[2015] JMSC Civ. 224

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2014 HCV 02279

BETWEEN	**THE RURAL TRANSIT ASSOCIATION LTD**	**APPLICANT**
AND	**JAMAICA URBAN TRANSIT COMPANY LTD**	**RESPONDENT**

CONSOLIDATED WITH:

CLAIM NO 2014 HCV 02299

BETWEEN	**V & B TRANSPORT LTD**	**APPLICANT**
AND	**JAMAICA URBAN TRANSIT COMPANY LTD**	**RESPONDENT**

Mr. Hugh Wildman and Miss Keiva Marshall instructed by Hugh Wildman and Company for the Applicants.

Mr. Walter Scott Q.C. and Mr. Matthieu Beckford instructed by Rattray Patterson Rattray for the Respondent.

Miss Dionne Cruickshank present representing the Respondent

Heard: January 07 & 09 and November 18, 2015

Judicial Review - Application for leave – Orders of Certiorari and Prohibition - Threshold Test – Whether sub-franchise fee imposed by JUTC is ultra vires – Whether JUTC is regulating public passenger transportation - Civil Procedure Rules Part 56

V. HARRIS, J

IN CHAMBERS

[1] These are applications by Rural Transit Association Ltd (RTA Ltd) and V & B Transport Ltd (V & B) ('the Applicants') pursuant to Part 56 of the Civil Procedure Rules 2002 (CPR) seeking leave to apply for judicial review.

[2] V & B is a member of the Western Transit Association Limited (WTA Ltd). WTA Ltd and RTA Ltd are incorporated under the Companies Act of Jamaica, to among other things, represent and promote the interest of private individuals who are engaged in the provision of public passenger transportation in Jamaica.

[3] The Respondent, Jamaica Urban Transit Company Limited (JUTC) is a private company also incorporated under the Companies Act of Jamaica. JUTC's sole shareholder is the Accountant General of Jamaica. It holds the exclusive licence or franchise to provide public passenger transport service within and throughout the Kingston Metropolitan Transport Region (KMTR) by means of stage and express carriages.

[4] These applications commenced with the Transport Authority (TA) as the 1st Respondent and the Office of Utilities Regulations (OUR) as the 3rd Respondent. However, on October 30, 2014 when the matters were before Hibbert J, he ordered that the two applications for leave were to be heard together. There was also an order which indicated that the reliefs that were being sought against the TA and OUR were no longer being pursued. JUTC, therefore, remains the only Respondent to this application.

[5] On December 18, 2014 RTA Ltd filed an amended notice for leave to apply for judicial review. On January 06, 2015 V & B filed a similar one. They are seeking several declarations, the prerogative writs of certiorari and prohibition, interim and permanent injunctions, as well as, damages and costs.

[6] The condensed grounds on which the Applicants are seeking these orders are:

(i) The Respondent has no power or capacity in law to regulate the provision of public passenger transportation in the country or the KMTR.

(ii) The refusal by the Respondent to renew the two one year licences that were issued to V & B amounts to regulation of public passenger transportation.

(iii) The Respondent has no power or capacity in law to grant a licence to the members of RTA Ltd to operate public passenger transportation in the KMTR.

(iv) The Respondent has no power or capacity in law to grant sub-franchise licences to the members of RTA Ltd who are engaged in the provision of public passenger transportation in the KMTR.

(v) The Respondent has no power or capacity in law, acting by itself to impose fees on members of RTA Ltd who are engaged in the provision of public passenger transportation in the country or the KMTR.

(vi) The purported increase in the fees from $280,000.00 to $756,000.00 by the Respondent amounts to regulation of public passenger transportation.

(vii) The Applicant RTA Ltd has a legitimate expectation that the licence issued to it will not be unilaterally amended by the Respondent and anyone acting on behalf of the Respondent. Accordingly, the actions of the Respondent in regulating the provision of public passenger transportation in Jamaica, if allowed to continue, would destroy and defeat those expectations.

Background

[7] I will commence with what I believe was the catalyst for these applications.

[8] In early November 2013, some members of the Applicants, who hold sub-franchise and rural licences to provide public passenger transport services both wholly and partly within the KMTR respectively, were notified by announcements in the print and electronic media of impending changes that would be made to the terms and conditions of their licences. Letters dated November 05, 2013 written by Mr. Colin

Campbell, the managing director of the Respondent company and addressed to sub-franchise operators confirmed this.

[9] This was because, *inter alia*, the Respondent anticipated that its fleet of buses would be substantially increased by the time the new licensing year arrived on April 01, 2014. This meant, naturally, that fewer routes within the KMTR would be sub-franchised.

[10] The Applicants were also informed, by this said letter, that a bidding process would be untaken by the Respondent to facilitate the identification of "the most suitable candidates who would be needed to provide transportation service on the various routes that were being franchised by the JUTC". They were also told that there would be no automatic renewal of their licences.

[11] To make matters worse, sometime during the month of March 2014, Mr. Campbell announced that he intended to consult with the Attorney General and seek to amend clause 2 of the licences issued by the TA.

[12] If this amendment were made, it would prevent the relevant licensees who were operating from areas outside the KMTR to destinations within the KMTR from setting down and picking up passengers within the KMTR. This pronouncement by the Respondent's managing director caused much alarm to the members of Applicants who regarded clause 2 of their licences to be 'fundamental and critical' to their operations.

[13] On April 23, 2014, a meeting was convened by the TA. Several members of the Applicants were in attendance. At that meeting, they were informed by a representative of the TA that the "official policy of the TA in respect to clause 2" of their licences had changed. They were told that "persons transporting passengers coming from rural areas into the KMTR, including persons operating from Papine and Cross Roads will not be able to let off or pick up passengers along the route". The Applicants felt that this was contrary to the term stipulated in clause 2 of their licences.

[14] Needless to say, some persons at that meeting protested. The meeting ended abruptly when the TA's representative walked out. The Applicants being aggrieved by

the far reaching changes that were about to overtake them sought legal advice and the matter is now before the Court.

The evidence presented by Applicants

[15] The applications are supported by three affidavits, one each from Mr. Lloyd Henry and Mr. Morraine Thompson on behalf of RTA Ltd; and the other from Mr. Bruce Miller on behalf of V & B.

[16] All three affiants have been in the public passenger transportation business for a long time. Mr. Henry is the holder of a rural stage carriage licence which permits him to provide public passenger transport services between Kitson Town in St. Catherine and the KMTR. Mr. Thompson holds both rural stage carriage licences and sub-franchise licences. The sub-franchise licences authorize him to operate wholly with the KMTR. Mr. Miller holds only sub-franchise licences.

[17] Messrs. Henry and Thompson have asserted that clause 2 of their rural licences allows them to set down and pick up passengers at designated bus stops or points of convenience along the route, including areas within the KMTR.

[18] Mr. Henry has exhibited one of his rural licences. Clause 2 of that licence reads: "The approved stopping points at which passengers may be taken up and/or set down shall be such places specified by the sign "Bus Stop" or where no signs are provided at such places convenient."

[19] But there is more. Clause 10 of that licence states: "The Licensee shall observe and comply with the conditions **imposed by Section 3 Subsection 4 Public Passenger Transport (Corporate Area) Act**." (Emphasis mine) I believe that the statute referred to is one and the same as the Public Passenger Transport (Kingston Metropolitan Transport Region) Act (PPKMTR Act). It would seem to me therefore that clause 2 of this licence is subject to the condition stated in section 3 (4) of the PPKMTR Act, which I will come to later in this judgment.

[20] Mr. Thompson stated that he initially paid $70,000.00 for his KMTR licences. These were later increased to $280,000.00. In February 2014 he was notified by the

Respondent that the fees would be increased to $756,000.00 on April 01, 2014. He was also later informed that three of his previous licences had been 'revoked'.

[21] Mr. Thompson has exhibited one of his licences. It bears the title "Public Passenger Transport (KMTR) Act. Sub-licence to operate stage carriage service in the KMTR". It was issued by the TA and authorizes him to operate between Bull Bay and Half Way Tree. Clause 3 of this licence is a replica of clause 2 in the rural licences. However, the other conditions in the KMTR licence are different from those in the rural licence.

[22] As an example, clause 9 of the KMTR licence expressly states that the licence is issued with the consent of the JUTC in accordance with section 3(3)(d) of the PPKMTR Act. The licensee is mandated to observe and comply with the terms and conditions of the said consent. Clause 3 is also not subject to the condition contained in clause 10 of the rural licences. I imagine that this is so because there are no provisions in the PPKMTR Act that stipulate that persons operating wholly within the KMTR require the consent of the JUTC to pick up and/or set down passengers. From a practical standpoint they would need to do so.

[23] Mr. Miller also gave evidence that the Respondent substantially hiked the sub-franchise fees and revoked two of his licences. He spoke of the notice that was circulated by the Respondent in the print media advising sub-franchise holders of the Respondent's intention to 'claim' a number of routes within the KMTR with the result that some licences would not be renewed. This information was later communicated to V & B by way of a letter from the Respondent's managing director. This letter is exhibited.

[24] The summarized version of the letter is that the JUTC had by way of a publication in the **Sunday Gleaner** dated January 12, 2014, invited applications for the provision of five thousand (5000) seats within the KMTR to supplement its services. The letter indicated that V & B was not successful in its bid.

[25] The Applicants are saying that the Respondent has been unlawfully regulating public passenger transportation within the KMTR and the Island. It is against this

backdrop that they have sought leave to make an application for judicial review to obtain:

> (i) an order of certiorari to quash the order made by the Respondent for the Applicants to pay a licence fee as a pre-condition for engaging in the provision of public passenger transportation in the KMTR; and
>
> (ii) an order of prohibition to prohibit the Respondent from taking any steps to regulate the provision of public passenger transportation in the KMTR.

The Respondent's evidence

[26] In response to the affidavits filed on behalf of the Applicants, Mr. Kirk Finnikin, the Deputy Managing Director of operations at the Respondent company has filed two affidavits. Both are dated May 22, 2014.

[27] He stated that the Respondent is the holder of the exclusive licence or franchise for stage and express carriages in the KMTR since 1998. This licence was granted pursuant to section 3 of the PPKMTR Act. The Respondent is mandated by this licence to provide at least 25,000 seats within the KMTR for the carriage of passengers.

[28] The Minister (now the TA) may, by virtue of section 3 (2) of the PPKMRT Act and with the written consent of the Respondent, grant licences (sub-franchise licences) authorizing the operation of stage and/or express carriage on a route that is wholly within the KMTR.

[29] However, an applicant for a rural stage or express carriage licence, Mr. Finnikin averred, does not require the consent of the JUTC. The Respondent's consent is required only for the picking up and setting down of passengers within the KMTR if the rural licensee operates partly within the KMTR.

[30] Mr. Finnikin maintained that the Respondent has not consented for any rural licensee to set down and pick up passengers within the KMTR. Therefore, if the TA has granted any rural licence which gives this authorization, then this would have been done

without their written consent and would be in breach of section 3 (4) of the PPKMTR Act. It has not therefore unilaterally amended clause 2 of the rural licences.

[31] The Respondent, he said, like the members of the Applicants is also a licensee. It has not and does not grant licences. This is done by the TA which is the body that has been established by statute to regulate public passenger transportation within Jamaica. The Respondent therefore does not regulate public passenger transportation in the KMTR or the Island.

[32] It was further stated by Mr. Finnikin that the Respondent as the holder of the exclusive licence for the KMTR, its consent is required, on such terms and conditions as it sees fit, subject to the approval of the Minister (now the TA), before any sub-franchise licence can be issued to any person or body wishing to operate within the KMTR on a stage or express carriage licence. The giving or refusal of the Respondent's consent does not amount to regulation and that it was well within its statutory remit to do so or not.

[33] He also gave evidence about the reason the Respondent decided to reduce the number of sub-franchised routes and how this was done (See paragraphs 8 to 10 above) Mr. Finnikin asserted that sub-franchisees were all notified of what was to come and the bidding process was not conducted in an unfair manner.

[34] The Respondent, Mr. Finnikin said, has a right to charge a sub-franchise fee by virtue of its statutory discretion, which allows the entity to give its consent on such terms and conditions as it may determine. The imposition of sub-franchise fees is one such term and condition (which has been approved by the Minister/TA by implication). It can also increase these fees. He also gave the reason for the increase in the fees which he said was proportional to the value of the route.

[35] Mr. Finnikin also stated that all persons who wished to obtain a sub-franchise licence are required to submit an application for a JUTC route licence to the Respondent at least forty-five (45) days before the expiration of the licensing year (March 31). These applications would be evaluated by the Respondent who would then

develop a list of approved candidates. This list is sent to the TA. The TA would then decide, in its statutory discretion, to grant or not to grant the licences.

[36] The sub-franchise licences are valid for a year. At the end of each licensing year, the application and evaluation processes are repeated. Everyone who wished to acquire or re-acquire a sub-franchise licence is obliged to submit to these processes. In short, there is no automatic renewal of sub-franchise licences, Mr. Finnikin said.

Applicants' submissions

[37] Learned counsel Mr. Wildman in his oral submissions that were made on behalf of the Applicants stated that the Respondent has taken on the duties of regulating public passenger transportation by issuing sub-franchise licences and that this is unlawful.

[38] He further contended that the Respondent has taken onto itself certain functions in carrying out its mandate which have infringed the rights of the Applicant to provide public transportation within and outside the KMTR. These infringements include the issuing of threats by its managing director to amend clause 2 of their licences, which would violate the licence granted to them by the TA. Mr. Wildman stated that only the regulator had the power to amend the Applicants' licences.

[39] When Mr. Campbell made this statement he had no jurisdiction to do so and had erred in law, Mr. Wildman advanced. The statement is therefore capable of being quashed by way of certiorari. A writ of prohibition is also required to prevent this unlawful act. He cited the authorities of **Anisminic Ltd v Foreign Compensation Commission and Another** [1969] 2 A.C. 147 (**Anisminic**); **Sampson v Air Jamaica Ltd** SCCA 99/91 delivered 06.06.1992 (**Sampson**) and **R v Justices for Court of Quarter Sessions for the County of Leicester, ex parte Gilks** [1966] Crim.L.R. 613 (**Gilks**), in support of this submission.

[40] Mr. Wildman also put forward that the Applicants have been operating within the KMTR pursuant on a one year licence which was granted to them by the Respondent and that some of these licences have now been revoked without any explanation. The Applicants had a legitimate expectation that their licences would be renewed providing

that they were not in breach of any terms and conditions contained therein. In support of this position Mr. Wildman relied on the cases of **Chief Immigration Officer of the British Virgin Islands v Burnett** [1955] 50 W.I.R.153 (**Burnett**) and **Council of Civil Service Unions et al v Minister for the Civil Service** [1985] A.C. 374 (**CCSU**).

[41] Additionally, Mr. Wildman argued, the revocation of the Applicants' licences without giving them an opportunity to be heard on the issue was in breach of the principles of natural justice. The Respondent, he continued, had a duty to act fairly and had failed to do so. In support of his submission, Mr. Wildman cited the cases of **Re Liverpool Taxi Association** [1972] 2 All ER 589 (**Liverpool**); **Padfield and Others v. Minister of Agriculture, Fisheries and Food and Others** [1968] 2 W.L.R. 924 (**Padfield**); **Narayansingh (Barl) v Commissioner of Police** (2004) 64 WIR 392 (**Narayansingh**)

[42] It was put forward, by Mr. Wildman, that the decisions of the JUTC not to renew the one year licences that were granted to the members of the Applicants, as well as, the proposed increase in the sub-franchise fee from $280,000.00 to $756,000.00 each were 'arbitrary, egregious and manifestly unreasonable'. Reliance was placed on the well known and often cited authority of **Associated Provincial Picture Houses Limited v Wednesbury Corporation** [1948] 1 K.B. 223. (**Wednesbury**)

[43] He further submitted that there was no delay in making the application for leave and that the Applicants have no other alternative remedy available to them.

[44] The Applicants have argued that in light of the evidence presented they have met the threshold for judicial review in keeping with the principles enunciated in the case of **Sharma v Brown-Antoine** [2007] 1 W.L.R. 780 (**Sharma**).

[45] I wish to point out that I have also read and taken into account the relevant aspects of the Applicants' written skeleton submissions that were filed on December 19, 2014.

The Respondent's submissions

[46] Learned Queen's Counsel Mr. Scott commenced his submissions by indicating from the outset that no issue was being taken with whether or not the Respondent company was amenable to judicial review. He stated that this issue was already litigated in the matter of **Rural Transit Association Limited v Jamaica Urban Transit Company Ltd, Commissioner of Police and Office of Utilities Regulation** [2014] JMSC Civ. 123 (**RTA Ltd v. JUTC et al**) and none of the parties in that case had challenged the decision of Campbell J who held that the decisions of the Respondent were subject to review by the court.

[47] He directed the attention of the Court to the affidavit of Mr. Kirk Finnikin as providing what he described as the factual context to the Respondent's opposition to the application, as well as, the Respondent's written skeleton submissions that were also filed on December 19, 2014. These I have also read and taken into consideration. He also amplified those written submissions with very succinct oral submissions.

[48] The Respondent also submitted that the Applicants in order to obtain leave for judicial review, must identify the decision that was made by the Respondent company that they are seeking to be impugned. The Applicants have failed to provide any evidence that the JUTC has made a decision to amend clause 2 of their licences.

[49] Evidence of a 'threat' to do so by the Respondent's managing director, Mr. Scott continued, was not evidence of a decision. Additionally only the TA, as the regulator, could make such a decision. The meeting that was convened by that body with providers of public passenger transportation to discuss the proposed amendment underscores the point, Mr. Scott argued. The TA is no longer a party to these proceedings. Accordingly, there is no decision made by the Respondent that is before the Court to impugn and the Applicants have no realistic prospect of success. He cited in support of this submission the decision of G. Smith J in the case of **National Association of Taxi Operators (NATO) v. Transport Authority** 2014 HCV 01146 delivered on March 17, 2014 (**NATO**).

[50] Mr. Scott further posited that the Respondent holds the exclusive licence for the KMTR and in accordance with section 3 of the PPKMTR Act is empowered to consent

or not to consent to any sub-franchise licence that is to be issued by the TA. This statutory power, however, does not allow the Respondent to morph from being an exclusive licensee to a regulator of public passenger transportation. It is the TA which, in its statutory discretion, grants or declines to grant these licences.

[51] He reminded the Court that the exclusive licence that the Respondent holds for the KMTR was not granted by the entity to itself. The JUTC like all other providers of public transportation had to be issued a licence which was done by the Minister of Transport in 1998 pursuant to section 3 of the PPKMTR Act.

[52] With the hope of strengthening his argument on this point, Mr. Scott also urged the court to consider that the Respondent could not be a regulator as the Applicants claim because persons who wished to operate outside of the KMTR do not require the consent of the JUTC to obtain a licence. (The consent of the JUTC is also not required for persons who wish to obtain contract and hackney carriage licences in the KMTR)

[53] Mr. Scott also argued that in relation to the increase in the sub-franchise fees, the first issue that the Court must determine is whether or not the charging of a sub-franchise fee by the Respondent is amenable to judicial review. He directed the Court to paragraphs 48 and 49 of Mr. Finnikin's affidavit in response to the affidavit of Lloyd Henry.

[54] He also asked the Court to examine the relationship that exists between the Respondent and the members of the Applicant who are sub-franchisees. He submitted that this relationship was clearly contractual and commercial. Therefore the decisions made by the Respondent to grant them consent on financial terms and to increase the sub-franchise fees are not administrative or regulatory in nature. They are purely commercial decisions which are not subject to review by the Court. He relied on the decisions of Evan Brown J (Ag) (as he was then) and Campbell J in the cases of **Karen Thames v National Irrigational Commission** 2009 HCV 0431 (**Thames**) and **RTA Ltd v JUTC et al** (supra) respectively.

[55] In addressing the submission made by the Applicants that they had a legitimate expectation of having their licences renewed, it was argued that they could hold no such

expectation given the application and evaluation processes that they had to submit to at the end of each licensing year.

[56] Additionally, they had failed to show that the Respondent company made a clear and unambiguous representation to them that their licences would be renewed as a matter of course. The Respondent placed reliance on the authorities of **R v Jockey Club ex parte RAM Racecourses** [1993] 2 All ER 225 (**Jockey Club**), **Lackston Robinson v Daisy Coke et al** SCCA No 16 of 2003 delivered on November 8, 2006 (**Robinson)** and **CCSU** (supra) for this submission.

[57] Finally, Mr. Scott submitted that on a totality of the material before the Court, the Applicants have failed to meet the threshold that has been enunciated in **Sharma** and their applications should be refused.

The relevant statutory regime

[58] The Respondent was granted the exclusive licence for the KMTR in 1998 in accordance with section 3 of the PPKMTR Act. (This licence is exhibited to Mr. Finnikin's affidavit) That section makes the following provisions:

> 3 - (1) The Minister may grant to any person an exclusive licence on such conditions as may be specified therein to provide public passenger services within and throughout the Kingston Metropolitan Transport Region by means of stage carriages or express carriages or both.
>
> (2) Subject to the provisions of this section during the continuance in force of any exclusive licence granted under subsection (1) no person shall hold or be granted a road licence authorizing the use of any stage carriage or express carriage within the Kingston Metropolitan Transport Region and no person except the licensee shall carry within the Kingston Metropolitan Transport Region any person on any

vehicle while that vehicle is being used as a stage carriage or express carriage.

(3) Nothing in subsection (2) shall prevent –

(a) the operation in any way of the Jamaica Railway Corporation;

(b) the grant or holding of a road licence authorizing the operation of a contract carriage service or a hackney carriage service within the Kingston Metropolitan Transport Region;

(c) the grant or holding of a road licence authorizing, subject to the condition referred to in subsection (4), the operation of any stage carriage service or express carriage service on any route which is partly within the Kingston Metropolitan Transport Region or the carriage of passengers on any service operated under and in accordance with such service;

(d) the grant or holding of a road licence authorizing the operation of any stage carriage service or express carriage service on any rout [sic] wholly within the Kingston Metropolitan Transport Region or the carriage of passengers in any service operated under and in accordance with such licence if the licensee shall have consented in writing to the grant or holding of that licence, and for avoidance of doubt it is expressly declared that -

(i) any consent given by the licensee for the purpose of this paragraph may be given subject to such terms and conditions as the licensee, with the approval of the Minister, may determine; and

(ii) the provisions of section 10 shall not apply in relation to a licence granted pursuant to such consent as aforesaid.

(4) **The condition referred to in paragraph (c) of subsection (3) is that no passenger carried on the service shall be taken up at any point within the Kingston Metropolitan Transport Region or not more than 440 yard beyond the boundary of that area and set down on the same journey at any other point within that area or not more than 440 yards beyond the boundary of that area unless the licensee has consented in writing to the taking up and setting down of passengers as aforesaid on such service and for the avoidance of doubt it is expressly declared that any consent given by the licensee for the purposes of this paragraph may be given subject to such conditions as the licensee may think fit.** (Emphasis mine)

[59] Based on these provisions, I agree with and adopt the views expressed by Campbell J in the case of **RTA Ltd v. JUTC et al** (supra) that:

> *"JUTC has its source in a licence granted by the Minister pursuant to Section 3 of the Act. The Act also provided for JUTC, as the exclusive licencee* [sic] *to 'consent in writing to the grant or holding of stage carriage or express carriage service on any route within the KMTR or the carriage of passengers operated under and in accordance with such licence.' Any such consent may be given subject to such terms and conditions as JUTC, with the approval of the Minister may determine."*

[60] I wish only to add that it is my view that the provisions of sections 3(3)(c) and 3(4) of the PPKMTR Act also clearly state that persons who operate any stage and/or express carriage services on a route that is partly within the KMTR would be required to obtain the Respondent's written consent in order to set down and pick up passengers within the KMTR. The consent given under these sections, it seems to me, is not subject to the approval of the Minister/TA.

[61] On July 08, 1987 the Transport Authority Act (TAA) was promulgated. The statute established a body corporate known as the TA. Section 4 of the TAA sets out the functions of the TA:

> (1) The function of the Authority shall be to regulate and monitor public passenger transport throughout the Island and to perform such duties as immediately prior to the 8th day of July were required to be performed by-
>
> (a) Licensing Authorities or specially constituted Licensing Authorities under the Road Traffic Act;
>
> (b) the Public Passenger Transport (Kingston Metropolitan Transport Region) Board of Control constituted under the Public Passenger Transport (Kingston Metropolitan Transport Region) Act; and
>
> (c) the Public Passenger Transport (Rural Area) Board of Control constituted under the Public Passenger Transport (Rural Area) Act.
>
> (2) The Authority may in carrying out its functions under subsection (1) –
>
> (a) charge and collect such fees as may be prescribed;
>
> (b) borrow money in accordance with section 9; and

(c) do such other things as may, in its opinion, be conducive to an efficient public passenger transport system.

[62] By virtue of the TAA, the TA is the regulator of public passenger transportation throughout Jamaica. Duties that were previously discharged by licensing authorities under the Road Traffic Act, the Public Passenger Transport (KMTR) and the Public Passenger Transport (Rural Area) Boards of Control, and to some extent, the Minister are now undertaken by the TA.

The application for leave

[63] The issues of whether the Applicants have sufficient interest or standing to seek leave for judicial review and whether as a private entity the Respondent was amendable to judicial review were not contested. Because of their significance to these proceedings I will simply address them in this way:

[64] On the subject of standing, Rule 56.2 of the CPR, so far as it is relevant, provides:

56.2 (1) An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.

(2) This includes:

(a) any person who has been adversely affected by the decision which is the subject of the application;

(b) any body or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);

[65] I have no difficulty in concluding, therefore, that Messrs. Miller, Henry and Thompson, in light of the above provisions of the CPR, are persons who have been adversely affected by the decisions which are the subject of this application. The Applicants, therefore, would be well within their rights to apply for leave at their request as "any body or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);".

[66] On the matter of whether the Respondent is amenable to judicial review, I agree with the analysis of Campbell J in **RTA Ltd v JUTC et al** that:

> *"It is clear that JUTC has direct statutory powers... It operates in the public domain; its service affects transportation in the KMTR as defined by the* (PPKMTR) *Act...The nature of the services it provides, and the consequences of its decisions, indicate that JUTC is performing a public duty when engaged in the performance of its statutory functions...JUTC has public law duties, imposed by statutes which are amenable to judicial review...I find that there is a statutory source for many of the duties of JUTC. In addition, the nature of the powers it exercises is part of the government's framework for the regulation of public passenger transportation within the KMTR, and as we have seen has the support of statutory powers, it was under a statutory duty to be reasonable and efficient, and was under a duty to exercise what amounted to public law duties. This court has jurisdiction to review those decisions of JUTC."*

[67] It is well settled that judicial review is the mechanism that the Court employs to make certain that the duties of public authorities are performed in harmony with the law and also that these bodies are held responsible for unlawful or ultra vires acts or any abuse of power.

[68] The requirement of leave is one aspect of the Court's function of separating the 'wheat from the chaff' so to speak. The Court acts as a gatekeeper so that trivial or misguided applications that are made by busybodies and cranks are like the chaff, discarded. This process ensures that public authorities are protected from unwarranted interference. As Mangatal J in the case of **Digicel Jamaica Ltd v The Office of Utilities** [2012] JMSC Civ. 91 eloquently puts it:

> *"...the business of government could grind to a halt and good administration be adversely affected if the Courts do not perform this sifting role efficiently and with care. It must for example, in the field of commercial endeavour, ensure that its processes are not used or misused as a mere ploy in competition battles...or used for ulterior motives such as obstructing or delaying a public authority from carrying out its statutory duties with a view to maximizing profit... Nor should it allow its process to be used to put a competitor out of business... Thus the Court has to balance these types of considerations with the citizen's right to seek redress and protection against an abuse of public power. It has to decide whether to give the green light for an applicant to proceed with a claim for judicial review."*

[69] In **Sharma** the Judicial Committee of the Privy Council explained the applicable threshold that an applicant must meet in order to obtain the leave for judicial review. Lord Walker reading the judgment of the court stated:

> *"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; see R v. Legal Aid*

Board, ex p Hughes (1992) 5 Admin LR 623, 628 and Fordham, Judicial Review Handbook 4th ed. (2004), p. 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in ***R (N) v. Mental Health Review Tribunal (Northern Region)*** *[2006] QB 468, paragraph 62 in a passage applicable mutatis mutandis, to arguability:*

'the more serious the allegation or the more serious the consequences of the allegation if proved, the stronger must be the evidence before a court will find the allegation proved on a balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength and quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'

It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen': ***Matatulu v. Director of Public Prosecutions*** *[2003] 4 LRC 712, 733."*

[70] In the decision of **R v IDT ex parte Wray and Nephew Ltd** 2009 HCV 04798 delivered on October 23, 2009, Sykes J at paragraph 58 of his judgment helpfully described the new approach:

> *"The point then is that leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. The judges, regardless of the opinion of litigants, are required to make an assessment of whether leave should be granted in light of the new stated approach...* (This) *also means that an application cannot simply be dressed up in the correct formulation and hope to get by. An application cannot cast about expressions such as 'ultra vires', 'null and void', 'erroneous in law', 'unreasonable' without adducing in the required affidavit evidence making these conclusions arguable with a realistic prospect of success. These expressions are really conclusions."*

[71] To be successful in their application for leave, the Applicants are required to establish that they have an arguable ground for judicial review that has a realistic prospect of success, and which is not subject to any discretionary bar such as delay or an alternative remedy. McDonald-Bishop J (as she then was) in the case of **Milton Baker v The Commissioner of FINSAC Commission of Enquiry Warwick Bogle and the Commissioner of FINSAC Commission of Enquiry Charles Ross** [2013] JMSC Civ. 137 (**Milton Baker**) with her usual clarity, puts it in this way:

> *"...A claim should only proceed to a substantive hearing upon the Court being satisfied that there is a case fit for consideration. The evidence relied on must disclose that arguable case with a realistic prospect of success of a ground on which the claim is based. Such a case would then be such as to merit full investigation at a substantive hearing."*

[72] Therefore the question that must be answered is whether the evidence put forward by the Applicants has met this threshold, or not.

Grounds for application

[73] Rule 56.3 (3) of the CPR requires that the grounds on which the application is made should be set out.

[74] In compliance with this requirement, the Applicants have set out several grounds on which it seems the application was made. The substantial ground advanced by the Applicants for which they seek judicial review is that the Respondent has been illegally acting as the regulator of public passenger transport services in the KMTR and in that unlawful capacity has made decisions to:

(a) unilaterally amend clause 2 of their licences;

(b) arbitrarily and unreasonably refused to renew their licences in breach of the members of the Applicants' legitimate expectations that these would be renewed;

(c) impose licence fees as a pre-condition for them to engage in the provision of public passenger transportation within the KMTR;

(d) arbitrarily and unreasonably increased the licence fees from $280,000.00 to $750,000.00.

[75] The Applicants have relied on the evidence of Messrs. Henry, Thompson and Miller which has been set out in paragraphs 15 to 25 above. The Respondent's case in response is set out in paragraphs 26 to 36 above.

Decisions to be impugn

[76] Mr. Scott submitted that there is no evidence of any decisions taken by the Respondent that the Court could review. I understand him to be saying this for two reasons.

[77] Firstly, he is putting forward that the Applicants have failed to show, by the material they have placed before the court, that the Respondent has taken any decisions as the regulator of public passenger transport services in the KMTR or the Island for that matter.

[78] Secondly, that the Respondent by virtue of sections 3 of the PPKMTR Act has the power to impose a fee for its sub-franchise licence and by implication to increase it. Additionally, the relationship that exists between the members of the Applicants and the Respondent is commercial in nature. Therefore the decision of the Respondent to increase its sub-franchise fees, is not only within the Respondent's statutory remit, but also not subject to the Court's review.

[79] The upshot of these submissions is that the Applicants have failed to meet the **Sharma** threshold and the court is to refuse their applications.

[80] To address this matter, I find the reasoning of Campbell J in **RTA Ltd v. JUTC et al** (supra) to be instructive. At paragraph 39 he said:

> *"The identification of the order direction or record whose validity is being questioned is a necessary pre-condition before a claimant can embark upon a trial to quash such order, direction or record by seeking a writ of Certiorari. This identification is key because of the nature of the writ of Certiorari, which is an examination on the face of the record to be impugned. The origin of the writ of Certiorari and its use in governance is aptly demonstrated by the dicta in the Canadian case of* ***R v. Titchmarsh*** *(1915) 22 D.L.R. 272, 277-278;*
>
> > *'The theory is that the Sovereign has been appealed to by someone of his subjects who complains to him of an injustice done to him by an inferior court; whereupon the Sovereign saying he wished to be certified – Certiorari – of the matter, orders that the record, etc. Be transmitted into court in which he is sitting'."*

[81] I can find nowhere in the evidence produced by the members of the Applicants that the Respondent has made decisions to grant them licences, refuse to renew their

licences and unilaterally amend clause 2 of their licences. In their own words, the Applicants have stated that the licences that they obtained were issued by the TA. The fees that they paid were paid to the TA and those licences were renewed by the TA. All the licences that they have exhibited were all granted by the TA. Although Mr. Thompson and Mr. Miller averred that they held licences that were issued by the JUTC, these licences were not placed in the material before the Court.

[82] It is clear from a reading of section 3 of the PPKMTR Act that it is the Minister (now the TA) who would grant the licences to these persons, subject to the Respondent's consent and the terms and conditions imposed by them. (See also the two sub-franchise licences (referred to as sub-licence) exhibited with Mr. Finnikin's affidavit which expressly state that the operation of these licences shall be subject to the supervision and control of the TA)

[83] To quote from the decision in the case of **In the Application of Jules Bernard** HCA No 2361 of 1993 (TT) (which was also relied on by Campbell J in **RTA Ltd v JUTC et al** at paragraph 41 of his judgment) Ramlogan J stated:

> *"There is nothing to indicate that anything has been done or not done which taints the process. The letter, in my view, does not constitute a decision to retire the Applicant. It merely says that the Commission would be considering whether it ought to retire the Applicant. The Applicant's contention seems to be that the Commission has its intention to retire him. That is a very different thing from what the letter says. The letter is seeking to get information so that the Commission could consider whether the Applicant should be retired. It is a mere preliminary step. In any case, how has the Commission erred in arriving at the decision that it ought to consider whether the Applicant should retire?...What is there to be reviewed? The court should not interfere unless some injustice has been done or injustice is*

inevitable. Whether or not this is so must be determined by looking at the matter as a whole..."

[84] I agree with Mr. Scott, to use his words 'that the threat made to amend clause 2' (by the Respondent's managing director) does not amount to 'the unilateral amendment' of clause 2 by the Respondent. I also agree with and respectfully adopt the reasoning of Ramlogan J that all the Respondent has done, in relation to the amendment of clause 2, is taken a preliminary step. There is therefore no decision to review both in relation to the 'decisions' to amend clause 2 of the rural licences, as well as, to regulate public passenger transport services within the KMTR and the rest of the Island.

[85] In disposing of this aspect of the application for leave, I wish to make two observations. Firstly, on the evidence presented by the Respondent, as well as, the provisions in sections 3(3)(c) and section 3(4) of the PPKMTR Act, it seems to me that the Respondent would be well within its rights to seek legal advice concerning clause 2 of the rural licences given the condition imposed by clause 10. (See paragraph 19 above) How has the Respondent erred in arriving at the decisions that it ought to consider whether clause 2 of the rural licences is to be amended and that it would consult with the Attorney General on the issue?

[86] Secondly, in response to the apparent controversy that Mr. Campbell's statement created, the Applicants' evidence is that it was the TA as the regulator, and not the JUTC, which convened a meeting with their members to advise them of 'the TA's change in policy' in relation to clause 2. This aspect of the evidence, in my view, also supports my finding that the evidence of the Applicants has failed to show that the Respondent is regulating public passenger transportation in the KMTR or elsewhere.

[87] In my judgment, grounds 1, 2 and 3 of the application, are not arguable grounds that have any realistic prospect of success.

Legitimate expectation

[88] In relation to grounds 6 and 7 which raise the issue of legitimate expectation, there does not appear to me to be any arguable ground with a realistic prospect of success.

[89] A legitimate expectation arises in circumstances where "a person has been led by a public authority to believe that he will receive or retain some benefit or advantage." (McDonald-Bishop J (as she then was) in **Milton Baker**)

[90] Lord Fraser of Tulleybelton in **CCSU**, cited earlier at paragraph 41, helpfully explained this principle:

> *"But even where a person claiming some benefit or privilege has no right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege and, if so, the Courts will protect his expectation by judicial review as a matter of public law. This subject has been fully explained by Lord Diplock in* ***O'Reilly v Mackman*** *[1982] 3 All ER 1124, [1983] 2 A.C. 237.*
>
> *Legitimate or reasonable expectation may arise either from an express promise given on behalf of a public body or from the existence of a regular practice which the claimant can reasonably expect to continue."*

[91] At page 210 of his text **Commonwealth Caribbean Administrative Law**, the author Eddy Ventose describes the principles of substantive legitimate expectation as follows:

> *"The question of substantive legitimate expectation is a more exacting one, because unlike the case of procedural legitimate expectations, where the Applicant claims a right of*

> *to be heard before a benefit is taken away or a public authority resiles from a promise,* ***the Applicant in such a case argues that he is entitled to the actual benefit and that the public authority is bound by that promise or cannot change a policy.*** *Substantive legitimate expectations are in a sense more important because they constrain, in a more intimate way, the action of public authorities. Here the Courts could direct the public authority to give effect to a promise or representation made to a person or direct them to continue to apply the old policy in the face of their attempt to introduce a new one. Many questions arise in this context. In what circumstances is a public authority bound by a promise made to a person that is of a substantive benefit? What test should the Courts apply in determining whether to allow the legitimate expectation to trump the actions of the public authority?* ***The standard is a high one for the claimant."*** (Emphases mine)

[92] Applying these principles to the case at bar, where is the evidence that the Respondent expressly promised the Applicants that it would renew their licences? Where is the evidence that there existed a regular practice by the Respondent of renewing the Applicants' licences which they could reasonably expect to continue? I have found none on the material placed before the Court by the Applicants.

Breach of natural justice

[93] Grounds 6 and 7 of V & B's application state that the Respondent has not provided the Applicant with any reason for refusing to renew its licences and that this decision was communicated to the company via a letter dated February 24, 2014.

[94] In his oral submissions Mr. Wildman for the Applicants argued that the revocation of the Applicants' licences by the Respondents, without giving them an opportunity to be

heard on the issue, was in breach of the principles of natural justice. He relied on the authorities of **Liverpool, Padfield and Narayansingh** (supra at paragraph 41)

[95] In **Liverpool**, a decision of the Court of Appeal, it was held that licensing authority, Liverpool Corporation, had a duty to act fairly, in considering applications for hackney carriage licences under the relevant legislation. This meant that the corporation should be ready to hear persons or bodies whose interests were affected by its decisions. It was also held that the corporation were not at liberty to disregard the undertakings that its chairman had given to the members of the Liverpool Taxi Owners' Association that the number of hackney carriage licences would not be increased without the association being heard on the matter.

[96] In **Padfield** milk producers sought judicial review of the Minister's refusal to exercise his power to direct an investigative committee to be set up to examine complaints. The House of Lords found that the refusal frustrated the policy of the relevant statute and ordered re-consideration of the matter by the Minister.

[97] In **Narayansingh** the Commissioner of Police for Trinidad had revoked the appellant's licence under section 21 of the Firearms Act 1970 after he had been acquitted of criminal charges without conducting a hearing. The Judicial Committee of the Privy Council allowed his appeal on the grounds that even though it was not always necessary for the Commissioner under section 21 to conduct an enquiry, given the specific circumstances of the appellant's case the Commissioner should have done so.

[98] In distinguishing the cases cited by Mr. Wildman from the case at bar, it seems to me that in those cases, unlike this one, the persons or body whose decisions were reviewed were empowered to make the decisions that they did and failed to afford the persons who would have been affected by them the opportunity of being heard. Furthermore, in **Liverpool**, the decision of the court also hinged on undertakings that were given to the members of the taxi association by the chairman of the corporation.

[99] However, this is not the case in the matter before me. The evidence being relied upon by the Applicants has failed to show that the JUTC was operating as the licensing authority and was granting and/or revoking rural or KMTR licences. Moreover, the

evidence does not disclose that the Respondent made any promises or gave any undertakings to the Applicants that they would be given the opportunity of being heard, before the JUTC decided not to renew their licences. I fail to see, on the evidence, how the Respondent could be said to have breached the principles of natural justice.

[100] In any event, the evidence shows that the members of the Applicants were notified by the Respondent of their decision to sub-franchise fewer routes within the KMTR. They were allowed to participate in the bidding process for the 5000 available seats that the Respondent was sub-franchising. The Applicants were also given the opportunity to take part in a meeting convened by the regulator, the TA, to discuss matters that concerned and affected them. That meeting, it seems, was unproductive.

[101] Accordingly, this ground of the application, in my view, is not an arguable ground that has any realistic prospect of success.

The imposition of sub-franchise fees

[102] The source of the Respondent's power to give its consent before the Minister or the TA can grant licences for express and stage carriages to persons wishing to operate wholly within the KMTR; and to consent to the picking up and setting down of passengers by rural operators, comes from sections 3(3)(d) and 3(4) respectively of the PPKMTR Act. Its consent, under section 3 (3)(d)(i) is given on such terms and conditions that the Respondent, subject to the approval of the Minister/TA, may determine, but the Minister's or TA's approval is not required for the consent given under section 3(4). The Respondent, no doubt, is given these powers because of its status as the exclusive licensee or franchise holder within the KMTR.

[103] The charging of a fee for the Respondent's sub-franchise licence is one such term and condition, Mr. Scott argued. This is not a regulatory or administrative act by the Respondent but a purely commercial decision.

[104] Mr. Scott has submitted that what the members of the Applicants hold is a licence, and by its very nature is a temporary permission which is subject to a renewal process each year by the TA and not the JUTC. He argues that the Court is to make

the distinction between the regulation of public passenger transport services which is done by the TA and the conducting of private business under the Respondent's exclusive licence.

.

[105] In relation to this ground, I again, find the analysis of Campbell J in **RTA Ltd v JUTC et al**, cited earlier, to be most instructive. At paragraph 52 of the judgment he said:

> *"A finding that JUTC, as a body is amenable to judicial review, does not make all its decisions reviewable, A public body often times achieves its statutory objectives by contractual or private arrangements or means; therefore not every activity of a public body will be amenable to review. Justice Evan Brown highlighted the distinction in* ***Karen Thames v National Irrigational Commission*** *2009 HCV 04341, a decision of the Supreme Court delivered on the 11th November 2011, at paragraph 13:*
>
> > *The court therefore is called upon to decide, first, whether the NIC, a private corporation licence to be the National Irrigation Authority, is a body that is subject to judicial review? And that question must be answered by an examination of the source and nature of the power of the NIC. Secondly, if the NIC is found to be amenable to judicial review generally, is the decision which brought the parties to this court similarly susceptible? It has long been the law that the reviewability of a body does not make its every decision subject to review, simply by establishing that it's a body whose*

> *decisions come within the court's supervisory jurisdiction, Consequently to decide if the impugned decision is reviewable, the court must define the nature of the relationship that existed between the parties..."*

[106] Ms. Thames appealed the decision of E. Brown J. (The Court of Appeal decision is reported at 2015 JMCA Civ. 43) on appeal, Phillips JA at paragraph 39 of the judgment noted:

> *"In determining whether a decision is amenable to judicial review, it has been held that one must examine whether there was a public law element to the particular decision, by looking at the nature of the decision and whether the decision was made under a statutory power. This test was illustrated by Lord Diplock in* ***Council of Civil Service Unions*** *at pages 949-950 where he said:*
>
> > *To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has*

> *received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn… For a decision to be susceptible to judicial review the decision maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers…"*

[107] Applying these principles, I am constrained to agree with Mr. Scott that the relationship that exists between the parties falls squarely within the ambit of "contractual and private arrangements" referred to by Campbell J. The decisions of the Respondent to impose and subsequently increase its sub-franchise fees are not regulatory or administrative acts, but are commercial in nature. They are, therefore, not amenable to judicial review.

[108] I am also of the view, that section 3(3)(d) of the PPKMTR Act, gives the Respondent a broad discretion to determine the terms and conditions that are attached to the consent it gives for the grant of a sub-franchise licence. Therefore, the Respondent was within the boundaries of its authority when it imposed the sub-franchise fees. Its decision to do so was neither unlawful nor ultra vires.

[109] As Harrison JA (as he then was) said in the case of **Attorney General v Jamaica Civil Service Association**, a decision of the Court of Appeal of Jamaica, SCCA No 56/2002, delivered on December 19, 2003:

> *"Proceedings before a review court are supervisory... Such proceedings are concerned with the propriety of the method*

by which the decision is arrived at, as distinct from the substance of the decision."

[110] I have found that this ground of the application, is not an arguable ground that has any realistic prospect of success.

Wednesbury unreasonableness

[111] Mr. Wildman also made oral submissions on the purported irrationability of the decision by the Respondent to increase the sub-franchise fees from $280,000.00 to $756,000.00.

[112] Although I believe this issue has been addressed based on the position I have taken concerning the relationship that exists between the parties, I wish to point out that there was no evidence put before the Court to assess whether the decision was unreasonable in the **Wednesbury** sense. The main complaint was that the increase was over 150%.

[113] On the material before the Court, there was no evidence to show that in making the decision:

(a) the Respondent took into account factors that ought not to have been taken into account;

(b) the Respondent failed to take into account factors that ought to have been taken into account;

(c) the decision was so unreasonable that no reasonable authority would ever consider imposing it. In other words, that this was "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (Per Lord Diplock in **CCSU,** supra)

[114] In accordance with the decision in **Sharma**, the affidavits in support of the applications, do not meet the threshold for the grant of leave. The Applicants have not

shown that they have ‘an arguable ground for judicial review having a realistic prospect of success.”

[115] In light of my decision, the application for injunctive relief is refused.

[116] No leave is required for an application for declaratory relief.

[117] Finally, I wish to thank both attorneys in this matter for their detailed and enlightening submissions which proved to be most helpful to the Court. I also wish to offer a sincere apology to the parties for the delay in the delivery of this judgment. I am not attempting to make excuses but simply to offer an explanation. Some, if not most, of the reasons for the delay are known and were beyond my control. However, I am well aware of the inconvenience that the delay may have caused.

Orders

1. The application for leave for judicial review for orders of certiorari and prohibition is refused.
2. The application for injunctive relief is refused.
3. No order as to costs.