IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 302/2019

BETWEEN	**PARADISE TRANSPORT LIMITED** a limited liability company having its registered office at Nayawa, Sigatoka, Fiji **PLAINTIFF**
AND	**LAND TRANSPORT AUTHORITY** a statutory body established under the Land Transport Act 1998, having its registered office at Lot 1, Daniva Road, Valelevu, Nasinu. **DEFENDANT**
APPEARANCES :	Mr R Singh for the Plaintiff Mr V Chand & Mr W Uri for the Defendant
DATE OF HEARING :	14 September 2020
DATE OF JUDGMENT :	**10th November 2020**

DECISION

1. By an originating summons filed on 15 November 2019 the plaintiff bus operator Paradise Transport Limited (*PTL*) applied for orders by the court directing the defendant, the Land Transport Authority (*LTA*), to process the following applications lodged by the plaintiff with the defendant on the dates referred to, seeking the grant of Road Route Licences (RRL):

i.	*7 February 2013*	*A new RRL application for a proposed bus service route between Suva/Lautoka/Suva overnight via Queens Road*
ii.	*7 January 2018*	*A new RRL application for a proposed bus service route between Sigatoka/Nacova/Sigatoka*
iii.	*17 January 2018*	*A new RRL application for a proposed bus service route between the Warwick Hotel and Nadi Airport.*
iv.	*17 January 2018*	*A new RRL application for a proposed bus service route between Suva and Lautoka via Queens Road*
v.	*17 January 2018*	*A new RRL application for a proposed bus service route between Nadi Airport and Nausori Airport via Queens Road*
vi.	*17 January 2018*	*A new RRL application for a proposed bus service route between Suva/Lautoka/Suva via Queens and Kings Roads (round the island).*

Background

2. The summons was supported by an affidavit by Mr Rohit Singh, a director of PTL, on 31 October 2019, in which Mr Singh says:

   i. that the applications referred to above were filed by PTL on the dates specified above. In apparent response to all but the second of these

applications (listed in the letter) LTA wrote to PTL on 19 January 2018 asking PTL to file the requisite particulars in support of the applications, as set out in RRL Guidelines approved by the LTA in 2014, a copy of which was said to be attached to the letter. This letter from LTA (but not the attached guidelines) was annexed to Mr Singh's affidavit. It refers to the **Proposed Amendment for Paradise Transport Limited** in the subject line, and in the body of the letter talks about *the proposed application for amendment received by the Authority as listed below*. The letter then lists the applications referred to in the table in paragraph 1 above (other than item 2 in that list), with dates corresponding to those in the table.

ii. that PTL provided the additional information (although the covering letter dated 1 March 2018 with which Mr Singh says this information was included refers to some information having already been supplied, other information that would be supplied 'next week', and asks for more explanation from LTA about other aspects of what was required).

iii. that the criteria for applications changed after the PTL applications were lodged, and LTA suspended the issue of new RRLs for a period pending the announcement of the new guidelines.

iv. in February/March 2019 LTA issued new guidelines, and on 22 March 2019 PTL lodged fresh applications for RRLs. It is not clear if these were intended to replace the applications listed above, or are In addition to them.

v. the LTA has declined or refused to process the applications, and failed to respond in any way to requests for progress.

3. An affidavit in reply was sworn by Susau Hazelman on behalf of LTA, and filed on 6 January 2020. The LTA's position is:

i. The 'applications' filed by PTA were not applications at all, but were 'proposals', and *there is a significant difference between an application proper using the application form with the paid application fees, and a proposal.* This difference is not explained, and – given the fact that the 'applications' filed by PTL use forms prescribed by LTA that are headed **Application for Road Permit (Road Route Licence) Transfer/Reissue/Amendment** – this distinction seems surprising.

ii. The 'proposals' were not lodged on the dates set out in paragraph 1 above, but were instead *received and stamped* by LTA on the following dates:

Overnight Suva/Lautoka Express	07/02/2013
Sigatoka/Nailovi/Sigatoka	No receive stamp
Warwick/Nadi Airport	20/09/2018.
Suva/Lautoka express	No receive stamp
Nadi Airport to Nausori Airport	20/09/2018
Suva/Lautoka Round the Island	20/09/2018

Again this seems surprising since the letter sent by LTA to PTL on 19 January 2018 (see paragraph 2(i) above) confirms the dates of receipt as set out above.

iii. the 2013 application was put on hold *because of pending court cases involving PTL on the issue of RRL.* Copies of a number of High Court and Land Transport Appeal Authority decisions from 2015 and 2018 are attached, none

of which appear to have any connection with the current matter, nor provide any obvious reason why such proceedings should warrant the 2013 and 2018 applications/proposals to be *put on hold/*

iv. during this time there was a directive freezing all new applications for RRL because the LTA was in the process of reviewing and formulating new RRL Guidelines that were put before LTA in April 2014, and reviewed again in November 2014. No copy of this directive is provided, although copies of both the old (2014) and new (2019) Guidelines have been put in evidence.

v. an inspection was carried out by LTA of the PTL garage/workshop in January 2019 (long after the applications were lodged by PTL), which showed that the workshop was substantially non-compliant with the Quality Assurance Management System (QAMS). It is not clear from the LTA affidavit what the significance of this is to the processing of PTL's applications.

vi. the 'proposals' lodged by PTL did not include the *complete documents requirements in order for a proposal to be an application* and accordingly – in compliance with regulations 3-5 Land Transport (Public Service Vehicle) Regulations 2000 - LTA did not proceed with processing the 'proposals'.

vii. Once PTL provided all the information required for an application (as set out in the application form and the regulations) LTA would have processed the application.

4. Annexed to the affidavit on behalf of LTA are what appear to be copies of the six applications lodged by PTL. It is not clear whether what is attached is all of what was lodged by PTL, or is only part of what was lodged. Three of the applications have accompanying them what appears to be a check sheet, listing the documents required for an application, and noting whether those documents are included with or are missing, with column of comments. The form is headed with the following:

> **RRL Guidelines – w.e.f. 01.06.14 and Pursuant to Section 38 of Land Transport Act 1998**
> **Approved vide Board Policy Meeting on 24.04.14 at LTA Valelevu and reviewed and endorsed by the LTA Board on 27.11.14**
> **Documents for New/Renewal/Transfer and Amendment of RRL Permit**

and at the foot of this sheet are the following words:

> **<u>Note:</u> Application shall not be received by Customer Services Officers at the counter if any requirements above is not met by any new or existing operators.**

It is not clear whether this form is part of the application, informing an applicant, and providing a convenient checklist for what information is required, or is merely an internal document of LTA's for use by staff in accepting and checking an application. The forms have columns for ticks and crosses to signify whether or not a requirement has been complied with. Again, it is not clear who has completed these columns (with handwritten ticks and crosses); they may have been filled in by the applicant to show LTA what had and had not been included, or they may have been completed by someone at LTA checking that all necessary material was present before the application was submitted to the appropriate decision-maker. Whatever the explanation, the three forms (out of six applications) that have been annexed to LTA's affidavit show ticks for only five of the 23 listed items, and crosses for all the

rest. The following required information was seemingly not provided by PTL with its applications (the numbers below correspond to the number for that item in the form and the words in bold appear in the Comments column of the form):

1 *Number of buses owned with current fitness and their particulars*
2. *Number of buses required (current fleet commitment according to RRL).* ***Comment: Tot No. of fleets per RRL***
3. *Number of buses required if NEW/Amendment is approved.* ***Comment: This is for amendment and new application only***
4. *Number of extra/surplus buses held by the operator (apart from the commitment listed)*
5. *History of applicants experience in the bus industry and other subsidiary or business entity (Curriculum Vitae)*
6. *Applicant financial viability (A Bank letter from their main Financier)*
8. *Memorandum of Association (MOA)*
12. *Tin Letter/ FIRCA Tax Clearance Letter*
14. *Consent of other operators on the route (for amendment & new application).* ***Comment: To be submitted by applicants***
15. *Load Checks & summary of all routes applied (Load checks form to be attached with statutory declaration).* ***Comment: For existing operators on the route***
16. *Photo of office facilities & garage*
17. *QAMS Report/Certificate* ***Comment; Certificate 1,2,3 if new then QAMS inspection will be done later.***
18. *Three Character References (Communities/Banks/Religious Organisation*
19. *Application to be signed/stamped by any of the Directors*
20. *Support letter from the public (Provincial Council/District Officers & PS of relevant departments.* ***Comment: for new or amendment of route only***
21. *List of all permits (RRL/Rental/Taxi) registered under the company or subsidiary.* ***Comment: To be in statement form***
22. *Two passport photo of any of the Directors (for renewal only) new – photos of all Directors*
23. *Waybill Report for each RRL (Last 3-6 months)* ***Comment: N/A for new application***
24. *Original permit (To be surrendered for renewal & amendment application)*

5. In his affidavit in reply filed on 16 January 2020 Mr Singh answers the LTA assertions, including with the following:

8. *... after the report on the garage of the Plaintiff, the Plaintiff has carried out substantial improvements and is waiting for a subsequent inspection by the Defendant. I understand that the Defendant is to inspect the garage at least every three months which it has failed to do.*

Furthermore, I understand and am personally aware that there have been instances where the Defendant processed application for RRL even where the garages had substantially defected. In any event the Defendant has not informed the Plaintiff that it has refused to process or vet the Plaintiffs application on the basis of the assessment [referred to].

10. *... the Defendant has never informed the Plaintiff that it required further papers and information from the Plaintiff to process the application for the RRL made by the Plaintiff. The Defendant is required to inform the Plaintiff that the applications made by the Plaintiff had insufficient papers.*

Furthermore, the Defendant had accepted the lodgement of these application and sought to vet the same. After vetting the application, the Defendant would advise on the application fee to be paid by the Plaintiff. The Defendant has failed to inform the Plaintiff that:

It required more documents from the Plaintiff, and
Payment of the application fee.

11. *... the Defendant by not processing the application made by the Plaintiff is not carrying out its statutory function and is not complying with the regulations and processes that it deposes it is required to uphold.*

Preliminary issues

6. Both parties invited the Court to strike out the affidavits of the other. The plaintiff's counsel submitted that the affidavit of Susau Hazelman contained, in paragraphs 8 & 11, legal submissions rather than *such facts as the deponent is able of his own knowledge to prove* as required by O.41, r.5 High Court Rules. Rather than add to the length of this decision by setting out both these paragraphs, referring to paragraph 8 of Ms Hazelman's affidavit is sufficient illustration of the point. It says:

> *That in response to paragraph 8 and 9 of the said Affidavit, the Defendant deny the matters averred to in those paragraphs and state that the 2013 proposal was put on hold because of the pending court cases involving the Plaintiff Company on the issue of RRL.*

and annexes copies of the cases referred to. Although I agree that too many affidavits filed in court contain submissions rather than evidence, I don't agree that this passage is an example of that particular fault. However, I certainly regard paragraph 11 from one of the plaintiff's affidavit in reply (quoted in paragraph 5 above) as a submission, and it is not the only example from the plaintiff's affidavits. I agree that attaching copies of court decisions and regulations – another matter that the plaintiff objected to - is unusual, and unnecessary, since both are public documents of which judicial notice can be taken, but it is sometimes convenient to have them to hand than to have to look for them, so I wouldn't criticise an affidavit for that reason alone.

7. The defendant, on the other hand, objected to the affidavits of Mr Singh on behalf of PTL because there was no written authority provided from the company for him to make the affidavits. I was not referred to and I am not aware of any rule that suggests that someone giving evidence in support of a party's case needs to provide written authority (or indeed any evidence of authority). Order 45 deals with affidavit evidence. Rule 1(4) states:

> *Every affidavit must be expressed in the first person and, unless the Court otherwise directs, must state the place of residence of the deponent and his occupation or, if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state that fact.*
> *In the case of a deponent who is giving evidence in a professional, business or other occupational capacity the affidavit may, instead of stating the deponents place of residence, state the address at which he works, the position he holds and the name of his firm or employer, if any.*

and rule 5(1) states that, subject to exceptions that don't apply here:

> *... an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.*

Reference was also made to a decision of the High Court in **Denarau Corporation v Deo** [2015] FJHC 112 in which it is said that:

> *A company being an artificial person cannot act by itself. It should act through an agent. The agent must have proper authority to act on behalf of the company.*

I certainly accept the correctness of this proposition, and also note the reference by counsel for LTA to sections 53 and 123 Companies Act 2015 relating to the execution of documents by a company, and delegation of authority. However, with respect, I do not accept that it follows from this decision, or the sections referred to, that someone giving evidence in support of a company's case in court is obliged to state that he is authorised by the company to give evidence, any more than that is a requirement for someone giving evidence in support of the case of a party who is a real, rather than an artificial person. A witness is not 'acting' (either as agent or in any other capacity) for a party when he/she gives evidence. There is no property in factual evidence, and it belongs to no-one. It is normally sufficient that they have relevant evidence to offer of facts that are within their personal knowledge (as required by rule 5), and that their evidence is not otherwise scandalous or oppressive (see Rule 6). While it may be that a witness's position in a company is relevant to the weight to be attached to his evidence, and so should be stated – as rule 1(4) requires – that is a different issue from admissibility.

8. Even if I considered the affidavits objectionable, I would not readily be persuaded to strike them out, particularly at the substantive trial. If parties want to object to affidavits they need to do so when they are first filed, so that any defects can be fixed, rather than wait until the hearing when a striking out would cause maximum inconvenience and injustice. Paragraphs in affidavits that comprise submissions are completely worthless as evidence, and can be safely ignored without resorting to striking out.

9. Counsel for LTA also submitted that because Mr Singh in his affidavit in reply agreed with paragraph 18 of Ms Hazelman's affidavit for LTA, the plaintiff should be taken to have acceded to the LTA's prayer to dismiss the claim. Paragraph 18 of Ms Hazelman's affidavit stated:

> *That the Defendant reasonably believe that the orders sought by the Plaintiff in its Originating Summons and the Supporting Affidavit be denied and cost be against the Plaintiff.*

My first comment about this paragraph is that this is not an interlocutory matter such that O.15, r5(2) applies to allow statements of belief in an affidavit. Even if it were, what Ms Hazelman believes should happen with the proceedings is irrelevant, and therefore is of no use as evidence in support of LTA's position. In so far as the paragraph is a pleading or a submission, it does not belong in an affidavit. In response to this paragraph Mr Singh, in his affidavit in reply said *I do agree* with the contents of this paragraph. I don't know whether the response is a mistake by Mr Singh (possibly he intended to say that *I don't agree*), or whether he was simply agreeing to the proposition that Ms Hazelman believes, as she says, that the orders should be denied. Whatever might be the explanation, the submission that the court should treat this response as an acceptance by PTL that its claim should be denied is disingenuous and vexatious. I am irritated that I need to spend time responding to such a pointless and futile submission. It is perfectly obvious that the plaintiff does not agree that the claim should be denied, and it has gone to some trouble and expense to demonstrate that.

10. Other 'preliminary objections' raised by the defendant were:

i. that the Plaintiff does not have power to move the Court for an Order without stating the source of the Authority or laws he rely (sic) on in the Originating Summons

ii. That the matter should first be referred to the Land Transport Appeals Tribunal since it's a matter concerning Road Route Licence that comes under the jurisdiction at first instance, the Tribunal, and it would be premature for the Court to deal with this matter.

iii. The proposal for an RRL Route does not amount to an application pursuant to Section 65(2)(d)(i) and (3)(a)(ii) Land Transport Act, and Regulation 3 Land Transport (Public Service Vehicle) Regulations 2000.

iv. That even though the Defendant has a statutory duty in carrying out its functions under the Act, however such duty can only be exercised as prescribed by law, and the Defendant did not breach any of its duty.

v. That a mere existence of statutory powers does not give a private law right to sue for breach.

11. While I agree that it is usually, if not invariably, useful for an applicant to set out in any originating or interlocutory summons or motion the legal foundation for what is sought, be that an Act, Regulations, the High Court Rules or some other authority, Order 7, rule 3(1) High Court Rules requires only:

> *Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or directions of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.*

A review of court decisions relating to this rule suggest, as one would expect, that there is no rigid requirement for the legislative foundation to be spelled out, as long as it is clear from the summons itself and any affidavits filed in support, what is the basis for the claim. In **Rasoki v Attorney-General & ors** [2010] FJHC 266 struck out the originating summons at an interlocutory stage because it was not clear, from all the material filed, what the basis of the claim was. Calancini J concluded that the deficiencies were so profound that they could not be remedied by amendment. That decision was given on an interlocutory striking out application made by the defendants shortly after the commencement of the proceedings. This is an issue that, if it is to be brought up at all, should be raised by a defendant at the commencement of the proceedings, not at the substantive trial. The point of the application is to discover the basis for the plaintiff's claim, if that is not apparent, so as to enable the defendant to properly defend the claim. The absence, in this case, of an interlocutory application to strike out, or to obtain better particulars, indicates that the defendant here was satisfied that it sufficiently understood the basis for the claim to be willing to have it heard. That impression is reinforced by the fact that counsel for LTA has apparently been able to prepare, in advance of the hearing, submissions that show no lack of understanding of what the basis for the claim is. Although in her submissions counsel for LTA suggested that the defendant was prejudiced by the omission from the originating summons of references to the

source of authority for the orders sought (which are set out with great particularity in the summons) the nature of that prejudice is not apparent. I note that even a writ of summons and statement of claim would not normally have any more information as to the legal basis for a claim than was contained in this application.

12. The other issues raised by counsel for LTA as 'preliminary issues' are not that at all. They are arguments in response to the substantive proceedings, and I will consider them in due course.

The law

13. Part VI of the Land Transport Act 1998 deals with public service vehicle licensing. Under section 61(1) a motor vehicle used for the carriage of passengers for hire, reward or other consideration is deemed to be a public service vehicle for the purpose of this Act and the regulations. Section 65 authorises the issue of public service permits by the LTA, and parts of sections 63, 64 and 66 are also important. The sections provide (to the extent relevant to this case):

> ***Public service vehicle licences***
> ***63****(1) The Authority may issue to a person who meets the prescribed requirements a public service vehicle licence of a class described in subsection (3) to enable a motor vehicle owned by that person to operate in the manner described in a public service permit held by that person.*
> *(2) A public service vehicle licence shall only be issued to the holder of a public service permit -*
> *(a) which is of an appropriate type; and*
> *(b) which, except in the case of a road permit, is for the time being not used.*
> *(3) The classes of public service vehicle licence are -*
> *(d) a road service vehicle licence, which shall only be issued in respect of -*
> *(i) an omnibus which, for the purpose of this Act, is a motor vehicle equipped for the conveyance of not less than 12 persons excluding the driver and constructed so that the driver and passengers are located in the same structural compartment; or*
> *(ii) a carrier which, for the purpose of this Act, is a motor vehicle constructed and equipped for the safe carriage of passengers and goods such that the majority of passengers are located separate from the driver's compartment.*
>
> ***Authority of public service permits***
> ***64****(1) A public service permit issued under this Part does not authorise the use of any motor vehicle otherwise than in accordance with such conditions as may prescribed in relation to that permit.*
>
> ***Public Service Permits***
> ***65****(1) The Authority may issue public service permits of the types described in subsection (2).*
> *(2) A person may apply to the Authority for a public service permit of the following types: ...*
> *(d) a road permit which authorises the use of a motor vehicle licensed as a road service vehicle, subject to this Act and subsection (3) and licence and permit conditions, except that -*
> *(i) only a road permit may authorise a person to conduct a regular service between two terminating points; and*
> *(ii) only a taxi permit may authorise a person to stand or ply for hire.*

(3) *A person may apply to the authority for a road permit in respect of -*

(a) *road route licence authorising the conduct of one or more road services for the transportation of passengers and goods at separate fares on -*

(i) *a stage service, which is a scheduled service along a specified route between terminating points with stops intended to meet the needs of persons along or in the vicinity of that route; or*

(ii) *an express service, which is a scheduled service between terminating points with or without a limited number of stops at hotels or towns intended to meet the needs of the general public;*

Provided that the fare shall be charged in accordance with the fares fixed by the Authority.

(4) *A person who operates or permits to be operated a public service vehicle without or contrary to the conditions of a public service permit issued under this section commits an offence and is liable on conviction to the prescribed penalty.*

Special conditions relating to road permits

66(3) *A road permit may include conditions or restrictions relating to charter services which may be performed under the authority of the road permit.*

(4) *The Authority shall not issue a road permit if any road service included on the permit: -*

(a) *is to be conducted with the use of a motor vehicle which is licensed as a carrier; and*

(b) *in the opinion of the Authority, competes unduly with a road service included on another road permit and conducted with the use of a motor vehicle which is licensed as an omnibus*

14. Section 38 of the Act authorises the LTA to issue Codes of Practise providing guidance about different aspects of its functions, as follows:

Authority to have codes of practice

38(1) *The Authority shall establish codes of practice which specify the procedures, standards and other criteria which the Authority will use in considering applications and conducting tests and inspections.*

(2) *The Authority shall make available to the public those codes of practice or parts thereof which it considers appropriate for the purpose of providing information which may be of assistance in preparing and submitting applications and otherwise understanding the procedures and criteria used by the Authority in considering applications and conducting tests and inspections.*

15. Also relevant are provisions from the Land Transport (Public Service Vehicles) Regulations 2000:

Applications

3(1) *A person may apply for a new permit ... in accordance with this Division [Division 1 of the regulations] ...*

(2) *If the application received by the Authority requires a notice under regulation 4(1), the applicant must ensure that the prepared notice given by the Authority is published within 14 days from the date of that notice and the cost of the publication is borne by the applicant.*

(3) *The Authority may by notice in the Gazette restrict the occasions upon which or the periods within which particular applications may be made.*

(4) *The Authority may require an applicant to submit any other particulars reasonably necessary to enable it to determine the application.*

(8) *Without limiting subregulation (1), a proposal to change any one of the following requires an application to approve the amendment to the permit:*

(c) *in the case of a road permit, a change in timetable, route or type of vehicle being operated,*

(9) *An application for a permit must be accompanied by:*

(a) *a statement relating to the business or proposed business of the applicant;*

(b) *the number of vehicles to be operated;*

(c) *in the case of a road permit in respect of a carrier licence, the design of each vehicle to be used and the number of permitted passengers;*

(d) *the locations from which the vehicles will operate or be available for hire;*

(f) *details of any other business or association with the holder of any public service permit, including sharing of a stand or other facilities;*

(g) *the office and telephone services which will be provided for the public;*

(h) *the intentions in regard to motor vehicle purchase and replacement;*

(i) *in the case of a road permit in respect of a road route licence, the proposed timetable with specific route to follow and fares to be charged;*

(10) *The holder of a permit must not vary any aspect of his or her business approved under subregulation (9) without written approval of the Authority.*

Public review of applications

4(1) *Subject to subregulations (2) and (3) and unless the application is frivolous, scandalous or vexatious, the Authority must, upon receipt of the application, publish a notice in at least one newspaper published in the English language and circulation throughout Fiji stating:*

(a) *the details of the application;*

(b) *that written representations for or against the application may be received by permit holders of the same type of permit, or in the case of a road permit by licence holders of the same type of licence, for which the application is made; and*

(c) *that any written representations received under paragraph (b) must be received within 14 days from the date of the notice.*

(3) *The Authority may refuse an application if:*

(a) *the vehicle proposed is unsuitable;*

(b) *the route proposed is unsuitable;*

(c) *the applicant is not a fit and proper person to be the holder of a licence; or*

(d) *for any other good cause,*

and if it does so the public notice requirement of subregulation (1) does not apply.

(3A) *A written objection received under this regulation may only be considered by the Authority if the written objection is made by permit holders of the same type of permit, or in the case of a road permit by licence holders of the same type of licence, for which the application is made.*

(4) *If no written objections are received in response to a notice under subregulation (1), the Authority or an officer of the Authority acting under the delegated power must determine the application under regulation 5.*

(5) *If any written objection is received in response to a notice under subregulation (1), the Authority must unless the representation is frivolous, scandalous or vexatious, give a hearing.*

(6) *The Authority must:*

(a) *serve the applicant and any person who made an objection a notice of hearing of not less than 14 days after the date of the notice requiring attendance at the hearing; and*

(b) *provide the applicant with copies of any written objection received.*

(7) *A hearing of the Authority is not open to the public but the Authority may invite or permit persons to attend if it considers it desirable to do so.*

(8) *A person who is required to give evidence at a hearing may be required by the Authority to absent himself or herself from the hearing until his or her evidence is to be received.*

(9) *The Authority may, at the request of a witness at a hearing, take in private his or her evidence relating to matters affecting his or her business, or which have come to his or her knowledge in the course of his or her duties.*

(10) *After receiving evidence at a hearing the Authority must determine the application under regulation 5.*

Decisions on applications

5(1) *In considering an application to issue, renew or change any condition of a permit, the Authority must take into account any matter it thinks fit or desirable to give effect to the provisions of the Act and in particular must have regard to:*

- *(a) the needs of the public and the desirability of ensuring that services to passengers are maintained or enhanced;*
- *(b) the effect of the proposed service on other public service operators;*
- *(c) the suitability of the routes on which a service would be provided under the permit;*
- *(d) the suitability and fitness of the applicant to hold a permit;*
- *(e) the financial standing of the applicant;*
- *(f) any evidence presented at a hearing conducted under regulation 4;*
- *(g) the type of vehicle which the applicant proposes to use on the service; and*
- *(h) the immigration status of the applicant.*

(2) *Subject to subregulation (3), an application for permit or a change in a permit must not be refused except at a meeting of the Authority.*

(3) *An application for a permit or change in a permit may be refused by an officer acting under the delegated power on the ground of the unsuitability of the vehicle or the unsuitability of the propose route.*

(4) *The Authority may require a party to an application to produce any book or document in his or her possession or control relating to the application.*

(5) *The Authority may, when granting an application, vary the service as proposed in the application subject to conditions and restrictions if in its opinion such variation will not seriously affect any other holder of a permit.*

(6) *No application for a permit or a change in a permit may be refused or varied by the Authority unless the Authority is satisfied that such action is likely to be in the interst of public service vehicle users.*

(7) *The granting of an application has no effect until the prescribed fee for the permit has been paid and any vehicle to be used for the service is registered.*

Conditions and restrictions

7(1) *In addition to the conditions prescribe in respect of permits, either generally or in particular cases or classes of cases, the Authority when issuing a permit may impose any condition or restriction the Authority thinks fit on matters that the Authority is required to have regard to when considering applications for permits and in particular for ensuring that:*

- *(a) the conditions of service of the employees of the permit holder in relation to the permit are consistent with public safety and the efficiency of the service;*
- *(b) any fare and freight charges under the permit are reasonable in the circumstances of the particular case;*
- *(c) wasteful competition with alternative forms of transport operating in the same sphere is avoided; and*
- *(d) any timetables to be observed and any picking up or setting down places to be used in the service carried on under the permit comply with any requirements the Authority specifies,*

and generally for securing the safety and convenience of the public.

(1A) *A permit is subject to the following conditions:*

- *(a) the permit holder must pay a prescribed annual fee to the Authority;*
- *(b) in the case of an individual, the permit holder must be a Fijian citizen who ordinarily resides in Fiji;*

(c) *in the case of a company, the permit holder must be a company registered under the Companies Act 2015, the controlling interest of which is held by a person or persons who are Fijian citizens who ordinarily reside in Fiji, and*

16. In submissions on behalf of the plaintiff counsel referred to a number of authorities and texts relating to the claims for remedies against public bodies for breach of personal rights. The authorities include the decision of the Supreme Court of Fiji in **Land Transport Authority v Lal** [2012] FJSC 23, in which the court upheld the finding in the High Court that failure by the LTA to ensure that a car owner had current third party insurance on renewing his motor vehicle registration gave rise to a private right of action by a plaintiff who was injured in a motor accident, but was unable to recover damages because the owner was uninsured. The Supreme Court followed the decision of the House of Lords in **X (minors) v Bedfordshire County Council** [1995] 3 All ER 353, at 364 holding that breach of a statutory duty gives rise to a private right of action if, as a matter of construction of the act or regulation concerned:

> *... that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private action for breach of duty.*

17. Also relevant, but not referred to by either counsel in their submissions, is the decision of the House of Lords in **O'Reilly v Mackman & ors** [1982] 2 All ER 1124, in which the issue was, in the words of Lord Diplock at page 1126:

> *Put in a single sentence the question for your Lordships is: whether in 1980, after RSC Ord 53 in its new form, adopted in 1977, had come into operation, it was an abuse of the process of the court to apply for such declarations by using the procedure laid down by the rules for proceedings begun by writ or by originating summons instead of using the procedure laid down by Ord 53 for an application for judicial review of the awards of forfeiture of remission of sentence made against them by the board which the appellants are seeking to impugn?*

Applied to the present case, the decision in **O'Reilly** suggests that it will, as a matter of policy, be an abuse of court process to commence by way of writ or originating summons a claim that should have been commenced under the procedure for judicial review under Order 53 of the High Court Rules.
The reasoning behind this is as follows (at p1133):

> *by adopting the procedure of an action begun by writ or by originating summons instead of an application for judicial review under Ord 53 (from which there have now been removed all those disadvantages to applicants that had previously led the courts to countenance actions for declarations and injunctions as an alternative procedure for obtaining a remedy for infringement of the rights of the individual that are entitled to protection in public law only) the appellants had thereby been able to evade those protections against groundless, unmeritorious or tardy harassment that were afforded to statutory tribunals or decision-making public authorities by Ord 53, and which might have resulted in the summary, and would in any event have resulted in the speedy, disposition of the application*

While the scope of this rule remains a matter of debate, at the margins it is clear which cases arise from a breach of private rights (e.g. administrative actions and decisions that cause personal injury, or breach of contract), and those that clearly concern only public law. At p.1133 Lord Diplock explained how the court might exercise its jurisdiction in a case that had been found to be improperly commenced:

So Ord 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of an application for judicial review, and whichever remedy is found to be the most appropriate in the light of what has emerged on the hearing of the application, can be granted to him. If what should emerge is that his complaint is not of an infringement of any of his rights that are entitled to protection in public law, but may be an infringement of his rights in private law and thus not a proper subject for judicial review, the court has power under r 9(5), instead of refusing the application, to order the proceedings to continue as if they had begun by writ. There is no such converse power under the Rules of the Supreme Court to permit an action begun by writ to continue as if it were an application for judicial review ...

Analysis

18. The plaintiff seeks by its originating summons orders:

    1. That the Defendant process in accordance with Section (sic) of the Land Transport Act the following applications for Road Route Licence applied for by the Plaintiff (here listing the six applications referred to in paragraph 1)
    2. Costs on client solicitor indemnity basis.
    3. Any further or other order as this Honourable Court may deem fit in the circumstances.

    It is PTL's contention that having lodged the applications, the LTA is obliged to deal with them, and either grant them, or reject them; in the latter case giving PTL a right to apply for review of that decision to the Land Transport Appeal Tribunal under Part III of the Act.

19. The LTA on the other hand takes the position that the 'applications' lodged by PTL are not applications at all, because PTL has not provided all the information required by the regulations and guidelines, but are merely proposals and don't require a response

20. To my mind there is no doubt that what PTL has lodged with the LTA are applications. They have been made using the prescribed application form. There is no 'proposal' form, nor is there any process prescribed by the Land Transport Act or the Land Transport (Public Service Vehicle) Regulations for lodging 'proposals', whereas the Act and regulations set out in quite elaborate detail what is to happen with applications. It would be odd for the legislature to contemplate an additional procedure, not provided for in the law, simply to address the administrative problem of having to deal with deficient applications, when the process that is provided for is perfectly adequate for that purpose (see reg. 4(1) above).

21. It is clear from reg. 4 that the LTA is entitled to conclude that an application is *frivolous, scandalous or vexatious,* and, if it reaches that conclusion, is not obliged to advertise the application, or provide a hearing for it. How then might the LTA be entitled to arrive at a conclusion about the genuineness of an application? Here I suggest that the LTA is entitled to have regard to the requirements listed in reg. 3, and any codes of practice issued by LTA pursuant to section 38 of the Act (see

above). Also relevant, because they affect the information that LTA is entitled to expect will accompany any application, are the conditions and restrictions that automatically apply to permits, or that the LTA is entitled to impose under reg. 7(1) and (1A) of the Public Service Vehicle regulations. For example, the fact that under reg. 7(1A) it is a condition of any permit that the operator (or if the operator is a company, its controlling shareholders) be citizens of and resident in Fiji, means that LTA would be entitled to expect that the information provided by an applicant will include information about the identity, citizenship and residence of the controlling shareholder of PTL. Although I note that this does not seem to be included in the information sought in the check list referred to previously (paragraph 4 above). Also, because of its right to impose, under reg. 7(1)(c), conditions with regard to avoiding *wasteful competition*, I would expect the LTA to be interested in full details about the need for the proposed new service, and the impact it may have – if allowed – on other operators. This information would also be important to any existing operators to enable them to understand what PTL was proposing, and work out – for the purpose of deciding whether to object to the proposed new services - what impact those services might have on their own businesses. These are but two examples of areas where the absence of information from the applicant might warrant a conclusion by LTA that the applications should not be advertised or heard.

22. The evidence here suggests that PTL was somewhat less than conscientious in the information it provided with its applications. Much of the information listed in the check-lists referred to previously appears to have been omitted by PTL, which seems to have expected LTA to apply information provided in support of one application to all the applications filed, and even to have applied information held in relation to other RRL permits held by PTL to the new applications. In my view LTA was entitled to expect that PTL would carefully provide all the information referred to in the checklist, and pay the necessary application fees, in relation to each of the six applications that it filed, even if this involved duplication. Had it done so PTL could then reasonably have expected that the LTA would promptly respond with details of any further information that it required to process the applications. While I do not agree that LTA was entitled to ignore the applications in the way that did, and should have made clear its requirements/intentions (i.e. that it required further information before deciding whether to progress the applications), the lack of care by PTL in making and supporting the applications means that it is not in a strong position to complain about the LTA's failings. These considerations are relevant when it comes to the exercise of my discretion whether to grant the remedies sought by PTL. Expressed in the terminology used in judicial review cases an applicant who has lodged a proper and complete application has a legitimate expectation that it will be dealt with conscientiously and promptly by LTA, and can expect the court's intervention if that expectation is not met.

23. Here I am satisfied that the deficiencies with the plaintiff's applications for the six Road Route Licences were such that LTO would have been entitled to regard them as frivolous, scandalous or vexatious, in which case they would not have progressed until any deficiencies had been addressed. The fact that it did not apparently come to that conclusion, and did not properly advise PTL why it was not progressing the applications, is certainly a failing on the part of LTO, but – because the outcome is

inevitable that the applications would be rejected - not one that entitles PTL to have the court exercise its discretion by making a direction to LTO to progress the applications.

24. Even if PTL had comprehensively complied with all the requirements, and provided all the information necessary for its applications I do not agree that it is entitled to apply in a private action of this sort for the orders it seeks. This is not an action, such as that in **Land Transport Authority v Lal** (see paragraph 16 above), where administrative actions or failures have led to a personal claim for compensation. In fact in the present case the plaintiff does not even seek compensation. Instead it is quintessentially a judicial review case of the type considered by the House of Lords in **O'Reilly v Mackman** where allowing the plaintiff to bring a private action would be inconsistent with the public policy that has led to the passage of Order 53 governing and controlling such actions. To allow parties to commence private actions of the type commenced here by PTL would frustrate the measures and controls introduced by the Order. In particular, in the present case, (and without deciding the issue) I very much doubt that the plaintiff would have been successful in obtaining, in November 2019 when these proceedings were commenced, leave under O.53, r.3 to issue judicial review proceedings in relation to the six applications for road route licences that it had made in 2013 and early 2018.

Conclusion

25. For the reasons given, the plaintiff's originating summons dated 15 November 2019 for orders directing the defendant to process the six applications is dismissed. There will be no order as to costs. The LTA's failure to properly process the applications in a timely way, even if it was only to reject them as I have suggested it could have, has contributed to the present situation and should not be rewarded by an order for costs in its favour.

HIGH COURT OF FIJI
LAUTOKA

A.G. Stuart
Judge

At Lautoka this 10th day of November, 20

SOLICITORS:
Messrs Patel & Sharma, Nadi for the plaintiff
Land Transport Authority, Nasinu, for the defendant