standing by virtue of a sufficient interest may arise, the enquiry will necessarily be fact sensitive and contextual. In a more recent consideration by the Supreme Court, Lord Reed explained the importance of context in this way, of equal applicability here although the appeal arose from Scotland: *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, at [170]:

> "*A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as cases where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say "might" because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context*."

31. Professor Elliot recognizes the insightfulness of this statement from Lord Reed in his following commentary (op cit):

> "*In this dictum, Lord Reed deftly acknowledges not only the rule-of-law significance of a broad standing test, but also the courts' unwillingness to exploit its flexibility in an unthinking way. This is achieved by, in effect, requiring those unaffected by decisions to compensate for their lack of "direct*

> *interest" by establishing either that they speak for those with such an interest, or that they speak for a public interest that deserves to be considered by the court- and that they are capable of litigating the case effectively. The "sufficient interest" test thus facilitates an accommodation of constitution(al) principle and pragmatic considerations in a way that a "direct interest" test, taken at face value likely would not*".

32. And only shortly after the judgment in *AXA* was delivered, in *Walton (Appellant) v The Scottish Ministers (Respondent) (Scotland)* [2012] UKSC 44, at [90], Lord Reed himself provided the following comment by way of emphasis:

> "*In AXA General Insurance Ltd and Others v HM Advocate and others [2011] UKSC 46 …, this court clarified the approach which should be adopted to the question of standing to bring an application to the supervisory jurisdiction. In doing so, it intended to put an end to an unduly restrictive approach which had too often obstructed the proper administration of justice: an approach which presupposed that the only function of the court's supervisory jurisdiction was to address individual grievances and ignored its constitutional function of maintaining the rule of law.*"

33. Lord Reed's dicta from *Axa* and *Walton* have been cited with approval and applied by the Judicial Committee of the Privy Council in *Mussington et al v Development Control Authority et al (Antigua and Barbuda)* [2024] UKPC 3 at [45] and [47], as representing the authoritative position on standing. This was a remarkable case in which an environmental activist was deemed to have had standing to challenge a decision to build an airport on the Island of Barbuda, even after the airport had been built. The decision gives meaning to the public interest concerns recognised by Lord Hope in *Walton* at *[152]* when he observed that *"environmental law, proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone*" a sentiment which he also captured symbolically when he observed: "*If its interests are to be protected someone has to be allowed to speak up on behalf of the osprey.*"

34. There is also real value in noting and adopting the Privy Council's further reflections on standing in *Mussington,* in its approval of Jamadar JA's "*set of general considerations*" which he gave in an appellate judgment from Trinidad and Tobago. This approval came from the Privy Council, per Lord Boyd at [37]:

> "37. *In Dumas v Attorney General of Trinidad and Tobago Civil Appeal No P218 2014, Jamadar JA undertook an extensive examination of the common law countries' approach to standing, including the Caribbean nations. He noted that the approach by the courts to develop, and where necessary, enlarge the rules of standing was evident throughout the common law: para 53. He included in that analysis the Scottish cases of Walton and AXA General (both above). At*

para 94 he commented that the value of the analysis is not to provide any direct precedent, as there were legislative and contextual differences in all of the jurisdictions, but to demonstrate trends and approaches across the common law. He concluded at para 95 with a set of general considerations that can be articulated as arising out of the more permissive approach to standing in public interest litigation as follows:

(i) Standing goes to jurisdiction and is to be determined in the legal and factual context of each case. It is a matter of judicial discretion.

(ii) The merits of the challenge and the nature of the breach raised are important considerations.

(iii) The value in vindicating the rule of law (the principle of legality) is a significant consideration.

(iv) The importance of the issue raised.

(v) The public interest benefit in having the issue raised and determined.

(vi) The bona fides and competence of the applicant to raise the issues.

(vii) Whether the applicant is directly affected by or has a genuine and serious interest and has demonstrated a credible engagement in relation to the issue raised.

(viii) The capacity of the applicant to effectively litigate the issues raised.

(ix) Whether the action commenced is a reasonable and effective means by which the courts can determine the issues raised.

(x) The imperative to be vigilant so as to prevent an abuse of process by busybodies and frivolous and vexatious litigation.

(xi) Whether the issues raised are a general or specific grievance and whether there are other challengers who are more directly impacted by the decision challenged, or more competent to litigate it.

(xii) The availability and allocation of judicial resources."

35. In the case at bar, it is said that Mailboxes' claim to standing legitimately straddles the conceptual divide between a "*direct interest'* and a '*sufficient interest*" or "*genuine and serious interest*" and, in the latter sense, also invokes Mailboxes' interest as a member of the public in the Court's constitutional function of maintaining the rule of law. As Mr. Sanderson explains:

> "*The Judge accepted that Mailboxes had a sufficient interest primarily because the services it offers could be impacted by the arrangement Government has made with Access USA and because, had there been an open procurement process as required by the Code, Mailboxes might have been able to bid.*
> *There was also Mailboxes' standing as a member of the public interested in due compliance with the policy of the Code*."

36. Mr. Johnston, on behalf of the Appellants, emphasised the importance of context- the operative context here he said being that of procurement (or putative procurement)- and

submitted that the other more prescriptive and less liberal aspects of the rules which arise in the context of procurement must also be observed when seeking to establish standing. In particular he submits, the onus was upon Mailboxes throughout, to establish its standing in the particular context of the case. In this regard he relied also upon Lord Scarman's famous dictum from *Regina v IRC* (above, at 563F):

> "*The one legal principle, which is implicit in the case law and accurately reflected in the rule of court, is that in determining the sufficiency of an applicant's interest it is necessary to consider the matter to which the application relates. It is wrong in law, as I understand the cases, for the court to attempt an assessment of the sufficiency of an applicant's interest without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, or reasonable grounds for believing that there has been a failure of public duty, the court would be in error if it granted leave. The curb presented by the need for an applicant to show, when he seeks leave to apply, that he has such a case is an essential protection against abuse of legal process. It enables the court to prevent abuse by busybodies, cranks and mischief makers*".

37. And, as to the need to identify the public law duty which is at stake in the application and whether the applicant is owed those duties, Lord Fraser gave the following advice (op. cit. 649 H):

> "*The correct approach in such a case is, in my opinion, to look at the statute under which the duty arises, and to see whether it gives any express or implied right to persons in the position of the applicant to complain of the alleged unlawful act or omission*."

38. Cases decided in the context of procurement were also cited. Mr. Johnston relied upon three in particular dealing with the question of standing:

    (i) *R v Hereford Corporation, ex parte Harrower* [1970] 1WLR 1424, in which Lord Parker CJ found at pp1427H-1428B, that the mere fact that the applicants were electrical contractors who might or might not have been successful in a bid, did not, of itself give them a sufficient interest to apply for mandamus (as opposed to certiorari) to compel the Corporation to follow the bidding process established by their own standing orders. However, as the contractors were also rate payers, they had a sufficient interest (or "right") to enable them to apply for mandamus to require the Corporation to comply.

    Thus, while the case might support a proposition that a mere indirect occupational interest may be insufficient for standing, it also confirms

that even in the context of procurement, an applicant may be able to rely upon his wider interest as a member of the public in the due enforcement of the rules. This was of significance not only in that case but in this case also because of Lord Parker CJ's finding, first of all- apropos Mr. Johnston's Code Argument to be considered below- that the Corporation, as a local authority, was bound by the procurement rules set out in its Standing Orders and section 266 of the Local Government Act 1933 which required that : " *All contracts made by the local authority or by a committee thereof shall be in accordance with the standing orders of the local council*."
The Corporation had failed, in keeping with its own Standing Orders, to publish notice of its intention to invite bids and actually to invite tenders. The analogy with the circumstances of this case will be discussed further below.

(ii) In *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] PTSR 1245[10], a challenge was raised by Mrs Chandler, relying on her status as a parent of school-aged children living in the area. This was whether the Secretary of State, in entering into an arrangement for the promotion of a new academy school, had failed to comply with the public procurement regime contained in the Public Contracts Regulations 2006 implementing Directives which governed the procedures applying to the award of "*public contracts*", including those for the provision of education services. The regulations applied to contracts concluded between a contracting authority such as the Secretary of State and an "*economic operator*".
Mrs Chandler's challenge failed on a number of grounds, including that the arrangement entered into between the Secretary of State and University College London was not "*for a pecuniary interest*" but was philanthropic in nature and therefore did not come within the public procurement regime. Nor was Mrs Chandler an "*economic operator*" within the meaning of the 2006 Regulations, being merely philosophically opposed to the idea of the new academy school, and she could not show that the Secretary's decision had any direct effect on herself. She was therefore not entitled to the statutory relief provided for under the 2006 Regulations but was characterized as seeking to use the Regulations for an impermissible purpose, namely, as a means of

[10] I note that *Chandler* was followed and applied in another procurement case cited by Mr. Thompson: *R (Wylde) v Waverley Borough Council* [2017] PTSR1247 where standing was also denied for lack of sufficient interest, the applicants being unable to show either that they were "economic operators" within the meaning of the applicable 2006 Regulations or that compliance with the competitive tendering process might have led to a different outcome which would have a direct impact on them.

seeking to advance her political standpoint, which was in opposition to academy schools.

However, it was also stated *per curiam*, in keeping with the modern trend in the case law, that if a contracting authority, such as the Secretary, fails to comply with the 2006 Regulations, they would commit an unlawful act, whether or not there is an economic operator who can pursue remedies under the Regulations, and that would be a paradigm situation in which a public body should be reviewed by the court. In light of her impermissible objectives, Mrs Chandler however, did not qualify for relief on the public interest ground either – she was not challenging the Secretary's decision because of any interest she had in the proper observance of the public procurement regime but because she was opposed to the institution of academy schools.
This case (in which the Court described the issue of standing as "academic")[11] figured prominently in the Judge's reasoning and, to the extent that it is now being relied upon by Mr. Johnston for the proposition that what the case law requires is that, for an applicant to show "*sufficient interest*" in the context of a procurement regime, it must show that the decision or action in question had "*some direct effect*" on it, will be further examined below as well.

(iii) *R(Unison) v NHS Wiltshire Primary Care Trust* [2012] EWHC 624 (Admin), is also relied upon by Mr. Johnston for the proposition that where an applicant may not claim to be an "*economic operator*" but relies instead upon a claim that had the procurement rules been properly observed and applied the outcome would have been different, it is not enough for him to show that the result might or could have been different but he must show, with cogent evidence, that it would have been different. The essence of the challenge here too, was that the Defendants had acted in breach of the Public Contract Regulations 2006, in deciding to enter into contracts with an interested party for out-sourcing health care services.

What sufficient interest did Mailboxes establish?

39. Mr. Johnston's primary argument is that Mailboxes should not have been granted leave to bring judicial review proceedings because it did not establish that it had a sufficient

[11] Because the arrangements between the Secretary of State and University College London were found not to come within the public procurement regime. It followed that the per curiam observations of the Court on standing to seek relief by way of judicial review on the grounds of failure to comply with the regime, were, strictly speaking, obiter dicta,

interest in the claim as required by the 1905 Act and RSC 53/3(7). Citing *R.v IRC* (above), he submits that the Judge failed in his central responsibility to assess three things: (1) what public law duties are engaged by Mailboxes' challenge; (2) who those duties are owed to and (3) whether Mailboxes' arguments about those duties have merit.

40. Here he relies upon *Chandler* (as well as *Wylde* and *R (Unison)* for the proposition that the court is required to assess what an applicant's actual challenge is, rather than relying upon convenient labels. He submits that there is no other way to determine whether a person has a sufficient interest "*in the matter to which the application relates*".

41. The Judge, he submits, misdirected himself, in his six reasons given in Judgment 1 for allowing Mailboxes' standing, because nowhere did he say that Mailboxes was "*directly affected*" by anything the PMG did, which is what he was obliged to find.

42. Mailboxes was a mere "busybody" because it could not show how it was directly affected by the Decision. Mailboxes was not an "*economic operator*", and it could not show that if a procurement process was followed it would have secured the contract. In Thompson 1 there is the claim that if the PMG had put the matter out to tender, Mailboxes "*would likely have considered making a bid*". That statement neither demonstrates that a procurement could have led to a different outcome, nor -as all the procurement cases demand- that a procurement would likely have led to a different outcome which directly affected Mailboxes.

43. Furthermore, submits Mr. Johnston, it was clear from Mailboxes' letter before claim that if Mailboxes had its way, the Bermuda Post Office would not enhance its service at all. Mailboxes was concerned with a supposed '*distortion of market conditions*" and '*taxpayer liability'* and '*the wisdom of government becoming a direct competitor to privately run businesses"*. Mailboxes is no different from Mrs Chandler: it is attempting to use procurement arguments when its real complaint lies somewhere else. This was impermissible and the Judge should have recognized it. Instead, goes the argument, in paragraph 27 of Judgment 1, the Judge said: "*The first bullet point of the letter (before action) identifies a concern with the procurement process*". But that first bullet point was not enough to veil Mailboxes' true motive for bringing proceedings (which was to stymie the procurement process altogether). For these reasons Mailboxes should not have been found to have a sufficient interest. The foregoing is described by Mr. Johnston as "*the Sufficiency Argumen*t".

Could Mailboxes base its claim upon enforcement of the Code in public law proceedings?

44. Mailboxes failure to show that it had a sufficient interest, was a consequence Mr. Johnston submits, of the fact that Mailboxes could not insist upon an open bid process in

which it would be able to compete - the PMG was allowed to enter into the Partnership with Access USA without following the Code, because the arrangement was never proposed as a '*procurement*' as defined by section 32B(6) of the 1969 Act; (ie: '*the provision of any goods or services to Government otherwise than by a public officer*"). It follows that Mailboxes cannot show that it had a particular or economic interest in the arrangement or that it was "*directly affected*" by the Decision.

45. The fundamental reason Mailboxes could not have insisted upon an open bidding process says Mr. Johnston, is that neither of the 2018 nor 2020 versions of the Code had legislative effect. They were internal governmental policy documents issued for the purpose of guidance only to government officers who are '*concerned with obtaining goods or services for Government',* as that term is used in section 32B (4) of the 1969 Act. The Code is not a *public law document* and so is not capable of being challenged in or being used to bring public law proceedings. Relying upon *R (Good Law Project) v Prime Minister* [2023] 1 WLR 785, he argued that policies are not enforceable by the general public just because they are policies. Only policies which are "*the epitome of Government policy*" are enforceable through public law proceedings see [55].

46. Relying here also upon *R v London Borough of Islington, ex parte Rixon* 32 BMLR 136 and *R (Munuz) v Mersey Care NHS Trust* [2006] AC 148, he further submits that it is only an enforceable policy that must be followed unless there is good reason not to do so. In this regard he further submits that it is important to understand what the Judge did not appreciate in Judgment 1 but got right in Judgment 2 at [63]; ie: the status of the Code as a guidance document, and not a statutory instrument with legislative effect. From there the Judge should have considered whether the Code was an enforceable policy but failed to do so. But this was not his fault because *Good Law Project* was not brought to his attention. Had it been, it is likely he would have understood the difference between enforceable policy and the Code. The Code is replete with ways it might be departed from: see for instance paragraphs 1.5; 1.7; 3.3; 4.8 and 6 (of the 2020 Code). The Code is therefore everything but a clear and definitive legal document. Notable is this passage from paragraph 4.8: "*If a breach is the result of the activities of an individual in contravention of Government's policies, code of conduct, practices or procedures, then the relevant Accounting Officer shall take the appropriate disciplinary action(s) in accordance with the Government's practices."* As such, the Code mirrors what is said in paragraph 59 of *Good Law Project*:

> "*Indeed, one of the policies warns that individuals might be subject to disciplinary action in the event of a failure to follow it, which is a different kind of enforcement based on a contract of employment.*"

47. All the foregoing says Mr. Johnston, is contrary to the Code being intended to be the subject of enforcement by way of judicial review. Mailboxes were challenging a non-enforceable policy, one which could only be controlled internally. Without regulations

made by the Minister of Finance as called for by section 33 of the 1969 Act (see below), the Code could not be the subject of public law proceedings. Moreover, because there was no clarity as to which of the 2018 or 2020 Code was applicable, Mailboxes could point to nothing that came close to an enforceable policy giving rise to a legitimate expectation as asserted by Mailboxes[12]. The foregoing, Mr. Johnston describes as "*the Code Argument*".

Was there a procurement?

48. Mr. Johnston's further argument is that there was, in any event, no procurement. The Code did not have to be followed before entering into the Partnership with Access USA (even if the Code had legislative effect), because there was no evidence of any "*procurement*", as that term is defined by section 32B(6) of the 1969 Act, ie, again: '*the provision of any goods or services to Government otherwise than by a public officer*'. And '*public officer*' is said to include a person acting as an agent for a public authority; the implication being that Access USA should be regarded as an agent and so, as a public officer.

The duty of candour

49. The arrangements that were made were of course, something peculiarly within the knowledge of the Appellants. While admitting that there is a duty of candour imposed by the case law and that public officers owe that duty to the Court in the context of a public law challenge, Mr. Johnston nonetheless submits that the onus of proof remained on Mailboxes throughout to show that there was a procurement within the meaning of the Code and it has failed to discharge that burden. Citing *R v Lancashire County Council ex parte Huddleston* [1986] 2 All E.R 941, he submits that the Appellants had only to "*set out fully what they did and why, so far as is necessary, fully and fairly to meet the challenge*"; per Parker LJ at 947E.

50. This the Appellants have done, says Mr. Johnston, by way of the PGM's evidence in Brangman1, in which at [3], the PGM, in explaining why there was no procurement and why Mailboxes could not have insisted upon and would not have been affected by a procurement process, averred that:

> "*What the management team decided to do was improve its parcel post services. What (Bermuda Post Office) required was an online presence and a*

[12] Citing *United Policyholders Group v A-G of Trinidad and Tobago* [2016] 1 WLR 3383 for the test on when a legitimate expectation may be established.

> *warehousing facility which would act as an overseas shipping address for customers … To my knowledge Mailboxes does not have an online presence, and they do not own an overseas shipping facility.*"

51. Thus, the PMG had, he contends, explained why there was a need to enter into an agreement with Access USA, in a way that did not entail a "*procurement"*. Access USA by implication, could have been engaged simply as an agent (public officer) within the meaning of the Code[13]. This was what the Judge failed to appreciate: no matter how unfortunate or misguided the Minister's or the Ministry's spokesperson's comments were about the arrangements (especially as to the significance of the $24000 value), they did not impact on whether section 32B of the Act of 1969 was engaged, as the Judge mistakenly regarded them as doing. No further duty of disclosure arose on the part of the Appellants to explain what had happened (citing the Privy Council's judgment in *Marshall v Deputy Governor of Bermuda* [2011] 1 LRC 178 as applied by the Judge himself in *Soares v Bermuda Health Council* [2021] Bda LR 12).

52. Furthermore, the Judge conflated two separate legal issues, says Mr. Johnston. He failed to distinguish between whether a '*procurement*' existed, and the "*value of the arrangement*". In order to make a safe decision, he had to first determine that there was a '*procurement*'. It could only be speculation (or conjecture) to assume that because $24,000 might have been paid to Access USA, it meant a '*procurement*' had to have existed. All of the foregoing, Mr. Johnston styled "*the Procurement Argument*".

The 1969 Act

53. The legislative context is set, primarily, by sections 32B and 33 of the 1969 Act. Section 32B under the heading "*Establishment of the Office of Project Management and Procurement"* is set out fully as follows:

> "32B (1) *The office of Project Management and Procurement is established for the following principal purposes –*
>
> *(a) to provide professional, qualified procurement expertise and advice to Government;*
>
> *(b) to ensure that there is no bias in the awarding of Government contracts;*
>
> *(c) to identify and apply performance measures to ensure that Government obtains value for money;*

[13] Determining whether AccessUSA could properly be described as an agent of a public authority as opposed to what it appeared to be, namely a provider of services to Government in the form of online access and a warehousing facility would require further information as to the nature and terms of the arrangements made. As noted above, this was something peculiarly within the Appellants' knowledge and so to be explained by them.

(d) to ensure that best practices are adhered to in the oversight of capital projects;

(e) to advise on, guide and support the development of, and adherence to, procurement regulations, policy and best practice.

(2) The Office shall consist of a public officer known as the Director of Project Management and Procurement, and such other staff as are required.

(3) The Director shall have the following functions –

(a) oversight of all Government procurement, including contracts and all pre-contract negotiations, such as requests for proposal, invitations to tender and the obtaining of quotations and estimates;

(b) oversight of all capital projects for Government;

(c) handling of complaints relating to the awarding of Government contracts;

(d) such other functions as may be conferred under any other enactments or by the Minister.

(4) The Director shall issue a Code of Practice for Project Management and Procurement to be followed by all public officers concerned with obtaining goods or services for Government.

(5) The Director shall take steps as he considers necessary to ensure that the Code of Practice for Project Management and Procurement is followed by all public officers.

(6) In this section and in sections 32C and 32E –

"capital project" includes any project, not funded out of capital, which the Director considers should be managed in accordance with the Code of Practice for Project Management and Procurement;

"Director" means the Director of Project Management and Procurement;

"Government" includes a public authority;

"procurement" means the provision of any goods or services to Government otherwise than by a public officer;

"public officer" includes a person employed by, or acting as an agent for, a public authority". [**emphases added**]**…**

Regulations

33. *(1) The Minister may make such regulations as appear to him to be necessary or expedient for the proper carrying out of the intent and provisions*

> *of this Act; provided that before the Minister makes regulations in relation to the Office of Project Management and Procurement, he shall consult the Minister responsible for that office.*
> *(2) Without prejudice to the generality of subsection (1), the Minister shall make regulations –*
> *(a) ….*
> *(b) containing the Code of Practice for Project Management and Procurement issued by the Director under section 32B;…"*

The Code

54. As mentioned above, the first edition of the Code was issued in July 2018. The second is stated as "*superceding any previous versions and takes effect from 1 July 2020*." While at the time of Mailboxes application there had been no disclosure by the Appellants of the exact date upon which the Decision was taken, it appears from the chronology of events as set out above from the evidence in the case, that, on 27 November 2020, a statement was published on the Government website that the Post Office intended to move forward with the Partnership to start in early 2021 and in his budget statement of 12 March 2021, the Minister reported that the Post Office expected to raise $600,000 as it would "*soon be contracting with MyUS.Com*".

55. Thus, assuming that the Partnership involved a procurement, as at early to mid-March 2021, the July 2018 version of the Code would have been superceded by the July 2020 Code. But if the 2018 Code was applicable and, in keeping with its terms, the procurement might have been deemed a "High Value Procurement" if the estimated value of the goods and services procured was at least $100,000 and an "Intermediate Value Procurement" if the estimated value was between $ 5,000 and $ 99,999.

56. However, we also see from the chronological evidence, that the Minister, on 24 September 2021, made a publicised statement to the House of Assembly, stating that there would be a soft launch of the online shopping platform MyBermudaPost, on 30 September 2021 and later, in the article published in *The Royal Gazette* on 9 October 2021, the Minister is reported as stating that as nobody responded to the RFI, no further steps needed to be taken. And still later, on 30 October 2021, *The Royal Gazette* reported that a Ministry spokesperson had stated that the procurement project had a value of only $24000 and so "*falls below the threshold requiring procurement or Cabinet approval*".

57. Accordingly, on the assumption that the Decision and Partnership involved a procurement and occurred circa September- October 2021, the July 2020 Code would be applicable. Thus, the procurement, if involving an award of $24,000, would be deemed a "*Low Value Procurement*" but, if involving a value of $600,000, an "*Intermediate Value Procurement*".

58. Given, again, the then state of uncertainty about the date of the Decision and the Partnership, and what, if there was a procurement, was its value, Mr. Sanderson, on behalf of Mailboxes, submitted that this Court should approve of the approach to this issue taken by the Judge at [70]-[71] of Judgment 2 and regard the Partnership as having involved a procurement of a value of between $10,000 to $49,000 (viz: $24,000) and so a "*Low Value Procurement*"[14] as defined in [2] of the July 2020 Code, which appeared to have then been in place. Apart from here noting my acceptance that the July 2020 Code should be the version considered, I will return to this issue below.

59. At this juncture, it is necessary to summarise some other relevant provisions of the Code:

- The Foreword begins by stating that the reason for the establishment of the Office of Project Management and Procurement (OPMP) in 2011 is to "*regulate all procurement of goods, services, and works in the public sector. OPMP has been mandated to build and strengthen capacity and develop a modern, transparent and cost- effective public procurement system. OPMP is also responsible for creating a standard, coherent and clear set of rules and procedures*". The Foreword continues: "*In pursuance of the above and the exercise of powers conferred under section 32B (4) of the [(1969 Act)], the Director of OPMP, with support of Cabinet, has created rules in accordance with the provisions contained (herein). The Code of Practice (Code) for Project Management and Procurement is thus established to service this need. <u>All public officers must follow this set of rules or otherwise seek a waiver</u>.* [emphasis added]

- At [1.2] the Code states: "*This Code is a statutory instrument that sets out the requirements and procedures ("Rules") for the procurement of goods and services for the Government. By following these Rules, public officers will ensure that the Government's procurement activities achieve the best value for money in the expenditure of public funds while being fair, ethical and transparent"*.

Among the further definitions in [2]:

- "*Procurement*" *means the provision of any goods or services to the Government otherwise than by a public officer*". (Thus mirroring section 32B (6) of the 1969 Act)

[14] A different proposition from that in Mailboxes' Form 86A where, at [5] citing the Minister's statement in his Estimates of Revenue and Expenditure for the Post Office for 2021/2022 as including income from the Partnership of $600,000 for that year, Mailboxes averred that there is an arguable case that the funds payable to the contractor in respect of this procurement will be somewhat in excess of $24,000.

- "*Tender" means a formal offer to supply or purchase goods or materials or provide services at a stated price*".

- "*Total value" is the value of goods or services to be procured during the term of a contract, or by the Government's financial year*".

- At [3.2] under the heading "*Legal Authority*", it is again stated that "*The Code shall be adapted and interpreted as rules issued by the Director as per section 32B(1) of the (1969) Act, as amended, and are to be followed by all public officers*."

- At [11.3], under the heading "*Low Value Procurement*" and of most significance here and emphasised, it is stated that "*For contracts with an estimated value between $10,000 and $49,999, a public officer must obtain at least three (3) quotations by telephone or in writing and will not be required to comply with paragraphs 15., 15.6, 15.8 and 16.2"* [ie: the Open Procedure advertisement of pre-qualifying criteria to be used for selection of contractors to be short-listed with a timeline for completion of the selection process] " *and sections 25-29 of the Code*" [ie: those provisions requiring, inter alia, the use of specific solicitation documents; a formal evaluation and scoring of tender submissions and a formal process for the Awarding of Contracts, including for contracts over $250,000, Cabinet approval and the vetting and signing of contracts by the Attorney General].

60. In summary then, from [11.3] of the Code, for Low Value Procurements, while the more formal aspects of the Open Procurement Procedure are waived, a public officer is nonetheless required to obtain at least three (3) quotations by telephone or in writing.

61. The gravamen of Mailboxes' complaint, is that there is no evidence that this apparently mandatory requirement was met by the Appellants, and given their obligation to disclose what transpired and their failure to meet their duty of candour to the Court especially in this regard, the Judge's finding and declaration that they acted in breach of the Code and unlawfully, is justified.

62. Mr. Johnston on behalf of the Appellants sought to counter this by way of elaboration upon his "*Code*" and "*Procurement Arguments"* described above.

63. First, he submits that while section 32B of the 1969 Act obliged the DPMP to "*issue a Code of Practice for Project Management and Procurement to be followed by all public officers concerned with obtaining goods or services for Government*", those words do not indicate that the Code, once made, has legislative effect; only that an independent functionary issues the Code. The phrase in section 32B (4) ('*to be followed by all public*

officers') describes the type of document to be issued but does not impose an obligation on public officers to follow the Code. Further, there are two reasons this interpretation must be correct:

(a) First, instead of leaving enforcement power to the public law courts, section 32B (3) gives oversight and enforcement powers to the DPMP, in particular paragraphs (a) and (c) [see above]; and

(b) Second, if the Code was seen as a statutory instrument that public officers were obliged to follow (as a matter of law) that would make nonsense of section 33 of the 1969 Act. Section 33(1) gives the Minister of Finance power to make regulations "*expedient for the proper carrying out of the intent and provisions*" of the 1969 Act. And section 33(2) demands that the Code should be embodied in the form of regulation: "*Without prejudice to the generality of subsection (1), the Minister shall make regulations – (a)…; (b) containing the Code of Practice for Project Management and Procurement issued by the Director under section 32B*." In other words, says Mr. Johnston, it is the Minister of Finance who has the power to make the Code law, not the DPMP. There is no reason why the 1969 Act would require a legally enforceable document to be given legislative power by a statutory instrument. The Minister having not made any regulations (either by adopting the entire text of the Code or by reference to a particular version) [15], neither the 2018 nor 2020 version of the Code may be regarded as having statutory effect and so neither version could impose any statutory obligation on public officers. Furthermore, the Code cannot be seen as a statutory instrument without first substantially complying with the provisions of the Statutory Instruments Act 1977: see paragraph 13 of *Corporation of Hamilton v Centre for Justice* [2017] CA (Bda) 4 Civ 930 March 2017. For instance, all statutory instruments must be published before they have legal effect: see section 5(1) and (4) of that Act.

64. Mr. Johnston continues by asserting that the Judge, when he concluded at [65] of Judgment 2: "*Thus, in the absence of a published regulation, in my view the Code is guidance which should not be departed from without cogent reasons*" was right in deciding that the Code was guidance, but wrong when he found that it could not be departed from. The Code he asserts, is not a "*public law document*" and because of its status, cannot be the subject of a judicial review claim. For this proposition he again relies upon *Good Law Project.*

[15]Citing *Pankina v Secretary of State for Home Department* [2011] QB 376 at [24] and [26], where it was recognized that regulation which incorporated existing accessible material by reference can be a legitimate form of sub-ordinate legislation. This dictum was approved by the JCPC in *Suraj v A.G. of Trinidad and Tobago* [2023] AC 337, at 356 [27]

65. Mr. Johnston also pursues, as already noted, the argument that Mailboxes had failed to bring its application promptly, as required by section 68 of the 1905 Act and/or RSC 53/4, "*the Delay Argument*". This argument will be addressed briefly at the end.

Discussion and analysis, in turn, on the "Sufficient Interest", "Code" and "Procurement arguments"

Sufficient interest

66. In Judgment 1 at [24], the Judge found that Mailboxes had sufficient interest to justify its standing in the matter. This was after reciting at [21], Mailboxes' evidence on this point, coming from Thompson 1 at [3] and [4]; namely, that it is a well-placed business entity, with a depot in the USA which receives and consolidates packages for onwards shipment to Bermuda, which might have tendered a bid, had there been an open procurement process, and that its interests are affected by newcomers entering into the parcel consolidation and delivery business market. He recognised at [24] that the test from *R v IRC* required that there be a consideration of "*two (sic) critical issues" (a) the character of the duty upon the [government body] and the persons to whom it is owed; and (b) the nature of the interest which the applicant must show*". The Judge goes on to assess the evidence in this regard and his acceptance of it, expressly noting at [26.7] his acceptance of and reliance also on Lord Scarman's dictum from *R v IRC* which is also worthy of repetition here, that "*in determining the sufficiency of an applicant's interest it is necessary to consider the matter to which the application relates and it would be wrong in law for the court to attempt an assessment of the sufficiency of interest without regard to the matter of the complaint*."

67. In this regard the Judge goes on at [27] to find that Mailboxes' letter before action "*identifies a concern with the procurement process and later addresses possible breaches of procedural fairness and/or legitimate expectations*" and that "*In the First Affidavit of Mr. Thompson he sets out that the nature of his business is consolidating and importing packages into Bermuda from the USA on behalf of customers. He went on to state that on 27 November a statement was published on the Government website stating that the BPO intended to move forward with a public-private partnership for package forwarding and consolidating services from the USA. On 12 March 2021 the Minister announced that the BPO would soon be contracting with MyUSA.com for these services. As I understand it, Mailboxes is saying that it has the ability to offer the same services. Having regard to the facts in this case and the statements of Lord Scarman, in my determination, I am satisfied that Mailboxes has a sufficient interest*".

68. The Judge then goes on at [28], properly in my view, to reject the argument then (but it seems no longer) being pursued by Mr. Johnston, that Mailboxes although having been aware of the RFI, had failed to submit to the PMG an expression of interest, thus

contradicting the notion that it saw itself as having a sufficient interest. As the Judge concluded (ibid) "*in determining "sufficient interest", there is no merit in this argument that Mailboxes failed to submit a completed RFI*". That is plainly right: the RFI was nothing more than a one-sided request for information to be used by the GPO to gauge the demand for or availability of the services it intended to introduce to the market. Mailboxes could not sensibly be regarded as being then obliged to explain its interests or concerns.

69. Nor was the Judge wrong to reject the argument that Mailboxes, in order to establish standing, was obliged to show that it was an "*economic operator*" whose interests would be "*directly affected*" by the proposed arrangements. These are technical terms derived from the Public Contract Regulations 2006 U.K., relating to procurement which was the subject of consideration, as we have seen, in *Chandler, Wylde* and *Unison.* They are not to be taken as defining "*sufficient interest*" for all purposes of procurement in the context of the 1969 Act and the Code and the Judge was right in his refusal, at [23] of Judgment 1, to be guided by comments in *Chandler* to the extent that it was based upon the UK legislation.

70. However, the significance, in the present context, of this distinction with *Chandler* based upon the different legislative contexts should not be overstated. In this regard it is to be noted that Arden LJ also stated at [77] that:

> "…*The failure to comply with the regulations is an unlawful act, whether or not there is no economic operator who wishes to bring proceedings under reg 47, and thus a paradigm situation in which a public body should be subject to review by the court. We incline to the view that an individual who has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way, but is not himself an economic operator who could pursue remedies under reg 47, can bring judicial review proceedings to prevent non-compliance with the regulations or the obligations derived from the Treaty, especially before any infringement takes place (see generally Mass Energy v Birmingham City Council [1994] Env LR 298 at 306, cf Kathro's case [2001] 4 PLR 83, where Richards J held that the claimants were not affected in any way by the choice of tendering procedure). He may have such an interest if he can show that performance of the competitive tendering procedure in the directive or of the obligation under the Treaty might have led to a different outcome that would have had a direct impact on him. We can also envisage cases where the gravity of a departure from public law obligations may justify the grant of a public law remedy in any event…*"

71. As we see from the Code at [59] bullet point 7 above, all that was required for bidding on a Low Value Procurement, was that at least three bids were obtained in writing or by telephone, without the need for the prequalification of contract bidders. A sufficient

interest in this context was thus, a straightforward matter of fact and degree. It follows that all that Mailboxes needed to show was that it would have had a sufficient interest to bid and was in a position to do so, had the process been properly observed. It was not, in my judgment, required to show that it would likely have been successful and so was directly affected by the Appellants' failure to observe the process.

72. Moreover as shown above, *Chandler*[16] itself, in keeping with the modern more liberal approach to the recognition of standing in the case law (as discussed to some extent above), accepted that an individual may have a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way, even if not himself an economic operator who could pursue remedies under the Regulations. And whether or not "*affected in some identifiable way*", such a person may nonetheless be able to bring judicial review proceedings to prevent non-compliance with the Regulations. This is speaking to that other function of the supervisory jurisdiction of the courts which Lord Reed was at pains to emphasise in *Axa* and again in *Walton*, which was not only *"to address individual grievances (but also) its constitutional function of maintaining the rule of law."*

73. For the purposes of the grant of leave to bring judicial review proceedings, in my view, the Judge was correct in concluding, in the exercise of his judgment and discretion, that Mailboxes had standing to claim relief by way of these proceedings. As will be discussed below, and harkening to the guidance given by all of their Lordships in *R v IRC* (as set out at [27] above) the Judge was also correct in his conclusion, after examination of all the circumstances of the case, that Mailboxes continued to have standing to claim the declaratory relief which he ultimately granted.

The Code Argument

74. Mr. Sanderson, at [3.1] of his submissions noted that it was only shortly before the substantive hearing leading to Judgment 2, that Mr. Johnston brought to the Judge's attention the fact that the Code had not been properly gazetted and so, according to his submissions then and now before this Court, had no legal effect. That of course, explains why the argument was not deployed at the leave stage as another basis for denying Mailboxes' standing, as it has before this Court as set out above.

[16] And for present purposes, it should also be noted that in both *Unison* and *Wylde* the approach in *Chandler* was accepted. However, given the views taken by the judges of the policy of the Regulations, standing to bring public law proceedings was denied. Per Eady J in *Unison* at [9]: "*Given the statutory structure of the Regulations, and the underlying policy as embodied in the corresponding European Directive, it is likely that breaches of the Regulations are more often going to give rise to private rather than public law remedies, which are going to be relatively rare. It is thus important to focus carefully upon the suggested criteria in Chandler's case and not to interpret them too freely*". And see Dove J in *Wylde* to similar effect at [39] .

75. I find Mr. Sanderson's responses to the Code Argument to be persuasive.

76. Section 32B (4) of the Act of 1969, as amended on 21 October 2011, provides that the DPMP shall issue a Code. It then appears that there was some delay in a Code being issued but according to a Ministerial Statement made on December 7 2018 by then Minister for the Cabinet Hon Walton Brown JP, MP, the Code was "implemented" on 2nd July 2018. As the Code itself acknowledges in the Foreword (and as set out above), in issuing the Code, the DPMP was acting in accordance with the provisions of Section 32B (4) of the 1969 Act. The Statement of the Minister contains clear assertions that (a) the Code had been implemented and (b) Government intended to operate accordingly in its procurement practices and strategies.

77. While it must be accepted that the Code was not made by the Minister the subject of a regulation pursuant to section 33 (2) (b) of the 1969 Act and was not gazetted and so has not come into force as effectively binding legislation within the remit of section 5(4) of the Statutory Instruments Act 1977 (the "SIA") (vide: *Hamilton Corporation* above), it does not follow that the Code had no binding effect whatsoever. To the extent that the Code was issued by authority of the 1969 Act, it is for the purposes for which it was issued, a legally effective document which required that, as stated in the Foreword: " *All public officers must follow this set of rules or otherwise seek a waiver*."

78. The Code was authorized by the Act to be issued by the DPMP alone, without the approval of the Minister and unlike statutory instruments generally, did not require Parliamentary scrutiny by way of affirmative resolution under section 6 of the SIA. While publication under section 5(4) of the SIA was required in order to have binding legal effect generally, it follows that as a document for the regulation of the conduct of Government procurements by public officers, the requirements of the 1969 Act were met when the Code was issued and implemented by the DPMP. There has been and could be no suggestion that the responsible public officers were uninformed about its existence or were not obliged to comply with it.

79. In any event, as Mr. Sanderson also submitted, it is well established that Ministers have a duty to comply with policies which they have adopted. These policies create and embody public law duties even when not set out in statute. He cited in support of this proposition, *Kambadzi v Secretary of State for the Home Department* [2011] UKSC 23. There Lord Hope, speaking to the effect of the policy of the Secretary of State as set out, not in a statute but in the Home Office's immigration Operational Enforcement Manual, declared at [36] that:

> "…*We are dealing in this case with what the Secretary of State agrees are public law duties which are not set out in the statute. Of course it is for the courts, not the Secretary of State, to say what the effect of the statements in the manual is. But there is a substantial body of authority to the effect that under*

> *domestic public law the Secretary of State is generally obliged to follow his published detention policy. In R (Saadi) v Secretary of State for Home Office Department [2002] 1 WLR 356, para 7 Lord Phillips of Worth Matravers MR, delivering the judgment of the court, said that lawful exercise of statutory powers can be restricted, according to established principles of public law, by government policy and the legitimate expectation to which such policy gives rise. In R (Nadarajah) v Secretary of State for the Home Department [2004] INLR 139, para 54 the Master of the Rolls, again delivering the judgment of the Court, said: "Our domestic law comprehends both the provisions of Schedule 2 to the Immigration Act 1971 and the Secretary of State's published policy, which, under principles of public law, he is obliged to follow." In D v Home Office (Bail for Immigration Detainees intervening) [2006] 1 WLR 1003, para 132 Brooke LJ said that what the law requires is that the policies for administrative detention are published and that immigration officers do not stray outside the four corners of those policies when taking decisions in individual cases. Wade & Forsyth, Administrative Law 10th ed (2009), pp 315-316 states that the principle that policy must be consistently applied is not in doubt and that the courts now expect government departments to honour their statements of policy. Policy is not law, so it may be departed from if a good reason is shown. But it has not been suggested that there was a good reason for the failure of officials of the required seniority to review the detention in this case and to do so in accordance with the prescribed timetable*."

80. By way of the Code, the Minister, the PMG and other responsible public officials, have adopted a policy for the procurement of goods and services on behalf of Government. Even though the Code has not been carried into effect as a statutory instrument, the policy it embodies is one of important public significance, given the public's interest in the due and proper administration of government affairs. Apart from the implicit suggestion in the Minister's public statements of a misunderstanding of the applicability of the Code to the procurement under discussion, or that Access USA came to enjoy some unexplained status of public officer, no reason at all, let alone good reason, has been proffered for the apparent failure to comply with it.

81. Mr. Johnston's argument, that the Code is akin to the policy examined in *Good Law Project*, I find to be unpersuasive. That case concerned government policies relating to the use of WhatsApp and private email for government purposes, essentially an internal administrative matter, as indeed it was so described by the Court of Appeal, in its findings among others, as reported at item 2 of the headnote:

> *"(2) That not every failure on the part of the executive to comply with one of its policies would be unlawful, because some policies, especially internal administrative policies, would be relevant only to the executive; that, when determining whether there was a duty as a matter of law to comply with a*

> *particular policy, the test was not whether the policy had consequences which affected some person (or body of persons) other than the decision-maker, but the fact that the policy directly affected the public would be a relevant factor to consider; that, wherever the line was to be drawn between those policies which were enforceable in law and those which were not, there was no duty to comply with the policies in the present case, having regard to the facts that (i) they were policies to govern the internal administration of Government Departments and did not involve the exercise of public power…."*

82. That situation is very different from the situation here involving the Code, which deals with procurement policies which, as Mr. Sanderson correctly observes, are public-facing and squarely concerned with processes which affect the public interest and the individual interests of those who might seek to interact with the process by way of tenders.

83. Moreover, within *Good Law Project* itself, one sees, at [55] and following, affirmation of the principle that there is a duty upon public officials to comply with policies unless there is good reason not to do so. As we have also seen from *Hereford Corporation*, at [37] above, Parker LCJ had as long ago as 1970, taken a similar view of the binding effect of the Standing Orders issued by the Corporation itself acting pursuant to authority given by statute, an analogous situation with the Code issued by the DPMP in this case.

84. Accordingly, the Judge was right to find as he did at [64] to [65] of Judgment 2[17], that the Code ought to have been followed unless there were cogent reasons for departing from it, and no such reason was proffered in this case.

The Procurement Argument

85. Given the state of the evidence in this case and the abiding position taken by the Appellants not to disclose the documents relating to their dealings with Access USA, the Judge was entitled to assume that a procurement had either taken place or its process was already set in train. Whatever concerns about confidentiality the Appellants might properly have had about disclosing those documents, they are not allowed to 'run with the hares and hunt with the hounds' on this issue. They cannot argue that the Court may not reasonably infer from the available evidence the existence of a procurement while at the same time choosing not to disclose any evidence they might have to the contrary.

86. And in this regard, I do not think that it is necessary to find an actual breach of any duty of candour owed to the Court as, for one thing, no positive order for disclosure was made by the Judge. Rather, the Appellants are simply not in a position to argue that the Judge was wrong to infer as he did at [70] – [71] of Judgment 2, that having regard to the

[17] Relying also upon *Ex parte Rixon* and *R (Munjaz*) (both above)

utterances by and on behalf of the Minister, an agreement had been reached with Access USA for the provision of services of a value of $24,000 which, it seems was regarded, mistakenly, as falling below the threshold requiring application of the Code and Cabinet approval.

87. While neither the Judge nor this Court could determine precisely what the payment of $24,000 to Access USA was for, nor in what capacities made, it was reasonable for the Judge to infer, as he did at [71], that the payment was in respect of a service agreement and was therefore subject to the process of the Code as a low value procurement. Further, that which the Cabinet Office spokesman was quoted by the Royal Gazette as saying in October 2021 – see [16] above - was, as the Judge recorded at [70], in effect a statement that the BPO had procured a service which had a value of $ 24,000. The Procurement Argument must therefore also be rejected.

The Delay Argument

88. At [34] of Judgment 2, the Judge dealt with this issue in this way:

> *"In my view the [Minister's] ground of delay to defeat the application for judicial review should be rejected for several reasons. First, the [Minister]has never filed any evidence on the date when the contract was entered into by the parties. I recall that at a hearing on the 29 March 2022 Mr. Johnston indicated, albeit begrudgingly, that the date the contract was signed was 18 May 2021. At that time, I calculated that the application for leave for judicial review dated 15 November 2021 and filed 16 November 2021 was inside the deadline of six months to file the application. To that point, the detail of the involvement of (Access) USA and My US.Com was first revealed on 12 March 2021… and then again on 24 September 2021 in a Ministerial statement to the House of Assembly about a soft launch. However, I agree with Mr. Sanderson that the contract date is the relevant event for the time period to run. Thus in my view, the application for leave was within time".*

89. In the circumstances of this case where uncertainty characterized the understanding Mailboxes would have been able to glean about the process, the further enquiry required by RSC 53/4, ie: whether, even if made strictly within the six months deadline, the application was made '*promptly*", would be, in my view, superfluous. In this regard Mr. Johnston again relies upon case law which he posits as applying different considerations to a procurement context, and which he says requires that time starts to run from the moment the applicant for judicial review "*should have been aware*" that they had

grounds for bringing a public law proceeding[18]. He submits that Mailboxes was therefore long out of time when, on 15 November 2021, it asked the court for leave to file. This is because, as a matter of fact, according to Thompson 1 at [8], on 6 March 2019, the Minister "*indicated that the Post Office would be introducing an online shopping platform*". Moreover, on 27 November 2020, details of the contract were published on Government's website; see Thompson I at [9], and still further, on 12 March 2021, details of expected expenditure were published; see Thompson 1 at [10].

While the first bit of knowledge attributed to Mr. Thompson per [8] of his affidavit is fairly described, the same cannot be said of what is attributed by virtue of [9] or [10].

90. This is best shown by reporting what is actually there recorded:

> "[9]. *On the 27th November 2020, a statement was published on the Government website, stating that the Post Office intended to move forward with a public-private partnership for package forwarding and consolidation services from the USA to start in early 2021"*[19]
>
> *[10] In his budget statement, of the 12th March 2021, the [Minister] said that the Post Office expected to raise $600,000 as it would soon be contracting with MyUS.com… On behalf of the Applicant, we were not aware of this specific announcement at the time. I do not believe that it was picked up by the media, and the Applicant does not have the resources to read through the volumes of Hansard reports that are published each year*."[20]

91. Far from being the implicit admission of knowledge of the date of procurement of the Access USA contract, these passages suggest an ongoing state of uncertainty on the part of Mailboxes, in that regard. That being so, I do not think that the Judge can be faulted for regarding the actual date of the contract to be, at earliest, the date when time started to run for the purposes of Mailboxes' application.

92. In any event, as the Judge also said at [38] of Judgment 2, in the exercise of the discretion he undoubtedly had to extend time (see *Maharaj v National Energy Corp. of Trinidad and Tobago* [2019] UKPC 5) if required he would find that there was good reason to do so and grant an extension. I can see no basis for interfering with that proposed exercise of judicial discretion, particularly in the absence of any evidence from the Appellants

[18] Here citing *Uniplex (UK) Ltd v NHS Business Services Authority* [2010] PTSR 1377 and *SITA UK Ltd v Greater Manchester Waste Disposal Authority* [2012] PTSR 645

[19] As the Judge said at [36] of his judgment" *there is nothing in the statement that I was taken to or on my own review that states that the BPO was entering into a contract or partnership with Access USA Shipping LLC or MyUS.com"*.

[20] The Judge accepted at [37] that Mailboxes was not aware of the announcement of 12 March 2021 in the House of Assembly and noted the absence of evidence from the Respondents before him about what efforts were taken (if any) to bring the matter to the attention of the public by way of a media statement or otherwise.

about any prejudice or hardship or detriment to good administration which was likely to result from proceeding and the grant of a remedy (as the Judge found at [39)]). Moreover, because the public interest, in the Judge's view, required that the application be permitted to proceed on all of the issues in the case about procurement of goods and services by the Government, given that there was a publicly issued Code that was implemented about the methodology of the process that promotes inclusivity and transparency: [40].

93. On the basis of all the foregoing I would dismiss the appeal. I would also grant Mailboxes its costs of the appeal, to be taxed on the standard basis, if not agreed.

KAWALEY JA:

94. I agree. I would only like to add that in the present case it was particularly apposite to adopt a flexible approach to the standing requirement. The function of public law is to enable the citizen to legally challenge actions of the 'body politic' which the private law cannot reach. Here, the Legislature decided a Code of Practice should be promulgated and given legislative effect. The Executive promulgated the Code but omitted to give it legal effect. In the absence of any private law avenues for enforcing the Code, the public interest clearly favoured affording the Respondent more liberal access to the Court than it might otherwise have been entitled to.

CLARKE P:

95. I, also, agree. I would only add that it seems to me unfortunate, to say the least, that the Appellants have been so unrevealing as to (i) exactly what the nature of the arrangement was; (ii) what was its term; and (iii) how and on what basis the $24,000 figure was calculated., including any estimate of contract value under clause 8.1. of the Code. It does not seem to me that the Appellants have set out "*fully and fairly*" what exactly they have done. In the absence of such information I entertain considerable doubt as to whether that extremely modest figure is a correct assessment of total value, which is "*the value of goods or services to be procured during the term of a contract"*: see, also section 8 (3) of the Code to the same effect. When the Supreme Court has to determine what further relief to grant (if any) it may well be necessary for it to be provided by the Appellants with further information under categories (i) – (iii) above. I would invite the Appellants to reconsider their policy of reticence.