K. R. LATCHAN BROTHERS LIMITED A

v.

SUNBEAN TRANSPORT LIMITED
PACIFIC TRANSPORT LIMITED
TRANSPORT CONTROL BOARD B

Present at the Hearing:

Lord Bridge of Harwich
Lord Fraser of Tullybelton
Lord Brandon of Oakbrook
Lord Ackner
Lord Oliver of Aylmerton C

Delivered by Lord Oliver (28th July 1986) of Aylmerton

Judicial Review—Applications for and objections to granting a road service licence—Transport Control Board refusing to hear objections from an applicant for license unless he withdrew his application for license—Board seeking Report from Transport officers which it undertook to make available to parties before reaching a decision—failure to do so—reviewable error—natural justice. D

Appeal by K. R. Latchan Brothers Limited against a decision of the Court of Appeal which had dismissed an appeal by the appellant against a decision of the Supreme Court which had quashed a decision of the Transport Control Board (third respondent) (Board) which had given a license to the appellant to operate a single service from Suva to Lautoka. E

The history of applications was that by 17 January 1983 there had been applications by City Transport Limited, the first and second respondents and Victory Transport Limited. The Board granted the license to the appellant. The first and second respondents applied for and were granted Judicial Review at this decision. The decision was quashed by Kermode, J. who remitted the matter to the Board to be reheard. F

This would have allowed existing or further applicants to apply for the license.

The Court of Appeal, on appeal to it, confirmed the decision of Kermode, J. G

The function of the Board and procedure to be followed in respect of such matters was set out in the Traffic Ordinance Cap. 152 (1967 Edn.) which their Lordships quoted.

A To return to the hearing before the Board; City Transport Limited (City Transport) had applied for the license. Objections had been lodged to this application upon grounds envisaged by s.66 of the Ordinance including that there was no necessity for the service. Counsel for first respondent also wished to object on such grounds.

B It was held by the Chairman that there was an established procedure that an objector who was also an applicant would not be allowed to pursue these objections unless his client's application was withdrawn. Counsel then under protest withdrew the application of the first respondent. Thus the first respondent was effectively eliminated as a competitor.

Further, the Board decided to obtain evidence for itself from Transport officers,
C and make this available to interested parties before reaching a decision. It did obtain the report but did not make it available. The evidence of the Chairman as to the Board's consideration of the Report was—

> "the reports .... were not distributed as they were not considered adequate and relevant by the Board and as they were rejected they were not distributed as earlier indicated."

D Further it was said apparently in the Report that there was substantial underloading on existing services. In a letter to the Board by the reporting Inspectors an opinion was expressed thus—

> "From the attached load checks it is revealed that there is very little public demand for a circular bus service, Some of the members of the travelling
E public when interviewed stated they are fully satisfied with the present service provided by the above operators."

The operators were the first and second respondents.

Held: The requirements that the first respondent either withdraw its application or proceed with its objection was a breach of the Board's duty under s.65 to hear all
F proper applications and consider all objections.

The failure to make the Report available, as the Court of Appeal said in its Reasons for judgment,

> "..... within the class of errors which render the Board's exercise of its power subject to judicial review."

Judgment

The appeal arises out of an application by the first and second respondents, Sunbeam Transport Limited and Pacific Transport Limited, for judicial review of a decision of the third respondent, the Transport Control Board of Fiji, on 27th April 1983 to grant to the appellant a road service licence pursuant to section 65 of the Traffic Ordinance of Fiji (Cap. 152).

The third respondent, which has not taken any part in the appeal before their Lordships' Board, is a statutory body which was constituted by legislation which preceded the current Ordinance and which has been continued by it. It will be convenient to refer to it as "the Board". It consists of a chairman and four members and among its functions is the grant or refusal of applications for licences under the provisions of the Ordinance for the operation of public service vehicles. Section 63 of the Ordinance provides that no person shall use or permit the use of a stage carriage or express carriage except under a licence granted by the Board (referred to as a "road service licence"). Application for such a licence is required by section 64 to be made in a prescribed form and sent to the Board with the appropriate fee.

The procedure to be followed by the Board once an application has been received is regulated by section 65 the terms of which, in the context of the matters complained of by the first and second respondents, are of some importance. The relevant provisions of that section are as follows:

> "(1) On receipt of an application for 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 . . . that within the next ten days following the date of the notice it will receive other applications in respect of the proposed service:" (There follows a proviso entitling the Board to refuse an application without giving notice if it is satisfied *(inter alia)* that the needs of the area of the proposed service are already adequately served) . . .
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> . . . . . .
>
> (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 4 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 . . .
>
> (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. . . ."

A In considering applications and objections the Board is not given an entirely free hand. Section 66 subsection (2) prescribes a number of matters which it is mandatory for the Board to consider. It is so far as material in the following terms:

> "(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:
>
> B *(a)* The extent to which the proposed service is necessary or desirable in the public interests;
>
> *(b)* The extent to which the needs of the area through which the proposed route will pass are already met.....
>
> *(f)* Any evidence and representation received by it at any public sitting held in accordance with the provisions of the last preceding section...."

C The appellant and the first and second respondent are all public transport operators providing public bus services on the island of Viti Levu Fiji and it will be helpful at this stage to say a few words about the geography of the island.

The island is broadly oval in shape, the principal towns being Ba, Lautoka and Nadi in the north-west and Suva, Nausori and Navua in the south-east. They are connected by two principal roads which together circle the island. Starting in the
D north-west and proceeding clockwise (i.e. travelling north-east from Ba) is the King's Road which runs through Tavua and Vaileka on the north coast and then turns south to Suva via Nausori. It is, their Lordships have been told, a very poor road which is not tarmacadamed and is recommended only for hardy travellers. Running south and anti-clockwise from Ba is the Queen's Road which also runs to Suva, skirting the coast via Lautoka, Nadi, Sigatoka and Navua. This is now a much better road than the King's Road and has been surfaced with tarmacadam. That
E process was completed in 1982 and on 2nd December of that year the Board invited applications from bus operators for a round island service. That resulted in a number of applications, the first of which was that of City Transport Limited which applied for a licence to operate a single service from Suva to Lautoka via the Queen's Road and from Lautoka to Suva via the King's Road. That application was opposed by the first and second respondents who on 17th and 15th December 1982 respectively, lodged competing applications for identical services.

F On 10th January 1983 a competing application for a double circular service over the same route (that is, a service involving two buses circling the island in opposite directions) was made by Victory Transport and on 17th January the appellant lodged an identical application. The Board also received a number of applications for licences for other services. The only ones material to be mentioned, since they form the ground of one of Mr Newman's submissions on behalf of the appellant, are
G an application by Adi Nanise on 2nd December 1982 for an express service Ba/Lautoka/Suva and return via Queen's Road only and an identical competing application by the first respondent (reference RSL/16/15) on 23rd December 1982. In March 1983 the Board proceeded to hear these and other applications together and it is out of those hearings that the present proceedings arise. The hearings occupied three days, that is to say, 9th, 10th and 11th March 1983 at the conclusion of
H which the outstanding applications for circular service were deferred for decision on notice. On 27th April 1983 the Board gave its decision granting the licence applied for by the appellant.

On the 27th May 1983 the first and second respondents applied *exparte* for leave to apply for judicial review of the Board's decision and such leave was granted on 6th June. The motion for judicial review was heard by Kermode J. on 3rd, 4th and 11th August 1983 and on 9th September 1983 he made an order quashing the decision and ordering the Board to pay the first and second respondents' costs of the motion. The appellant appealed to the Court of Appeal enumerating some twenty-three grounds of appeal. After a hearing lasting three days the Court of Appeal (Speight V. P., Mishra and O'Regan J. J. A.) dismised the appeal with costs and ordered that the applications for road service licences be remitted to the Board for re-hearing. On 16th April 1984 final leave to appeal to Her Majesty in Council was granted by the Court of Appeal.

In his judgment in the Supreme Court Kermode J. had been extremely critical of various aspects of the conduct of the Board and its Chairman, Mr Lala, and his decision was based in part on matters which, in the judgment of the Court of Appeal, were not sustained as grounds upon which a judicial review ought to be ordered. Although, in their printed case, the respondents rely upon these matters in supporting the decision of the Court of Appeal, their Lordships have not, in the event, found it necessary to consider them. There were, however, two substantial matters upon which Kermode J. relied in reaching his decision and which the Court of Appeal held, in themselves, to be sufficient—indeed, unanswerable—grounds for quashing the decision of the Board. Both involve some consideration of the course which the hearing of the objections and the various competing applications took before the Board.

The first application to be heard for a licence for a circular express service was that of City Transport Limited. That application had prompted a number of objections on the grounds envisaged by section 66 of the Ordinance, namely, that no necessity for such a service in the public interest had been established and that the needs of the area were adequately met by the existing services. Mr Koya, who was appearing at the time for the first respondent alone, sought to urge these considerations on the Board, tendered some written submissions as regards the matters referred to in section 66 and indicated that he wished to produce evidence from Mr Jalil, The Managing Director of the first respondent. He was told that there was an established ruling that an objector who was also an applicant would not be allowed to argue his objections on these grounds unless he first withdrew his application. Mr Koya wished to proceed with his objections to the application then being heard and, in order to do so, having regard to the Chairman's ruling, then withdrew the first respondent's competing application under protest. The result was, of course, that when the Board determined subsequently to defer decision on the pending applications on notice, it had no longer before it any application by the first respondent, which was thus effectively eliminated by the Board as a competitor for a licence.

Kermode J. had no hesitation in saying that a ruling which compelled operators to elect either to proceed with their applications or to oppose a competing one was a breach of the Board's statutory duty under section 65 referred to above to hear all proper applications and to consider all objections. The Court of Appeal agreed fully with that conclusion. So do their Lordships. Mr Newman, on behalf of the appellant, has submitted to their Lordships, as he did to the Court of Appeal, first that this was purely a matter of the Board regulating its own procedure as to the stage at which objection was to be heard and that there was nothing to prevent a compet-

A ing applicant from pursuing his objection to an earlier heard application at the stage when his own application came to be heard. The short answer to that is in the Chairman's own evidence which runs as follows:

> "... 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 com-
B peting application or to object to the existing application but he is not allowed to do both."

Mr Newman's alternative submission is that even if the Chairman's ruling was a breach of the Board's statutory duty, it caused no prejudice to the first respondent. That, it is said, can be sustained on two grounds. First, it is said that the application withdrawn was a precise copy of the City Transport application which was a defective application as a result of certain
C errors in the time-table, so that all that Mr Koya was doing was withdrawing an application which he believed in any event to be defective. Secondly, it is said that, having regard to the existence of another application of the first respondent (RSL/16/15) which was proceeded with (although it failed), Mr Koya still had, on that application, the opportunity to ventilate any objections on lack of necessity for further services and absence of local need.

D In their Lordships' judgment neither of these submissions has any substance. There is no ground whatever for supposing that Mr Koya regarded his clients' application as defective and, even if it was, it is clear from section 65(5) that any defects in time-tabling could be perfectly easily cured. The plain fact is that, on the Chairman's own evidence, Mr Koya was put under pressure to withdraw an application which competed with that of the appellant and which must be presumed at least to have merited consideration. It is idle to speculate as to what might have been the
E result if the application had been proceeded with and it is quite impossible to say that the first respondent's position was not prejudiced by the withdrawal. That in itself is sufficient to dispose of the suggestion that there was no prejudice and the second of Mr Newman's submissions becomes simply irrelevant.

The other matter relied upon by Kermode J. and the Court of Appeal as equally if not even more conclusively demanding that the Board's decision be quashed arose
F in the following way. After the Board had heard the applications of City Transport, Victory and the appellant and having regard to the objections raised by Mr Koya on the absence of local need for additional services, Mr Lala, the Chairman, undertook that, before reaching a decision, the Board would obtain evidence for itself by way of a report from its Transport Officers as to the need for the introduction of the proposed services. That report, Mr Lala said, would be made available to all interested parties before the decision was given. And indeed the Board did obtain such a
G report. Inspectors were instructed to carry out load checks on the existing services and they did so on four days in April. It is unnecessary to refer to the results of those checks in any detail. They showed substantial underloading on existing services and the reporting Inspector, in a letter to the Transport Officer, opined:

> "From the attached load checks it is revealed that there is very little public demand for a circular bus service. Some of the members of the travelling
H public when interviewed stated they are fully satisfied with the present service provided by the above operators."

"The above operators" were the first and second respondents. When the Board met to give its decision on 27th April 1983, Mr Mustaq, a Transport Officer, was present.

The report was, however, not made available to the interested parties as had been promised. All that the minutes record is that: A

> "the Board had a look at the report presented by the Transport Officer Higher Grade Western and met privately to come to a decision."

Mr Lala's evidence on the consideration of the report is jejune and consists simply of a statement that:

> "the reports . . . were not distributed as they were not considered adequate and relevant by the Board and as they were rejected they were not distributed as earlier indicated." B

As the learned trial judge observed, if the reports were inadequate that was the fault of the Board itself in not directing the Transport Officers to obtain further information. In any event if they were considered inadequate there was no reason whatever why the Board should not adjourn for the compilation of more adequate material. And as to the suggestion that they were "irrelevant" it is difficult to imagine anything more pertinent to the inquiry which the Board was under a statutory duty to conduct in acordance with the section of the Act already quoted. Their Lordships can do no better than quote from the relevant portion of the judgment of the Court of Appeal which reads as follows: C

> "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." D

Mr Newman has gallantly done his best to defend the indefensible by seeking to suggest that to describe the reports as irrelevant is really no more than a clumsy way of saying that the Board, within its proper province, regarded the evidence presented by the reports as of little weight. But that really will not do in the light of the Chairman's own quite clear evidence; nor does it explain the failure to live up to an express promise to disclose the reports prior to making a decision and to give the parties an opportunity to address the Board on them. This alone is quite sufficient to involve an inevitable conclusion that the appeal must fail. E F

As an alternative way of putting the case Mr Newman has sought to persuade their Lordships that the Court of Appeal in some way erred in the exercise of its discretion which he now invites their Lordships' Board to exercise afresh in his favour. No foundation whatever has been laid for that submission and their Lordships are entirely unpersuaded that it is even arguably capable of being supported.

Finally, the appellant seeks to raise the question of costs in the courts below. First, it is said that the trial judge should not, as he did, have left the appellant to pay its own costs but should have made an order for their payment by the Board. The short answer to that is that that was not something which was even hinted at in the notice of appeal from the Supreme Court and it is far too late to raise it now. Secondly, it is said that the Court of Appeal gave its decision on costs without inviting argument on the question and that, if it had been argued, whilst it might have been right that the appellant should pay the respondents' costs, the Board should have been ordered to indemnify the appellant against the costs which the appellant was ordered to pay to the first and second respondents. Their Lordships are accordingly G H

A now asked either to make an order for payment by the Board of the appellant's costs in the Court of Appeal or to remit the question of costs to the Court of Appeal for reconsideration. Their Lordships do not regard either course as appropriate. It is apparent that the order of the Court of Appeal was not drawn up until some time after the judgment was pronounced in court. If the appellant was dissatisfied with the order it was open to counsel either to seek to make submissions when the judg-
B ment was handed down or, if that was not practicable, to seek to have the drawing up and passing of the order suspended until an appointment could be made for further argument. It is, in their Lordships' view, too late now to seek to upset the order when there is nothing in the material before their Lordships to indicate in what respect (if at all) the Court of Appeal could be said to have exercised its discretion as to costs wrongly and when the matter was not even sought to be argued before it.

C Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs before their Lordships' Board.

Appeal dismissed.