IN THE FIJI COURT OF APPEAL

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CIVIL JURISDICTION

CIVIL APPEAL NO. 67 OF 1992
(High Court Judicial Review No. 36 of 1990)

BETWEEN:

PACIFIC TRANSPORT LIMITED	APPELLANT
-and-	
SUNBEAM TRANSPORT LIMITED TRANSPORT CONTROL BOARD	RESPONDENTS

Mr. F. S. Lateef for the Appellant
Mr. H. K. Nagin for the first Respondent
Mr. J. Semisi for the second Respondent

Date of Hearing	:	11th February, 1994
Date of Delivery of Judgment	:	10th March, 1994

JUDGMENT OF THE COURT

The appeal in these proceedings is against the decision of Byrne J. in the High Court to reject the application by the appellant ("Pacific") for judicial review of a decision of the second respondent ("the TCB"). By that decision the TCB had granted an application for a road service licence to operate an express bus service from Ba to Suva and return which the first respondent ("Sunbeam") had made under section 64 of the Traffic Act (Cap 176). The grounds of appeal were as follows:-

> *"1. THE learned Trial Judge erred in law and in fact when he ruled that no resolution was made until after the departure of Mr. Whiteside.*

2. *THAT the learned Trial Judge erred in law when he failed to consider that a resolution cannot be changed at the same meeting.*

3. *THAT the learned Trial Judge erred in fact when he ruled that there was no Ba/Suva/Ba services at the relevant times when these services were being run by the Appellant.*

4. *THAT the learned Trial Judge erred in law in failing to give proper weight to the summary dismissal by the Transport Control Board of a similar application.*

5. *THAT the learned Trial Judge erred in law when he failed to properly consider the issue of bias.*

6. *THAT the learned Trial Judge erred when he ruled that the issue of failure to give reasons was not a ground of relief and that reasons were given.*

7. *THAT the learned Trial Judge erred in law when he permitted the Respondent Board to take an active part at the hearing.*

8. *THAT in all the circumstances of the case, the learned Trial Judge did not properly exercise his discretion and erred in law in not quashing the Respondent Board's decision dated 26th November 1990."*

At the hearing Mr. Lateef did not pursue grounds 3, 7 and 8.

The evidence before the trial Judge comprised affidavits sworn by directors of Pacific and Sunbeam and by the Secretary of the TCB and oral evidence given at the hearing by the Secretary and a member of the TCB. Numerous documents were exhibited to the affidavits. They included the records of meetings of the TCB and a written statement of the procedures and guidelines adopted by it to regulate its decision-making in respect of applications

made under section 64. They included also details of material which had been provided to the TCB in respect of Sunbeam's application for the road service licence. After the oral evidence had been given, the hearing was adjourned and counsel for Pacific and Sunbeam made their submissions in writing. It would, in our view, have been preferable if the usual practice of closing addresses being made orally at the end of the hearing had been followed, as the second of the written submissions was not lodged until nearly seven months after the hearing. Although the Judge was admirably prompt in delivering his judgment thereafter, the procedure adopted resulted in a lengthy delay which ought not to have occurred.

Grounds 1 and 2 of the appeal are inter-related and can be dealt with together. Byrne J. made a finding that the TCB made only one decision, namely to grant the licence. Counsel for Pacific drew to our attention evidence given at the hearing by Mr. G. H. Whiteside, a member of the TCB, that the Chairman requested the members to vote on Sunbeam's application, that the vote was taken and was 3-2 against granting it, that discussion of the application nevertheless continued and was not concluded by the time that he left the meeting and that he then told the other members that he would go along with the decision of the Board. Questioned by counsel for Sunbeam, he said that the 3-2 vote was "an indication of how the Board felt" but that, when he left, he knew the matter was still to be discussed. The written record of the meeting refers only to the expression of views by the members before Mr. Whiteside left the meeting; his views and

those of two other members were that Sunbeam's application should be refused. We think too much attention may have been given to the expression used by Mr. Whiteside that a 'vote' had been taken. The Minutes of the TCB do not use this expression, and Mr. Whiteside qualified it later in his evidence by saying that he knew when he left the meeting that the discussion had not concluded. This would account for the fact that he was content to leave the final decision to those who remained at the meeting. We have come to the conclusion that Mr. Whiteside's evidence is not necessarily inconsistent with Byrne J's conclusion that there was only one decision, which was made after Mr. Whiteside had left the meeting. We are satisfied that he made no error in coming to his conclusion on the matter and that neither of grounds 1 and 2 is made out.

We can find no merit in ground 4 of the appeal. Seventeen days before the TCB granted Sunbeam's application, it had rejected an application by another bus company for a road service licence for the same route. It had power under proviso (a) to section 65(1) of the Traffic Act to do so but only for good cause. It informed the bus company that it was refusing its application because the needs of the area were already adequately served. In view of the provisions of section 66(2)(a) it was implicit in its granting Sunbeam's application that, when it did so, it was of the opinion that the needs of the area through which the service would pass were not adequately met. It had held a public hearing and received a good deal of evidence relevant to that question. There was nothing illogical in its

forming on the basis of that evidence an opinion which was different from the opinion which it held when it summarily refused the other application. Possibly it acted precipitately in refusing that application summarily but that is not a matter with which we are concerned in this appeal.

In support of ground 5 Mr. Lateef referred to the record of the TCB's meeting which showed that one member, Mr. Baleilakeba, had observed that Pacific was "more or less a monopoly operator" on the route, that the TCB should encourage competition, that Sunbeam had "helped the Board" in most areas and that the TCB should ask operators to share economical and uneconomical routes. In the High Court, in response to a similar submission, Byrne J. held that that did not demonstrate bias; it was "simply a reminder to the Board by one of its members of the matters the Board should take into account". Mr. Lateef initially submitted to this Court that, in exercising its discretion under section 65(4) of the Traffic Act to grant or refuse a road service licence, the TCB could take into account only those matters specified in section 66(2). Consequently, he argued, to take into account that an applicant had "helped" the TCB by undertaking uneconomical services on other routes vitiated the exercise of the discretion and demonstrated bias. However, subsequently he conceded, correctly in our view, that, provided that the TCB had regard to the matters specified in section 66(2), it could take other relevant matters into account, and that the matters referred to by Mr. Baleilakeba were relevant matters. We are satisfied that taking them into account did not

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constitute bias. It did not show actual bias; nor, whether the "real likelihood" or the "reasonable suspicion" test should be applied, would it have caused a reasonable man fully apprised of the facts to apprehend that there was a substantial possibility of bias (R v Camborne JJ., ex.p. Pearce [1955] 1 QB 41) or reasonably to suspect bias (Metropolitan Properties Co (F.G.C.) v Lannon [1969] 1 QB 577). The appeal on ground 5 must, therefore, fail.

Ground 6 raises a matter which was not made a ground of the application in the High Court. Although it was argued by counsel in that Court, counsel for Sunbeam submitted there that, as the issue had not been included in the grounds of the application for judicial review and had not been raised in the High court proceedings at any stage before the written submissions which were made in lieu of closing addresses, it could not be relied on by Pacific. In his judgment Byrne J. accepted the submission that the matter could not be raised by Pacific at that late stage. In our view, that concludes the matter and we should not consider the merits of the submission, even though, incorrectly, Byrne J. did so, in spite of having held that the issue could not be raised. The appeal on ground 6 must also fail.

As stated above, Mr. Lateef did not present arguments in support of grounds 7 and 8. Accordingly the appellant has failed on all the grounds of the appeal and it must be dismissed with costs.

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Sir Peter Quilliam
Judge of Appeal

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Mr. Justice Ian R. Thompson
Judge of Appeal

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Mr. Justice Savage
Judge of Appeal