IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
CIVIL APPEAL NOS.45,51,57 & 61 OF 1983.

Between:

K.R. LATCHAN BROTHERS LTD. VATUKOULA EXPRESS SERVICE	APPELLANTS

- and -

SUNBEAM TRANSPORT LIMITED	1ST RESPONDENT
PACIFIC TRANSPORT LIMITED	2ND RESPONDENT
TRANSPORT CONTROL BOARD	3RD RESPONDENT

G.M. Newman Q.C. and G.P. Shankar for Latchan Brothers.
V. Parmanandam for Vatukoula Express
S.M. Koya and F.S. Lateef for 1st and 2nd respondents.
P.W. Young Q.C., S.J. Stanton and H.M. Patel for Transport Control Board.

Dates of Hearing: 14th, 15th & 16th March, 1984.
Delivery of Judgment: ~~24th July, 1984.~~ 30/3/84

JUDGMENT OF THE COURT

SPEIGHT, J.A.

The Transport Licensing Board was constituted by section 94 of the Traffic Ordinance (Cap 21) 1946 and has continued to function pursuant to subsequent ordinances. The present operative provisions are sections 54 et seq of the 1965 Ordinance - Cap. 152, 1967 Edition of the Laws of Fiji. Its functions include receiving applications for Road Service Licences from operators of Public Service Vehicles,

and dealing with the same. The Board sat and heard a very large number of such applications at Ba on 9, 10th and 11th March, 1983. This case concerns :-

(a) a number of applications relating to licences sought for Suva-Lautoka and Lautoka-Suva services along the Queen's and King's Road and

(b) a service from Suva via the King's Road to Vatukoula.

Companies involved as applicants or objectors included City Transport Limited (hereinafter called City), Sunbeam Transport Limited (Sunbeam), Pacific Transport Limited (pacific), Victory Transport Service (Victory), K.R. Latchan Brothers Limited (Latchan) and Vatukoula Express Service (Vatukoula).

On 11th March, 1983, the Board granted Vatukoula a licence for a Suva-Vatukoula-Suva service and on 27th April, 1983, in a reserved decision, granted Latchan a licence to operate services Suva-Lautoka-Suva via the Queen's Road thence via King's Road and also in the reverse direction - referred to as Double Circular Licence.

In accordance with Order 53 of the Supreme Court Rules 1981, Sunbeam and Pacific applied on 27th May and obtained leave from Kermode J. on 31st May, 1983, to issue Motions for Judicial Review concerning those decisions. On 6th June Motions for Review by way of Certiorari were filed to remove the decisions into the Supreme Court for the purpose of quashing the following decisions of the Transport Control Board :

1. Given at Ba on 11th March, 1983, rejecting Sunbeam's objection to Vatukoula to operate an Express Daily Service: Vatukoula-Suva-Vatukoula.
2. At Ba on 11th March, 1983, preventing Sunbeam from pursuing its applications for Express Daily

Service: Suva (Queen's Road) to Lautoka (King's Road) to Suva (Single Circular Service).

3. Rejecting Pacific's objection to a Double Circular Service - Suva (Queen's Road) Lautoka (King's Road) Suva; and Suva (King's Road) Lautoka (Queen's Road) Suva being granted to Latchan.

4. And at Suva on 27th April, 1983, rejecting Sunbeam's objection to Double Circular Service being granted to anyone (and in fact granted to Latchan).

5. And at Suva on 27th April rejecting Pacific's application for a Single Circular Service Suva (Queen's Road) Lautoka - (King's Road) Suva.

The motions also asked for interim injunctions against Vatukoula and Latchan from operating the granted licences meanwhile.

The particulars of matters giving rise to complaint as far as we think necessary refer to them, as derived from the Statement filed (Order 53 Rule 3(2)) were:

> It wrongfully preventing Sunbeam from pursuing its application for a Single Circular Service - Suva (Queen's Road) Lautoka (King's Road) Suva.
>
> Failure by the Board to make available a report which it said would, and did, commission - a report from its officers as to the need for Circular Services (as applied for by Sunbeam, Pacific, City, Victory and Latchan).
>
> Complaint had been made on 11th March, 1983, by Mr. Koya, counsel for Sunbeam at the hearing at Ba that on 10th March, 1983, operators had been invited to a function that night to be attended by bus operators and the Chairman had announced that that would provide an opportunity "to lobby the Board".

No evidence had been produced to the Board in respect of applications for Circular Licences to enable the Board to have regard to the provisions of section 66(2), (a), (b) and (c) - viz: need or desirability; extent of present services; the need for efficiency and the elimination of unnecessary services.

In respect of Vatukoula, there had been no evidence of unsatisfied need or on question of unremunerative services.

It is interesting for later relevance to note that Pacific had at the beginning submitted to the Board that it had put in its application for a Circular Licence only to protect its existing interests - for it already held certain licences for various routes on Queen's Road (as did Sunbeam). We note in particular that it told the Board that in its view there was no need for any additional service of the variety sought in the Circular applications; but if the Board felt there was such a need then existing and efficient operators such as itself should be granted the trips. Evidence showed that Sunbeam and Pacific had operated on the Queen's Road for many years. Latchan, City and Victory had not.

At the conclusion of the general particulars the following grounds of complaint were summarised as :

Against Latchan's Grant:

(a) Breach of natural justice by the Board in preventing Sunbeam from pursuing its application for a single circular licence.
(b) Bias by the Board.
(c) No evidence on the matters in section 66(2).
(d) Financial repercussions on Sunbeam.
(e) Consideration by the Board of a subsequent application by Latchan in April (we see no relevance in this and will not refer to it further).
(f) The Board did not take into account relevant matters and took into account irrelevant matters.

(g) A breach of natural justice by the Board in preventing Pacific from pursuing its objection against Latchan.

(h) Financial repercussions on Pacific.

(i) Latchan's lack of experience or repair facilities on the route.

Against Vatukoula's Grant:

(a) Affect on Sunbeam's existing services.

(b) Absence of evidence of need.

Some of the foregoing appear to confuse a motion for review with an appeal on facts, e.g. Latchan (d), (e), (h) and (i) and Vatukoula (a) and do not call for consideration. Nor have we been able to find satisfactory evidence that there was a ruling against Pacific as claimed in (g).

Affidavits and supplementary affidavits in support were filed by Mr. Maharaj General Manager of Pacific and Mr. Jalil General Manager of Sunbeam and in opposition by Mr. Lala - Chairman of the Board, Mr. Singh Manager of Vatukoula, Mr. Latchan, Mr. Jamnadas - member of the Board - and Mr. Shiri Ram Secretary of the Board.

The matter came before Kermode J. on 3rd, 4th and 11th August and later written submissions were filed.

Decision was reserved and delivered on 9th September, 1983. It upheld a number of the grounds raised by the applicants, Sunbeam and Pacific, and it quashed both the grant of a licence on 11th March, 1983, to Vatukoula and on 27th April, 1983, to Latchan.

In his judgment the learned Judge grouped the multifarious allegations under headings appropriate to the legal principles applicable to this type of application. We will treat the matter in the same way for there were 20 grounds cited in the original appeal notice and more

still in a supplementary notice. Many of these were repetitions - some indeed were incomprehensible.

The Judge made it clear that the matter under review was the decision making process and the propriety of the Board's procedures - and not the validity of the reasons for decision. That of course is trite law in this field. In this appeal the Court is concerned with the validity of the reasons relied on by the Judge for concluding that the Board had erred in that way.

It will be noted that the Judge did not burden his judgment with references to cases which established the legal principles he was discussing. These are well known and established matters of law. We propose to follow the same course for this case does not require nice decisions on various authorities. On the contrary, it is a case of applying understood law to the facts of the case.

It seems convenient to take the matters dealt with in the judgment in the same sequence, to examine the findings made, and to discuss the criticism made before this Court of those findings. We will then attempt to evaluate those criticisms against the appropriate legal principles.

Much of the case, before the Board, the Supreme Court and this Court turned on the provisions of sections 64, 65 and 66 of the Traffic Act and it is convenient now to set these out in extenso :

> "64. An application for a road service licence or for the renewal, transfer or amendment thereof shall be made in the prescribed form and shall be forwarded to the Board accompanied by the prescribed fee. The Board may require any applicant to submit such further particulars as may be reasonably necessary to enable it to discharge its duties in relation to the application.
>
> 65. (1) On receipt of an application for a road service licence or for the renewal, transfer or amendment of a road service licence, being an application

complying with the provisions of the last preceding section and which in the opinion of the Board is not frivolous, scandalous or vexatious, the Board shall give notice in a newspaper published and circulating in Fiji specifying the details of the application and stating that within the next ten days following the date of the notice it will receive representations in writing for or against the application, and if the application is for a road service licence or for the renewal thereof stating also that within the next ten days following the date of the notice it will receive other applications in respect of the proposed service:

Provided that -

(a) where the application is for a road service licence or for anamendment thereof, which in the opinion of the Board should not be granted because the needs of the area of the proposed service are already adequately served or because the route proposed is unsuitable for the regular passage of a public service vehicle or for other good cause, the Board may refuse the application without giving any public notice of the application; and

(b) the provisions of this subsection shall not apply to any amendment of a road service licence which in the opinion of the Board is not substantial and does not seriously affect the public or any other holder of a road service licence.

(2) If no written representations against the application and, in a case where other applications may be received, no other application in respect of the service are received by the Board within the time specified in the notice, the Board may, subject to the provisions of this Part and in its discretion, grant the application upon payment by the applicant of the prescribed fee.

(3) If any written representations against the granting of the licence or, in a case where other applications may be received, any other application in respect of the proposed service are received by the Board within the time specified in the notice the Board shall by public notice specify the name of any applicant for the proposed service and appoint a day, not less than fourteen days after the date of the notice, and place for the purpose of receiving in public evidence for or against any application in respect of the proposed service and shall give notice of such time and place to any applicant in respect of the proposed service. Every representation against the granting of the service or other

application in respect of such service shall state the grounds in support thereof and in the case of any other application the conditions desired to be attached to the proposed licence shall be specified. The Board shall when giving notice to the applicant as hereinbefore required furnish the applicant with a copy of the written representations received by the Board.

(4) After receiving any evidence and any representations for or against any application in respect of the proposed service the Board may, subject to the provisions of this Ordinance and in its discretion, grant or refuse any application in respect of the proposed licence.

(5) The Board may in granting an application under this section make such variations in the route, time-table and fare-table applied for as to it seem desirable :

Provided that -

(a) the Board shall not make such variations in the route as would in the opinion of the Board make it a substantially different route; and

(b) the Board shall not make any substantial alteration in the time-table unless the existing licensees on the route applied for have had an opportunity of making representations in respect of the proposed alterations.

(6) Where the Board grants an application the secretary shall, upon payment of the appropriate fee, issue the road service licence as granted by the Board.

(7) (a) A licensee shall deliver up his road service licence to the secretary within ten days of being requested to do so by him.

(b) Such request shall be in writing and served personally upon the licensee or shall be deemed to be served if despatched by registered post to his last known address.

66. (1) The Board shall not grant a road service licence or make an amendment to a road service licence in respect of any route if it appears to it from the particulars furnished in pursuance of section 64 of this Ordinance that any provision restricting the speed of any motor vehicle or class

of motor vehicle or of all motor vehicles in any area made under this Ordinance or under the regulations is likely to be contravened.

(2) In exercising its discretion to grant or refuse a road service licence in respect of any route and its discretion to attach any conditions to any such licence the Board shall have regard to the following matters :-

(a) the extent to which the proposed service is necessary or desirable in the public interest;

(b) the extent to which the needs of the area through which the proposed route will pass are already met;

(c) the desirability of encouraging the provision of adequate and efficient services and eliminating unnecessary and unremunerative services;

(d) the applicant's reliability, financial stability and the facilities at his disposal for carrying out the proposed services;

(e) the number, type and design of vehicles which the applicant proposes to use under the licence;

(f) any evidence and representation received by it at any public sitting held in accordance with the provisions of the last preceding section and any representations otherwise made by local authorities, public bodies or any persons carrying on transport services of any kind likely to be affected.

Concerning these procedures, the Board in a letter of 27th April, 1982, had issued the following notice :

"Circular 1/81. 11/7

TRANSPORT CONTROL BOARD
P O BOX 6100
Nasinu

27 April 1982

Dear Sir/Madam

SECTION 66 OF THE TRAFFIC ACT CAP. 152

Please take note that in future the Board will reject all applications summarily if the provisions of section

66 are not fulfilled when applications are submitted to the Secretary, Transport Control Board.

The applicant should in their application deal with each provisions of section 66 in detail and where necessary submit certified copies of information needed.

This will apply to applications for Major Amendment of Road Service Licences and applications for New Road Service Licences.

Yours faithfully
(sgd) Shiri Ram
Secretary, Transport Control Board."

All the applications filed were economical in the extreme in providing such particulars.

City's application for example set out the timetable it proposed and then added:

"REASONS: The request by the Board at Lautoka Transport Control Board meeting on 2.12.82.

b. At present there is no bus service round the island.

c. Public demand.

VEHICLES TO BE USED: ALL VEHICLES SPECIFIED ON RSL 12/6/9
FARE TO BE CHARGED: Board's Standard Fares with 20 cents surcharge."

We were not given details of this request of 2nd December, 1982, but it seems likely that various operators were asked to put forward certain applications so they could be dealt with together. There were more than 60 quite extensive applications on various routes needing to be dealt with by March 1983, including those now being discussed. Despite the Board's letter no supporting material seems to have been put in in the cases we are concerned with except for four individual letters from private persons supporting Latchan's application.

The minutes of the meeting however set out quite detailed particulars of "Objections Received".

It appears that these were written documents filed by objectors pursuant to the newspaper notices. In their protestations they did contain a lot of information about existing services and timetables, and statements of conflicts which would arise and losses which would be suffered if services were increased.

For the purpose of better understanding it is perhaps convenient to summarise the applications in table form:

Applicant	Lodged	Advertised	Route	Times
City (Record P47) RSL 12/9/62	7.12.82	9.12.82	Suva via Queen's Rd Lautoka via King's Rd Suva	6 a.m. 11.40 a.m. 1.30 p.m. 6.55 p.m.
Pacific (Record P78) RSL 12/9/67	15.12.82	31 .12.82	Suva via Queen's Rd Lautoka via King's Rd Suva	6 a.m. 11.40 a.m. 1.30 p.m. 6. 55 p.m.
Sunbeam (Record P105) RSL 12/9/68	17.12.82	30.12.82	Suva via Queen's Rd Lautoka via King's Rd Suva	6 a.m. 11.40 a.m. 1.30 p.m. 7 p.m.
Victory (Record P.131) RSL 12/10/59	10. 1.83	15. 1.83	Suva via Queen's Rd Lautoka via King's Rd Suva AND Suva via King's Rd Lautoka via Queen's Rd Suva	6 a.m. 12.10 p.m. 1.00 p.m. 6.10 p.m. 6 a.m. 12.10 p.m. 1.00 p.m. 6.10 p.m.
Latchan (Record P190) RSL 12/10/66	17. 1.83	20. 1.83	Suva via Queen's Rd Lautoka via King's Rd Suva AND Suva via King's Rd Lautoka via King's Rd Suva	6 a.m. 12.10 p.m. 1 p.m. 6.10 p.m. 6 a.m. 12.10 p.m. 1 p.m. 6.10 p.m.
Vatukoula (Record P72) RSL 12/9/65 Of course Vatukoula is an entirely different applicant from the others.	18.12.82	6. 1.83	Suva via King's Rd Vatukoula AND Vatukoula via King's Rd Suva	10.30 a.m. 3.05 p.m. 11.10 a.m. 4.10 p.m.

These are now as best we can classify them, the logical headings under which the Judge dealt with a variety of rather untidily formulated complaints formulated before him.

The Time Limit:

The Judge held that Latchan's application was treated as a competitor with City (and others) and said that it was well outside the 10 day time limit fixed in section 65(3).

We do not accept that this is necessarily so. The difficulty arises in deciding whether all these circular route applications were competing with one another, or whether differences in timetable as between Victory and Latchan on the one hand, and Sunbeam/Pacific/City on the other hand made them different applications. (The former allowed 50 minutes at Lautoka as against 1 hour 50 minutes). If Latchan was competing with the other three, then it was out of time as an objection, or as "another application". The learned Judge held that Latchan should not have been considered.

Doubtless if there is only one original application and one objection-cum-application, under section 65(3) the Board would be entitled to disregard the later if it was out of time. But that we think disregards the way in which the Board treated this matter - and the Board must be the judge of whether an application competes with, or is relevant to another . At the Ba sitting it had before it City, Pacific and Sunbeam all asking for a circular licence, travelling clockwise around the island - a total distance of approximately 300 miles. It also had Victory and Latchan seeking a double circular licence - one service travelling clockwise and the other anticlockwise. It is true that there were slight differences in timetable between the two groups, but the Board has power in granting a licence to vary the terms from those applied for.

The record shows that there was filed against each application a number of objections. Most of these have a date alongside them. Latchan's objection is not dated. If there was anything in Mr. Koya's complaint it is only as against the objection by Latchan. As far as the Latchan (and other) application was concerned that was treated as a de novo application and was advertised in its entirety. So were the others. The Board was thereby treating them as separate applications and it was perhaps entitled to do so. However we feel this was an erroneous step. The Board should not have advertised what were really competing applications as if they were original applications - they should adhere to the time limit and the advertising direction in the subsection.

However the Board decided (though we think erroneously) to treat these as separate original applications. Erroneously because City, Sunbeam and Pacific were identical and Victory and Latchan were identical. But no objection was raised in either Court to that procedure so each application (as distinct from objection) stood independently of time limits - this had the undesirable effect of repeatedly extending the time which is contrary to the apparent intention of the subsection and should be avoided in future.

However counsel are agreed that thereafter the course followed at the hearing was the logical approach. After each applicant had put forward its case - and others had objected to it - decisions were deferred pending the hearing of the other similar applications. Obviously there are only a limited number of potential passengers, and a decision to grant a single circular licence to, say, City, would prempt half of Victory's application - for in considering each on its own, even without objectors, the first questions are - Is there a need? How far is it catered for at present?

No application, at a consolidated hearing like this, could be considered in isolation. Indeed the way

in which the Board dealt with these applications confirms that that was the Board's thinking as is shown in the final published decision.

Success for Latchan meant failure for City, Pacific and Victory - but no other resolution was passed refusing their applications - Sunbeam had already been eliminated but for a different reason. Although we deprecate the individual advertising the Board was quite justified in dealing with the applications in this way and there was no justification for applying a time limit to Latchan in respect of its application.

While this topic is being discussed - a comment was made by the learned Judge that having accepted the application from Latchan "the Board should first have dealt in all fairness with the prior applications". If this was meant to indicate that priority of hearing was accorded to Latchan, with respect, the minutes produced do not so record. In respect of the circular route applications - of which there were 5 - Latchan's application was heard after the others. No real point was taken before us on this matter and we disregard what appears to have been an erroneous comment. In passing we note from the minutes that in respect of most applications a very large number of other operators seem to have been heard as objectors, and some who were out for time on a strict construction of section 95(3) - but no complaint was made in the Supreme Court about this.

Lack of Evidence.

A very substantial point raised by counsel for the present 1st and 2nd respondents both in Supreme Court and before us was that the decision was taken without evidence on the matters, set out in section 66(2), which the Board is obliged to take into account. Stress was laid on subsection (f) relating to "evidence and representations received by it at any public sitting.....".

The learned Judge said in the course of the judgment that there was no evidence upon which the Board could have concluded there was a need for the services applied for.

As has been said the written material on the respective applications is sparse - and we have referred to the City application as an example.

The complaint is that apart from this brief material there was no other evidence.

Certainly there were no witnesses called, but we accept as valid the submission made by Mr. Newman for Latchan.

He submitted that the written material before the Board did comprise some material on which to act - apart from the reasons given in the applications it is apparent from the objections set out in the minutes that the pros and cons of the present services and whether or not they catered for the public need, and whether existing operators would be adversely affected by new licences was extensively detailed. That would have directed attention to the existing situation, and counsel spoke on the same lines.

However the matter goes further than that. We are concerned with the activities of an administrative tribunal - a licencing board set up to control an economic activity so that affairs in the community are regularised in a rational way. It has often been said that the material to be taken into account by such a body includes material from its own specialised knowledge, which comes to its members by experience and from the continual monitoring of the relevant public activity. More particularly is this so when the tribunal is exercising jurisdiction within a local area, has records of similar previous applications, and can be taken to be knowledgeable about prevailing conditions.

Rents Authorities, Planning Tribunals and Licensing Boards, particularly when they operate continually in the same geographical area, are giving consideration not only to the requests of individuals but to overall community needs, based on local knowledge and past experience. The present case is a good example. The Transport Control Board is set up to advise the Minister on traffic and transport matters, and for this purpose will continually be aware of current conditions; in considering the grant or refusal of licences it can use its existing knowledge of public transport services available, as against the demand for bus transport - in this instance around the Queen's and King's roads - an enquiry which must comprehend the majority of its licensing work on Viti Levu.

It is true that the cases which were under consideration were lacking in supporting evidence of the kind sometimes encountered in licensing application - Local Organizations, Chambers of Commerce, Consumer Groups and the like - but the fact that these obviously well represented and commercially experienced companies did not put forward such material may in itself be recognition that the bus operators accepted that the Board was knowledgeable and could be counted on to use that knowledge. We cannot see that this point could avail the appellants.

The Traffic Report.

Leading on from the question of material available to be considered is an issue which arose from a request made by counsel for one of the applicants (not Latchan) near the end of the Board's sitting at Ba. It was a request for the Board to obtain further evidence on the question of public need for the proposed services. In an affidavit, Mr. Lala, Chairman of the Board has agreed that the Board said it would obtain evidence by way of a report from the Transport Officers and enquire whether there was any need for such services, and when this became available

it would be made available to all applicants and objectors.

Such a report was called for. In view of allegations made that there was bias and predetermination in favour of Latchan, the cynic might note that the load checks which the Board asked its officers to make were headed up as being in the matter of the Latchan application. Perhaps this is no more than fortuitous.

However reports were received by the Board from two of its senior officers. In one it was reported that travellers interviewed said they were satisfied with present services and no further services were needed. We accept Mr. Newman's comment that this was but a random sample of persons who were apparently already travelling and it had little evidential value.

An examination of the balance of the report however is more informative. The officers drew up comparative tables showing the existing services (including Express Services) currently run by such companies as Pacific, Sunbeam and others against the proposed Latchan's service. In most respects the stopping places, the time of stopping and the destinations and arrival times were similar. The officers then listed passenger loadings on a number of existing services which had been checked and showed that generally speaking the buses were less than half full - often much less - for every stage of the journeys.

The report concluded by saying that "the load sheets and the timetables given above do not show the necessity for introduction of new trips at the present time".

Contrary to what had been indicated these reports, made in April, and received by the Board prior to it making and publishing its decision, were not made available to the applicants.

The record shows that during the time when the decision was reserved, and afterwards, solicitors acting for Pacific had been requesting the Secretary of the Board to make available the minutes of the Ba sittings, and the Traffic Officers reports - but without success until the 20th June 1983.

In the pleadings filed for Judicial Review, this failure in connection with the reports was one of the grounds of complaint.

In an affidavit, responding to the complaints, the Board's Chairman Mr. Lala said :

> " The Board says that the reports mentioned therein were not distributed as they were not considered adequate and relevant by the board and as they were rejected they were not distributed".

Now it is of course clear that the Board is free to accept or reject evidence or other material as it sees fit, and no complaint could be made if the Board had decided the report was merely "not adequate" - though one questions what more the officers could have done in response to the enquiry which the Board asked for onload checks for Suva-Lautoka and Lautoka-Suva express services. If it was not adequate then the Board could have asked for more detailed reports. But the comment goes further. The report was "rejected" as not "relevant".

An administrative body is free to exercise its judgment within its jurisdiction but in doing so it may not disregard matters that ought to be taken into account - in this case the matters comprehended in section 56(2) (a) and (b).

We agree with the learned hearing judge that nothing could be more relevant than information as to the availability of existing services to cope with demand - and the fact of partly empty buses running on comparable

services to those proposed was information of substantial importance, and to fail to take it into account as "irrelevant" is within the class of errors which render the Board's exercise of its power subject to judicial review.

Bias.

In its motion and particulars the bias alleged principally related to an incident at the close of the hearing on 10th March, 1983.

The Board Chairman apparently referred to a social function which was being held that evening by one of the local bus companies - not one of the present parties - and he said that "the bus operators would have the opportunity to lobby the Board members at that function".

When proceedings resumed the following day Mr. Koya, counsel for Sunbeam who had not been present on the 10th March raised this matter, stating that according to his instructions Board members and bus operators had attended such a gathering the previous evening and accordingly further hearing of the applications should cease. The Chairman agreed that he had made such a remark but only as a joke, and he ordered proceedings to continue.

Now the test in these matters is well understood - would the circumstances cause a reasonable onlooker to think there was a real likelihood of bias? - i.e. not proof of the same but reasonable suspicion.

The learned Judge thought that this was so - but for ourselves we cannot see that the onus on the complainant was discharged. It was an imprudent remark for the Chairman to have made and it was unwise for Board members to mix socially with applicants during the course of the hearings.

But it would seem unlikely that such a jocular remark would be taken seriously - for if the Chairman was

so removed from propriety that he and his members were open to private overtures, it would be unlikely that he would announce that publicly. And there is no evidence that Mr. Latchan attended the function - if he had we feel certain someone would have sworn an affidavit to prove it.

Other lesser matters were raised - that a Board member had prior to his appointment worked for a solicitor who did work for Mr. Latchan - that when the Board and Latchan were preparing to contest the Motion for Review there was a rather unusual degree of collaboration between them in preparing affidavits - and finally that the Board's Secretary is said to be Mr. Latchan's brother-in-law.

These are matters of little substance and in our view fall far short of the degree of proof required to establish such a grave allegation.

Fair Hearing.

This is the matter which more than any engaged the attention of the learned hearing Judge and in our view was the most substantial ground for complaint.

It will be remembered that operators may object and may also apply. It has previously been noted that each of the five operators filed what were treated as original applications for a single circular or double circular licence. The sequence of filing is set out in the table (supra). Latchan's application was the last in point of time. Sunbeam was third - approximately a month earlier.

In the printed record the form of each application is followed by what are obviously written objections filed by other operators. In the case of City's single circular application there were a number of objections filed, including one by Sunbeam which reads :

"(1) 15.12.82 - SUNBEAM TRANSPORT LTD.

'We refer to advertisement in the newspapers dated 9 December 1982 for Express Service Suva/Lautoka via Kings Road, Lautoka/Suva via Kings Road.

We object to the granting of this application on the following grounds:

(1) The proposed timetable by City Transport specifies daily trips as follows :

Suva/Lautoka via Kings Road

Suva dep. 11.00 am Arrive Lautoka 4.35 pm
Lautoka depart 11.00 am. Arrive Suva 10.35 pm.

Lautoka/Suva via Kings Road

Lautoka Depart 1.30pm. Arrive Suva 6.55 pm.

The above timetable will clash with our existing trips as follows:

(a) We have a service departing Suva on Sunday at 12.00 pm for Vatukoula.

(b) We have a daily Express Service departing Suva at 1.30 pm for Lautoka.

(c) We have a daily Express Service leaving Lautoka at 12.15 pm for Suva.

(d) We have a service departing Lautoka on Saturdays and Sundays at 2.15pm for Suva.

We make strong representations against City Transport's decision to enter the Queen/Kings Road Services, as City Transport is not a long distance operator and is, by of the advertised application, attempting to upset the operation of all existing operators. Longhaul bus operation is an entirely different aspect of transport operation from the City and suburb operation to which City Transport is accustomed. We strongly believe that City Transport Limited does not have the expertise to take on the services applied for via the captioned application.

We request that the Board reject the captioned application'. "

This is an example of the assertions made by other operators on such matters as the existing services, their patronage or lack of patronage and similar matters which as we have said earlier comprised part of "material" before the Board. In this example Sunbeam stressed the unsuitability of City as a longhaul operator in comparison with existing licencees.

Similar objections were filed by Sunbeam (and others) against the other rival applications.

Against Pacific it stressed that there was no need because of existing coverage.

Against Victory it referred to loading numbers.

Against Latchan that there was no need for additional services and Latchan was only a Suva/Nausori operator.

If one turns to the minutes of the proceedings, which regrettable are rather disjointed it appears that when City's application was being considered Mr. Koya for Sunbeam spoke in support of his objection, tendered some written material relating to the section 66 particulars and said Mr. Jalil of Sunbeam would give evidence.

The minutes however are fragmented and only show that in some way Mr. Koya was told that evidence could be given when his application was heard, but that he could not object to the granting of a licence and also apply himself, and he was to elect whether to discontinue his opposition or discontinue his application. Under protest Mr. Koya discontinued his application and thereafter appeared only in opposition to various other applications.

Mr. Newman has endeavoured before us to submit that this prohibition to opposition made in conjunction with an application only related to preventing the calling of evidence at that stage to prove there was no need for the service. However we do not accept this for two reasons. First, because the evidence in affidavit form, which we will set out hereunder does not support it, nor indeed is it logical or fair to refuse to hear evidence at the opposition stage; and secondly we see no reason why an operator cannot both object and apply. The provisions of section 65(3) allow such a course and it is a permissible and indeed not necessarily illogical attitude for a litigant to adopt. It has already

been noted in paragraph 11 of Mr. Maharaj's affidavit that Pacific submitted to the Board that its primary stance was that there was no need for the additional Express Service and wished all applications to be refused; but if contrary to its submission the Board held that there was a need, then Pacific claimed the existing operators on that route had better entitlement and qualifications than other applicants.

A common enough type of approach in many fields of litigation.

The uncertainty in the minutes has been referred to - for certainty we must turn to the affidavits of Mr. Jalil of Sunbeam and Mr. Maharaj of Pacific and the reply affidavit by Mr. Lala.

Mr. Jalil had deposted (para. 12) that: "the Board had wrongfully prevented the First Applicant to pursue its application.....which was properly lodged,advertised and placed before the Board....." and Mr. Maharaj (para.13) had deposed that :

> "the Board wrongfully prevented the Second Applicant to pursue its objections..... to other operators when such objections were properly lodged and placed before the Board...."

Mr. Lala replied :

> ".....it has been the established procedure of the Board that where an applicant lodges a competing or similar application to an existing application then before the matter is heard he's given a choice either to proceed with his competing application or to object to the existing application but he is not allowed to do both. It was to this ruling that Mr. Koya objected but withdrew his competing application under protest.
>
> These matters are referred to in the minutes of the said meeting dated 11.3.83 and attached herewith marked 'A'. "

The minutes show that Mr. Koya challenged that the Board had ever previously laid down such a policy or procedure, but on the Chairman ruling it was so, Mr. Koya, under protest, elected to continue with his client's objection to the grant of any licence and abandoned its own application.

That Sunbeam was no longer considered for a circular route is confirmed by the record of the Board's final decision of 27th April, 1983, where no reference is made to Sunbeam being one of the applicants although the other four were listed.

We agree with the conclusions of the hearing Judge that this was total denial of a hearing of a party entitled to be heard, and apart from any other matters discussed under other heads must call for judicial interference.

Mr. Newman made an alternative submission - namely that there was an onus on Sunbeam to show that it was prejudiced. It is now recognised law that a breach of procedure which has hindered a party from the fullest expression of his case will not of necessity call for review unless something of substance has been lost. We do not think it necessary to rule on the question of onus but certainly the court will ask itself what damage if any has been done - and if there is no possible prejudice then it would be vain to interfere. But those will be rare cases - see R. v. Environment Secretary ex parte Brent 1982 2 W.L.R. 693 at 734. It is certainly far from the situation here.

The Board for whatever reason decided that there was a need for the additional circular service. There were five applicants. The only two with existing services, and with experience and facilities on the route, were Pacific (40 years) and Sunbeam (27 years). The other three operated shorter routes from Suva. For some reason Pacific was rejected but that is not to say that Sunbeam could not have succeeded. It may have had a good case to put forward as to the superiority of the service it was willing to provide if such a licence was to be granted - certainly it was entitled to be heard. Nor do we think there was undue delay or prevarication on the part of Sunbeam's advisors, such as should persuade a court to decline to exercise its discretion. Mr. Koya did protest vigorously before being forced to withdraw his client's

application, and he did ask for an adjournment which was refused over the "lobbying incident". After the decisions were reserved Pacific's solicitors were seeking copies of the minutes and of the officers' reports but were unable to obtain them.

Vatukoula.

This was quite a separate matter. It concerns a proposed service from Suva along the King's Road to Tavua (about three-quarter of the way to Lautoka) and thence inland a short distance to Vatukoula. There were some objections filed by other companies on the ground of competition with their own services, but there were no competing applications. The licence was granted at the conclusion of the Ba hearing.

The Motion for Review levelled some of the same complaints as in the Lautoka case - viz, adverse affect on existing licencees, bias and lack of evidence. In his judgment the learned Judge said :

> " I find as a fact that the Board did not properly exercise its discretion in approving the applications of Latchan and Vatukoula in that it clearly failed to consider the relevant provisions of section 66 of the Act".

and later -

> " Vatukoula has not been mentioned to any great extent in my foregoing remarks. There is no suggestion that any Director of Vatukoula has in any way acted improperly. However, it is quite impossible to consider the Board's decision on Vatukoula's application in isolation.
>
> All applications before the Board in my view were tainted by the improper actions of its Chairman. Operators who could have applied for similar services as Vatukoula and/or objected to its application, were not given a proper hearing or had its objections ignored because of a ruling the Board should never have made".

and further -

> " In addition to the breaches I have referred to, I find as a fact that the Board did not properly consider the matters it was obliged to consider under section 66 of the Act before exercising its discretion. That finding in itself is sufficient reason to grant the applicants the relief they seek."

With respect, we cannot agree that Vatukoula and Latchan fall to be considered together. We have already held that the Board is entitled to act on its own knowledge and on such material as proposed timetables and the like in concluding whether or not there is a need for the service. Having so concluded, in the absence of other applicants it was entitled to grant the licence to Vatukoula. Certain findings were made which affected the validity of the entire proceedings, but we have felt obliged to reverse those findings - viz :

(a) the alleged absence of evidence on which to act
(b) bias.

The denial of a hearing of Sunbeam was in respect of its circular route application and was not related to the Vatukoula service nor did any question of time limit arise for this was an independent application. Similarly the traffic report was called for only in relation to the circular route, so that we conclude that Vatukoula's decision was not affected by the two matters which we have held were defective in the Latchan case i.e. failure to give a hearing, and failure to treat the reports as relevant.

Conclusion.

While accepting the appellant Latchan's submissions concerning the findings on time limit, lack of evidence, and bias, we reject them on -

(a) breach of natural justice by denying the First Respondent a hearing as canvassed by it in its Motion for Review and

(b) failing to consider relevant matters as canvassed by both First and Second Respondents in the same motion viz the Traffic Report.

Consequently the order removing into the Supreme Court the decision of the Transport Control Board of 27th April, 1983, whereby Latchan was granted the relevant licence, and the quashing of the same is confirmed.

The consequence of that order is that the 5 applications, of City, Sunbeam, Pacific, Victory and Latchan have not been disposed of and the same are referred back to the Board for hearing and determination.

Further, and for the reasons most recently stated above the appeal against the decision of the Supreme Court quashing the grant of a licence to Vatukoula is allowed and the original decision of 11th March, 1983, is restored.

The Consolidated Appeals.

After the decision of the Supreme Court was delivered on 9th September, 1983, the Board met to consider the same. No further direction had been given as to the further course of proceedings. Apparently believing that some steps had to be taken the Board advised Latchan and Vatukoula that their licences were to be returned. In view of the order quashing the decision this step was unnecessary and of no effect.

However without further ado the Board then proceeded to grant temporary licences to the same effect to both operators, pursuant to section 74.

Not surprisingly this immediately led to a further Motion for Leave to Apply for Judicial Review of

that decision by the Board - and the remedies sought were Certiorari, Prohibition and Injunction.

Orders as sought were made by Rooney J. and these too have been the subject of appeal by Latchan and Vatukoula, and the hearing of these appeals were consolidated with that from Kermode J.

In the event very little was made of this later matter because under section 74, temporary licences run only for 3 months and then lapse, and as all counsel recognised that time has long since passed. Indeed Rooney J's decision was given on 18th October, 1983, so that the temporary licences were only in force for a little over one month. Even if his decision was reversed, these licences would have lapsed by now.

In passing we wish to endorse the strong disapproval voiced by Rooney J. concerning the Board's action. Section 74 empowers the Board to grant temporary licences when "it considers the public interest necessitates the immediate establishment of a new service". Rightly or wrongly the Supreme Court has held that there was no such need demonstrated and the Board's action could only be interpreted as defiance of that decision, and an unwillingness to consider the rights of others which the Supreme Court said had been wrongly ignored. The lends colour to the very unsatisfactory picture that the Board has painted of itself from time to time in these proceedings. However that may be there is still one matter remaining to be disposed of on the consolidated appeals.

As well as removing the Board's decision and quashing the same Rooney J., and with some justification, was apparently apprehensive that the Board might transgress again.

Consequently he granted an injunction restraining the Board from issuing temporary licences between Suva and Lautoka either on the King's or Queen's Road "or any other licence under section 74(1) of the Traffic Act over any portion of the route thereby covered" and Latchan and Vatukoula were similarly restrained from operating any such licences.

We understand and endorse Rooney J's reasons for so ordering, but now that the substantive matters have been resolved some modification is called for.

As Vatukoula has succeeded in its main appeal, its consolidated appeal is allowed in so far as the above detailed injunction related to Vatukoula and to that extent it is discharged.

As far as Latchan is concerned the injunction can stand save that no time limit was placed on it - read on its face it meant that Latchan could never in future obtain any temporary licence on the King's and Queen's Roads. We are sure Rooney J. did not intend that result and the appeal by Latchan is allowed to the extent that the injunction issued against the Board and against it are modified by adding the words "until the further hearing and determination by the Transport Control Board of the applications Nos. RSL 12/9/63 (City), RSL 12/9/67 (Pacific), RSL 12/9/68 (Sunbeam) RSL 12/10/59 (Victory) and 12/10/66 (Latchan)".

Supplement Concerning Procedure.

Because of the very recent introduction of Order 53 in Fiji in 1981 there has been little experience here of the operation of the new procedure for Judicial Review. Kermode J. outlined these difficulties in the early part of his judgment and we concur in his observations as to how these matters should be handled. The change came as a consequence of Fiji following the new

procedures introduced in England initially in 1938 and later in 1979 - replacing archaic procedures followed in former times. As Kermode J. pointed out however, although the procedures changed the essential nature of the remedies remained the same - although with the addition of further remedies - declaration and injunction which would otherwise have been sought by way of originating application.

The jurisdiction was exercised by the Court of Queen's Bench - proceedings could not be issued by the private litigant - for the control at the behest of the Crown whose prerogative it has always been to supervise inferior courts. The historical development can be found discussed in appendices to the various Editions of Professor de Smith's text book on Judicial Review. Hence, when this remedy became available to individuals, the need for leave to commence proceedings; formerly by obtaining an order nisi returnable to the High Court, and more recently by way of motion for leave. The Crown became the nominal applicant but proceedings were initiated by the person aggrieved.

Once the leave is granted proceedings are intituled as R. v.....naming the tribunal or other body as the respondent, adding the name or names of the applicants in the "ex parte" role. We accept the procedure followed by Kermode J. as correct in this respect including his observation that despite an apparent slip in the Fiji order, the Crown Office should be served with the motion for leave.

Where the complaint relates to proceedings where no other parties are involved, such as a criminal case before justices or a magistrate then the burden falls on the party who obtained leave, albeit the proceedings are nominally in the name of the Crown. Neither the Attorney-General nor any Law Officer should appear for the Crown nor for the respondent tribunal, which however

should brief counsel to assist the Court and participate to a greater or less degree as circumstances require.

Where the original proceedings were more of an inter partes nature, then when leave is given other interested persons should also be made parties and served. At the hearing the matter will then become more of a lis inter partes, and the tribunal should restrict its participation to a more neutral roll, by assisting the Court if required on such matters as its understanding of procedural points and the like - a function which was very properly discharged by Mr. Young Q.C. and other counsel appearing before us in this matter.

Although inferior Courts and Tribunals are in one sense appointed by the Crown, they are independent of the Crown in the discharge of their judicial, quasi-judicial and executive functions - as too with Ministers - so Law Officers should not appear for them but other counsel should be briefed. In some circumstance however the Judge granting leave may consider that the public interest should be represented, and in such circumstances may think it proper to add the Attorney-General as a party for such purpose and he will arrange appropriate representation. It will be seen therefore that we endorse the course followed by Kermode J. and his adoption of the procedures discussed by Professor Wade in Chapter 17 of his various editions.

The only matter which troubles us, and which was not raised in the Supreme Court, is the submission by Mr. Young that as the Board is not an incorporated legal person having perpetual succession, it cannot be made respondent in proceedings of this nature. We do not accept this. The reports abound with cases where the actions of a wide variety of bodies have been the subject of prerogative orders - many of them being un-incorporated - and we are indebted to Mr. Newman for his many examples of bodies exercising even purely administrative

functions which have been involved in such proceedings let alone licensing authorities clothed with the power to conduct hearings and grant rights and privileges to applicants. Such bodies should be sued in their corporate or statutory name.

The only difficulty which might arise would be in enforcement procedures, where the primary purpose is to obtain an injunction and in such cases it may be necessary to name the individual members. So too in cases where there is no body, as such, appointed by statute, but an individual holding a judicial position, such as a Magistrate.

Conclusion.

The appeal (No. 45/83) by Vatukoula is allowed with costs against the 1st and 2nd Respondents.

The appeal (No. 45/83) by Latchan is dismissed with costs and the matter of all five applications referred to therein is remitted to the Board for rehearing.

No argument was submitted by the Board in support of its appeal No. 51/83 and the same is dismissed without costs.

Appeals Nos. 57/83 and 61/83 are varied by limiting the injunctions issued to the period until the above matters in appeal No. 45/83 are reheard by the Board but in all other respects they are dismissed without costs.

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