

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE FULL COURT

BEFORE: ORR, HARRISON AND PANTON, JJ.

SUIT NO. M-70 OF 1986

IN THE MATTER of an Application by
UNITED MOTORS LIMITED and PACIFIC
MOTORS LIMITED for leave to apply
for an Order of Certiorari

A N D

IN THE MATTER of a directive given
by the MINISTER OF INDUSTRY AND
COMMERCE to the JAMAICA COMMODITY
TRADING COMPANY LIMITED in or
about August 1986.

Hugh Small, Q.C. and Richard Small for first-named Applicant
J. Leo-Rhynie, Q.C., and W. Shelton for second-named Applicant
R. Langrin, Q.C. and D. Henry for Minister of Industry & Commerce
W.K. ChinSee, Q.C. and John Vassell for Jamaica Commodity Trading
Company Limited.

Heard: October 27, 28 and 29
November 4, 5, 6, 7 and 27, 1986.

ORR, J.

This is an Application by leave of Walker, J. granted on the
3rd October, 1986 for an Order of Certiorari to quash a decision and/or
order dated 15th August, 1986, of the Honourable Douglas Vaz, Minister of
Industry and Commerce made under section 3 of the Motor Vehicles (Sales
and Distribution) Order, 1985, allocating approved motor vehicles to
dealers.

The background to the application is as follows:

1. The Applicants are motor vehicle dealers who have
been in business for over fifty-five (55) and
thirteen (13) years, respectively. The first-
named applicant operates the largest service
centre in Jamaica.

2.

2. The Minister of Industry and Commerce is empowered by the Trade Act to make Orders providing, inter alia, for regulating the importation, distribution, purchase and sale of motor vehicles.
3. The Jamaica Commodity Trading Company, hereafter referred to as the "J.C.T.C." is the sole specified importer of approved motor vehicles by virtue of the provisions of the aforesaid Motor Vehicles (Sales and Distribution) Order.
4. From 1979 to 1984 there was a system in force for the allocation of motor vehicles for use in the U-Drive Trade. This allocation was based on the quantum of foreign currency lodged in the banking system by the U-Drive operators in the preceding year.
5. Under this system, 80% of the allocation in foreign currency was divided among certain U-Drive operators based on their foreign exchange lodgments and the other 20% was designated for hardship cases and new dealers.
6. The quotas for importation were given directly to U-Drive operators. This permitted the operators to select the vehicles of their choice and place orders for them through the appropriate Agent.
7. On the basis of this system the first-named applicant's market shares in the years 1982 to 1984 was 63%, 62% and 54% respectively.

The second-named applicant's share for these years was 10.43%, 6.57% and 13.79% respectively.
8. There was no importation of motor vehicles for the U-Drive Trade in 1985.
9. In September 1985, the Government published Ministry Paper No. 30 under the signature of the Honourable Douglas Vaz, Minister of Industry and Commerce.

3.

The Ministry Paper set out the basic objectives of the policy relating to the importation of motor vehicles as new policy guidelines for such importation. Specific reference was made to certain categories of importers but not to dealers. These were to be dealt with by the Motor Vehicle Imports Committee under Policy guidelines from the Ministry of Industry and Commerce.

The programme for the importation of motor vehicles was to be spearheaded by the Ministry of Construction (Works) in collaboration with other Ministries and Agents as part of an overall Motor Vehicle Import Committee.

10. The Honourable Robert Marsh, hereafter referred to as "Minister Marsh" was the Minister of State in the Ministry of Construction.
11. Sometime in the month of May, 1986 at a meeting with motor vehicle dealers, Minister Marsh advised that U.S. \$4,000,000.00 had been allocated for the importation of motor vehicles for use by the U-Drive Trade for the winter season 1986 - 1987 and that the dealers should negotiate with their overseas principals for credit on certain specified terms.
12. Credit offers were received by the dealers and reviewed by Minister Marsh who instructed the dealers to solicit orders from the U-Drive operators, which orders were to be submitted directly to him by the U-Drive operators.
13. There were no guidelines as to the size of the allocation for each dealer or for each U-Drive operator.
14. The Applicants secured orders for 784 and 501 motor vehicles respectively. These orders were based on

historical data and preferences which had been shown in previous years for these motor vehicles.

15. At a meeting of dealers and operators on or about the 15th July, 1986, Minister Marsh proposed a change in the system whereby vehicles would be allocated to the dealers instead of to the U-Drive operators. This proposal was rejected by a majority of the dealers and operators who expressed a desire to retain the system of allocation to the U-Drive operators.

The Minister accepted the decision and announced that he would hold a meeting later that day, with the operators, to decide on the allocation to them.

16. Subsequent to this meeting Minister Marsh advised the dealers that the allocation would be made to the dealers and not to the U-Drive operators.

17. At a subsequent meeting Minister Marsh advised the dealers of their respective allocations. The Minister stated that the allocations were based on orders which he said he had received from the U-Drive operators but "forcefully declined" to show them when requested so to do by the first-named applicants.

18. The allocation is as follows:

Executive Motors Ltd.	-	\$1,360,000
Crown Motors Ltd.	-	1,280,000
John Crook Ltd.	-	40,000
K.I.G. Ltd.	-	40,000
Pacific Motors	-	160,000
Premier Motors	-	160,000
United Motors Ltd.	-	920,000
Vehicles and Supplies	-	40,000

19. The applicants have received approximately 23% and 5% respectively of the allocation.

20. Executive Motors Ltd. and Crown Motors Ltd. have received between them 64% of the allocation:

Executive motors having received approximately

21. Executive Motors Ltd. who are the agents for Mazda motor cars, have no servicing facilities at present, very few spare parts and Mazda motor cars have not been imported for the U-Drive Trade since 1979.
22. Executive Motors Ltd. has not imported Mazda motor cars since its incorporation in 1982.
23. The first-named applicants have objected to the allocation. Letters were sent to Minister Marsh and copied to Minister Vaz. The Prime Minister was also addressed on the subject. There were no replies to these letters.
24. By letter dated 14th August, 1986, Minister Marsh wrote Minister Vaz stating that the J.C.T.C. was unaware of the allocation and requested Minister Vaz to instruct the J.C.T.C. to have the necessary contracts prepared. He set out the allocation referred to above and dealt with a further allocation to a Mr. Michael Stewart.
25. By letter dated 15th August, 1986, Minister Vaz instructed the J.C.T.C. to proceed immediately with the ordering of the motor vehicles.
26. By letters dated 21st August, 1986 the J.C.T.C. advised the applicants of their respective allocations. The letters made reference to the letter dated 14th August, 1986 from Minister Marsh.
27. The first applicant wrote the J.C.T.C. by letter of the 25th August, 1986 in which the authority of Minister Marsh to give instructions was challenged.
28. No reply was sent to this letter. Both Applicants filed suit for an injunction against the Attorney General and the J.C.T.C.
29. An Affidavit of Mr. Paul Ellis, Managing Director of J.C.T.C. sworn on the 4th September, 1986 was filed in the suit. Attached to the Affidavit was a copy

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of the letter dated 15th August, 1986 from Minister Vaz to J.C.T.C. The applicants contend that this was the first intimation to them of the existence of the letter.

Several grounds were filed in support of the application.

I shall deal with them under three heads:

1. Illegality.
2. Irrationality
3. Procedural Impropriety.

This method which was adopted in argument is consonant with the approach of Lord Diplock in Council of Civil Service Unions and others v. Minister for the Civil Service /1984/ 3 All E.R. 935 where he states at page 950.

"Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "Procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds. By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."

1. Illegality

Two grounds were argued:

- (1) That the order of the Minister was unlawful and/or an abuse of the power conferred on him by the Trade Act.

Section 3 of the Motor Vehicles (Sale and Distribution) Order, 1985 reads thus:

"3. All approved motor vehicles shall be allocated among dealers in such manner and in such numbers and subject to such terms and conditions as the Minister may in his absolute discretion, determine." (emphasis added).

7.

In the Order:

"Approved motor vehicle" means a motor vehicle imported into the island under credit facilities guaranteed by the Government of Jamaica.

The complaint was that the Minister had no power to allocate any motor vehicles unless those vehicles had actually been imported into the Island (emphasis added).

Further, that there was insufficient proof that the credit facilities had been guaranteed by the Government of Jamaica. Therefore, the Minister's purported exercise of his discretion in making the allocation was ultra vires the Order.

Mr. Langrin referred to the definitions of "import" and "export" in the Trade Act as follows:

"import" means to bring, or be concerned in bringing into Jamaica or the territorial waters thereof, and "importation" shall be construed accordingly.

"export" means to take, or be concerned in taking out of Jamaica or the territorial waters thereof, and "exportation" shall be construed accordingly.

He also referred to Section 8 of the Trade Act which states that the Minister with certain exceptions, may, by order provide for, inter alia, prohibiting absolutely the importation or exportation of goods and regulating the distribution purchase or sale of goods or any class or description of goods.

He submitted that the applicants placed a restricted meaning on the word "imported" which the Parent Act did not do.

In the Order "Importer" means any person who imports into the Island any motor vehicle for the purpose of sale or distribution or to whom any such motor vehicle is invoiced or consigned for the said purpose (emphasis added).

Having regard to the purposes for which the Minister is empowered to make an Order particularly for regulating the distribution of goods

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and the definitions of "import" and "importer", I am of the opinion that "imported goods" in the Order is not confined to goods which have actually been imported into the Island.

With regard to the question of credit facilities, there was an Affidavit from Gloria Priestly, the acting Permanent Secretary in the Ministry of Industry and Commerce, that credit facilities had been guaranteed with certain foreign companies by the Government of Jamaica for the purchase by the J.C.T.C. of a number of motor cars.

I hold that this Affidavit provided sufficient proof that credit facilities had been guaranteed by the Government of Jamaica.

This ground therefore fails.

The second ground concerned a breach of the maxim "delegatus non potest delegare".

It was submitted that Minister Vaz had delegated his powers to Minister Marsh without authority so to do.

Alternatively, that Minister Vaz acted under the direction of Minister Marsh when he made the decision of the 15th August, 1986.

It is to be observed that the case differs in an important aspect from those cited and referred to in argument. In all these cases there was some positive act of a Minister or other official on whom the power was conferred, for example, circulars, instructions or policy statements, from which the Court was asked to infer that the power had been delegated.

In the instant case reliance is placed on the conduct of Minister Marsh as alleged in the Affidavits, albeit uncontradicted, correspondence between the first applicants and the Ministers, between the Ministers themselves, between the J.C.T.C. and the applicants and Affidavits filed on behalf of the respondents.

The resolution of the issue of necessity involves drawing inferences from the conduct of the Ministers as well as determining the true meaning and intention of the writers from the correspondence.

It will be recalled that the Ministry Paper stated that the programme should be spearheaded by the Ministry of Construction (Works). This apparently accounts for the involvement of Minister Marsh, the

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Minister of State in that Ministry. He was Chairman of the Motor Vehicles Sub-Committee.

It is to be noted that there is no evidence of any meetings between Minister Vaz and the dealers and/or operators. Correspondence to Minister Marsh from the first-named applicants was copied to him but there is no evidence of any reply thereto.

There were various meetings between Minister Marsh and the dealers and operators as stated above.

By letter dated 9th July, 1986, Minister Marsh wrote the first-named applicant as follows:

"Mr. Vernon Matalon
United Motors Ltd.
427 Spanish Town Road
Kingston 11.

Dear Mr. Matalon,

Based on orders for your product, as set out in my letter of July 2, your quota for importation of vehicles for U-Drive operators is Eight Hundred and Eighty Two Thousand Dollars (US\$882,000.00).

Orders for vehicles will normally consist of 50% Class 'A' - 1300 c.c. and under 40% Class 'B' - 1500 - 1800 c.c. and 10% Class 'C' 1800 - 2000 c.c. vehicles.

Please contact the Jamaica Commodity Trading Company to place your orders.

Yours truly

(Sgd.) Robert A. Marsh
Minister of State."

and again by letter dated 16th July, 1986 as follows:

"Mr. Vernon Matalon
United Motors Ltd.
427 Spanish Town Road
KINGSTON 11.

Dear Mr. Matalon

Further to our Meeting yesterday morning it was agreed that Members of the U-Drive Operators represented by Mr. George Johnson, Mr. Neville Millar, Mr. Victor Green and Mrs. Jeanne Dixon from the U-Drive Association and Mrs. Carmen Brown, Mr. Michael Miller and Mr. Ludlow Johnson from the Independent Operators would meet with me in the afternoon to arrive at a decision, regarding the importation of Motor Vehicles for their use.

10.

As a result of this meeting, I am to advise you that the decision reached by them was that the dealers would be given a money quota based on orders already submitted to the Motor Vehicles Import Committee by the U-Drive Operators.

Your quota based on the percentage of orders received for your product is \$US 920,000.00.

Please send in confirmation of your acceptance from your principals by 'telex' or in 'writing' to me by Friday, 18th July, 1986 at 12 noon.

Yours truly

Sgd. Robert A. Marsh
Minister of State
Chairman, Motor Vehicle Sub-Committee."

Then came two important letters. One dated 14th August, 1986 from Minister Marsh to Minister Vaz reads:

"Hon. Douglas Vaz
Minister of Industry & Commerce
4 Winchester Road
KINGSTON 10.

Dear Minister Vaz

Further to my copy letter to the Prime Minister of August 8th I am advised by Jamaica Commodity Trading Co. that they are unaware of the allocations to the Dealers for cars for the U-Drive Operators.

The Dealers need to place these orders as quickly as possible for the cars to come in time for the Winter Season.

Would you be kind enough to instruct Jamaica Commodity Trading Co. to have the Contracts prepared, so that the cars can be ordered.

Please see below quota for Dealers based on preference of cars ordered by the Operators:

Executive Motors Ltd.	--	\$1,360,000
Crown Motors Ltd.	-	1,280,000
John Crook Ltd.	-	40,000
K.I.G. Ltd.	-	40,000
Pacific Motors	-	160,000
Premier Motors	-	160,000
United Motors Ltd.	-	920,000
Vehicles & Supplies	--	40,000

Mr. Richard Stewart of Stewart's Auto Sales is to re-confirm the original prices of vehicles submitted by him. As soon as confirmation is received, a further \$350,000 will be allotted to him.

This has been confirmed by Bank of Jamaica.

Yours truly

(Sgd.) Robert A. Marsh
Minister of State.

c.c. Mr. L. Levers, J.C.T.C.
Miss T. Grant, Trade Board."

11.

The other dated 15th August, 1986 from Minister Vaz to Mr. Paul Ellis,
Managing Director of J.C.T.C. reads:

"Mr. Paul Ellis
Managing Director
Jamaica Commodity Trading Company
8 Ocean Boulevard
Kingston Hill.

Dear Mr. Ellis:

Motor Vehicles for U-Drive Operators
1986/87 Import Programme US\$4M.

Please proceed immediately with the ordering of motor vehicles for the U-Drive Operators, in keeping with the contractual agreements entered into between the operators and the respective dealers, and as reflected in letter dated 14th August, 1986, from the Hon. Robert Marsh to me, and copied to the Jamaica Commodity Trading Company.

I appreciate that you will need to consult with the Ministry of Finance and the Bank of Jamaica, in finalising the orders since there are some important aspects to be settled by them, prior to your placing the orders.

Do impress upon the Ministry of Finance and the Bank of Jamaica, the necessity of placing the orders now, if, as is our objective, the upcoming Tourist Season is to benefit by the strengthening of the present emaciated and severely depleted fleet of U-Drive motor cars. We should not lose sight of the fact that "later arrival" of vehicles will not only adversely affect the Tourist Season, but will most likely result in forfeiture of contracts between the Operators and the Dealers, whereby cars are unlikely to be taken up after the peak of the 'Season'.

Yours sincerely,

(Sgd.) Douglas C. Vaz
Minister of Industry & Commerce."

This is followed by letter dated 19th August, 1986 from Mr. Ellis to the first-named applicant.

"United Motors Limited
427 Spanish Town Road
Kingston 11.

Attn: Mr. Vernon Matalon

Dear Sirs:

Re 1986/87 Motor Vehicle Import Programme
for the U-Drive Industry

As you are aware, the Government intends to purchase vehicles valued at US\$4.0 million for the U-Drive Industry for the year 1986/87.

12.

Credit offers have been received from a finance house at the request of your principals for the purchase of Toyota vehicles valued at US\$920,000.

Enclosed are two draft contracts which will serve as prototypes for the contractual arrangements between -

- (a) JCTC, the supplier and the local dealer; and
- (b) JCTC and the local dealer.

We are awaiting directives from the MOF and MIC. As soon as we obtain these, we will be in a position to finalise the contracts.

If you should need further information on this matter, please contact Mrs. Bette Grant-Otunia, Legal Officer.

Yours truly

(Sgd.) Paul S. Ellis
Managing Director"

There is a letter dated 21st August, 1986 from Mr. Lovers, the General Sales Manager of J.C.T.C. to the first-named applicant.

"Mr. Vernon Matalon
United Motors Limited
427 Spanish Town Road
Kingston 11.

Dear Sir:

Further to a letter dated 14th August, 1986, from Hon. Robert Marsh, Minister of State, Ministry of Construction, advising of your allocation of Nine Hundred and Twenty Thousand U.S. Dollars (US\$920,000) for the purchase of Toyota Motor Cars for the U-Drive Industry 1986/87 import programme; I am to request that you advise this Company of the quantities and specifications of the Toyota vehicles you intend to order to the extent of this value.

As you well understand time is of the essence, therefore, would you please be good enough to forward this advice to reach us by August 27, 1986.

If the advice is not received by this date, it will be assumed that you do not intend to take up the allocation.

Regards,

Yours truly,

A.V. Lovers
General Sales Manager"

To this the first-named applicant replied by letter dated 25th August, 1986.

13.

Mr. A.V. Lavers
 General Sales Manager
 Jamaica Commodity Trading
 Company Limited
 8 Ocean Boulevard
 Kingston.

Dear Sir,

I have your letter of the 21st August, 1986.

I am a little puzzled by your reference to the letter written by the Hon. Robert Marsh as this does not appear to comply with the provisions of the Trade Act and the Order passed under that Act. Perhaps you could explain to us why the instructions are coming from the Minister of State, in the Ministry of Construction and not the Minister of Industry and Commerce as required by the Trade Act and Regulations.

As you are aware, we have constantly protested the proposed allocation which was being dealt with by the Hon. Robert Marsh and the Motor Vehicle Committee. We have constantly objected to the method of allocation and copies of our letters doing so have been sent to your Company.

Because of your decision to allocate Nine Hundred and Twenty Thousand Dollars United States Currency (US\$920,000) to United Motors Limited in the face of our protest, we will have to re-examine the quantities and the specifications of the number and types of vehicles to be offered by us and also to take advice from our attorneys-at-Law, to determine what is our legal position in relation to the request contained in your letter of the 21st August, 1986. Taking both these factors into account, it is impossible to provide the information by the 27th August, 1986 bearing in mind that your letter of the 21st instant only reached us on the 22nd August, 1986. We expect in the circumstances that you will extend the date for providing the information beyond the 27th August, 1986.

Please let us have your confirmation of the above and of the extended date for providing the information.

Yours faithfully,
 UNITED MOTORS LTD.

VERNON C. MATALON
 Executive Director."

Minister Vaz in his Affidavit sworn to on the 22nd October, 1986 states as follows:

"2. That as Minister acting under powers conferred upon me by paragraph 3 of the said Order, I approved the motor vehicle allocation among dealers on the 15th day of August, 1986 based on the following monetary quotas:

Executive Motors Ltd.	-	U.S.\$1,160,000.00
Crown Motors Ltd.	-	1,280,000.00
John Crook Ltd.	-	40,000.00
K.I.G. Ltd.	-	40,000.00
Pacific Motors Ltd.	-	160,000.00

14.

Premier Motors	-	\$160,000.00
United Motors Ltd.	-	920,000.00
Vehicles & Supplies Ltd.	-	40,000.00

3. That in exercising my ^{discretion}~~discretion~~ pursuant to the said Order, I took into consideration, inter alia, the following matters:

These matters are not relevant here.

"4. That at all material times I have been in close consultation with the Honourable Robert Marsh, Minister of State and Chairman, Motor Vehicle Technical Advisory Sub-Committee who has consulted with all the Dealers and U-Drive Operators on my behalf.

5. That I have personally considered the representations and concerns of Dealers and U-Drive Operators and other interested parties in deciding the motor vehicles allocation.

7. That in the exercise of my discretion pursuant to the said Order and in exercising judgment as a matter of policy under the aforesaid Order, I allocated motor vehicles to the Applicants after due consultations and after taking into consideration the concerns of all the Dealers including the Applicants and U-Drive Operators."

Mr. Ellis in an Affidavit sworn to on the 4th September, 1986

states at paragraph 7.

"That on the 15th day of August, 1986, the Honourable Douglas C. Vaz, Minister of Industry and Commerce notified me in writing of the allocation for dealers and directed that I immediately proceed with the ordering of motor vehicles for U-Drive operators and I am obliged so to do." (emphasis added).

The following points were stressed in support of the argument for the applicants:

- (i) The letters from Minister Marsh to the first applicants dated 9th and 16th July, 1986, purported to advise of their allocation before Minister Vaz had approved such allocation on the 15th August, 1986.
- (ii) The letter from Mr. Ellis dated 19th August, 1986 made no reference to the allocation which Mr. Ellis stated he had received from the 15th August. Further the statement that he was awaiting directives from the P.I.C. (which it is agreed refers to the Ministry of Commerce) was inconsistent with the receipt of instructions contained in the letter from Minister Vaz of the 15th August.

15.

(iii) The "peculiar circumstances", according to Mr. Leo-Rhynie, in which the letter dated 15th August, 1986, from Minister Vaz came to the attention of the applicants. The first applicant by letter dated the 25th August, challenged the authority of Mr. Marsh. No reply was received and it was not until the suit was filed that disclosure of the letter was made in Mr. Ellis' affidavit of the 4th September, 1986.

It was submitted that the inescapable conclusion was that it was Minister Marsh who made the allocation, Minister Vaz was a mere "rubber stamp".

Mr. Langrin submitted that there was no delegation by Minister Vaz. He drew attention to the Affidavit of Minister Vaz in which he stated that he approved the allocation and had consultations with the parties concerned. (emphasis added).

He submitted that Minister Marsh was a mere agent of Minister Vaz and that no inferences from Minister Marsh's conduct nor from the correspondence could over-ride the sworn evidence of Minister Vaz.

Mr. Vassell submitted that delegation of duty and acting under dictation were concepts which could not be conclusively inferred from the acts or utterances of the alleged delegate. Both concepts require a positive delegation and a positive abdication in favour of another. That delegation must reside in some act of the delegating power and no such acts were disclosed in the evidence.

Further that the word approve connotes a conscious choice by the Minister. (emphasis added).

Alternatively, he submitted that if the Court finds that there was a delegation, a power to delegate could be implied even though the Trade Act does not confer the power.

Reference was made to Professor Wade's Administrative Law 4th edition at page 307 where he states:

16.

"Convenience and necessity often demand that a public authority should work through committees, executive officers and other agencies. The law makes little difficulty over this provided that the subordinate agencies merely recommend, leaving the legal act of decision to the body specifically empowered. It is obvious that in many such situations the real discretion will be exercised by the agency that recommends, and that in substance the law allows this function to be delegated. Nevertheless, it is more than a matter of observing legal forms. The valid exercise of a discretion requires a genuine application of the mind and a conscious choice by the correct authority."

Paragraph 3 of the Order states that all approved motor vehicles shall be allocated in such manner as the Minister may in his absolute discretion determine. (emphasis added).

The Oxford English Dictionary defines "determine" -

"To settle, decide, come to some conclusion, give a decision."

The Minister states "I approved the allocation".

The same dictionary defines "approve" -

"To confirm authoritatively; to sanction".

I am of the opinion that "to approve" requires a genuine application of the mind and a conscious choice by the person approving.

Minister Vaz states that at all material times he was in close consultation with Minister Marsh. (emphasis added). The sequence of events indicate that there was time for consultation. In addition, he stated what matters he took into consideration.

Assuming Mr. Ellis is in error as to the date on which he received the letter of the 15th August, from Minister Vaz, the fact is that in his (Ellis) letter of the 21st August, he carried out the instructions contained in Minister Vaz's letter. Minister Marsh, himself, recognized in his letter of the 14th that he could not give any instructions to the J.C.T.C., the sole specified importer concerning the allocation.

From the evidence I hold that there was no delegation of power by Minister Vaz to Minister Marsh.

In my opinion the question of acting under dictation of another does not arise in this case.

18.

and at page 312.

"Implied power to delegate is not commonly found in peace time legislation. Under wartime powers, which are necessarily very wide and which necessarily demand much delegation and sub-delegation, the implication is almost irresistible."

I accept the above statements as correctly representing the law.

I hold that the determination of the allocation in the absolute discretion of the Minister is a decision which must be made by the Minister himself.

In the circumstances no power to delegate can be implied.

2. Irrationality.

Lord Diplock in C.C.S.U. v. Minister for the Public Service
supra said at p. 951

"By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' (see Associated Provincial Picture House Ltd. v. Wednesbury Corp /1947/ 2 All ER 680 /1948/ 1 KB 223.) It applies to a decision so outrageous in its ~~irrationality~~ ^{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. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review."

In the same case Lord Roskill said at page 953.

"Thus far this evolution has established that executive action will be the subject of judicial review on three separate grounds 'The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called in lawyers' shorthand, Wednesbury Principles (see Associated Provincial Picture Houses Ltd. v. Wednesbury Corp. /1947/ 2 All ER 680, /1948/ 1 KB 223.)"

These two statements formed the basis of the grounds under this heading, viz.

- (1) That the decision was so unreasonable that no reasonable authority would have made it, and
- (2) That in making the decision the Minister took into account irrelevant matters or failed to consider relevant matters.

17.

Professor Smith in his Judicial Review of Administration
Action 4th edition at page 309 states:

"An authority instructed with a discretion must not, in the purported exercise of its discretion, act under the dictation of another body or person".

He gives examples of one authority acting under the dictation of another as in H. Lavender and Son Ltd. v. Minister of Housing and Local Government [1970] 3 All ER 871 where the Minister of Housing and Local Government refused planning permission on the ground that the Minister of Agriculture objected to the proposed use for agricultural reasons.

In the instant case the Minister of Industry and Commerce was not concerned with the policy of any other Minister.

Assuming my conclusion is incorrect, I shall deal with the alternative submission of an implied power to delegate.

Mr. Leo Rhynie submitted that the Courts are reluctant to imply a power to delegate. Such a power will not normally be implied where the power is legislative or judicial or affects private interests. The power under the Order was legislative and the discretion judicial. The order created offences and prescribed penalties for such offences.

In Halsbury's Laws of England 4th edition volume I at page 32 the learned author states:

"There is a strong presumption against construing a grant of legislative, judicial or disciplinary power as impliedly authorising sub-delegation; and the same may be said of any power to the exercise of which the designated body should address its own mind."

Professor Wade in Administrative Law 4th edition at page 310 states:

"The decisions in fact show that the courts do not normally allow the delegation even of administrative functions if they involve the exercise of discretion. There is no general principle that administrative functions are delegable. The principle is rather that, where any sort of decision has to be made, it must be made by the authority designated by Parliament and by no one else."

19.

Under ground (1) it was submitted -

- (1) that the allocation to Executive Motors Ltd. was unfair within the terms of the Ministry Paper;
- (2) that the Minister had substituted an arbitrary system of allocation that was discriminatory and less beneficial to the public than the one which had existed before.

Attention was drawn to the following:

- (1) That Executive Motors Ltd. and Crown Motors Ltd. received approximately 64% of the allocation;
- (2) that both companies are owned and controlled by Mr. Desmond Panton a fact which the Minister must have known or ought to have ascertained;
- (3) that Mazda motor cars had not been imported into the Island since 1979, yet there was an allocation of 56% which was contrary to the stated objective in the Ministry Paper of reducing the proliferation of makes and models of cars imported into the Island.

Mr. Langrin submitted that the discretion of the Minister was absolute and unfettered, that the Court should not interfere unless the decision was outrageous under the Wednesbury principles.

Between 1979 and 1984 the allocation of motor vehicles for the U-Drive Trade was based on the foreign exchange earnings of the U-Drive operators.

It was not stated nor suggested that the amount available for allocation in 1985 was based on these earnings.

The Motor Vehicles (Sale and Distribution) Order of the 22nd February, 1985, provided that the allocation would be in the absolute discretion of the Minister.

The Ministry Paper, published in September, 1985 established no criteria for the allocations. It stated that the basic objectives must be directed towards the most efficient use of foreign exchange and established a ceiling for the engine capacity of imported motor vehicles.

It is apparent that in 1986 the allocation was made on a different basis from that prevailing previously. Minister Marsh stated that it was based on orders received from U-Drive operators but disclosed no formula or proportion for the allocation.

The fact that the Applicants have received a smaller quota than that received in previous years is not in the circumstances proof of unreasonableness or unfairness of the allocation.

It has not been demonstrated that the tourist industry or the public will suffer as a result of the allocation.

The allocation concerns eight (8) models of motor cars. In the absence of evidence as to the number of models existing before the allocation and evidence of any reduction in the number of models imported, it is impossible to contend that the introduction of Mazda motor cars could result in a proliferation of models.

I find no merit in this ground.

The second ground relates to the exercise of the Minister's discretion.

It was submitted that the Minister had failed to take into consideration the most relevant factors and the policy and criteria in the Ministry Paper.

A critical examination was made of the matters stated in the Affidavit of Minister Vaz.

The failure to mention the Ministry Paper was criticised.

Mr. Langrin's reply with which I agree, was that there was nothing in the Affidavit which was inconsistent with the Ministry Paper.

Re Affidavit of Minister Vaz

Paragraph 3 (a) was unobjectionable.

3 (b) the transportation needs of the tourist industry.

It was submitted that the Minister must have ignored the orders obtained by the applicants pursuant to the directive of Minister Marsh. The refusal of Minister Marsh to show the orders he received and the absence of any explanation for such refusal led to the conclusion that the

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Minister had failed to take into account the likelihood if not impossibility of obtaining a preference for Mazda cars which had been absent from the U-Drive Trade since 1979.

I am of the opinion that the Minister was under no obligation to show the orders. These orders were a part of business dealing between the dealers and the operators. I am unable to appreciate this criticism. The dealers were instructed to solicit orders from the operators. This was done. On what basis is the unlikelihood or impossibility of preference for Mazda cars posited?

3 (c) The prices of the different types of vehicles

The criticism was that the Minister failed to compare the prices of the Toyota "Starlet" and "Sunny" motor cars which were comparable to the Mazda cars. That the comparison was deliberately done to justify the allocation.

Apparently, there is conflict as to what types of vehicles are comparable. The Applicants contend that the "Starlet" and "Sunny" are comparable with the Mazda. The Minister appears to be of a different opinion.

However the approximate prices of the "Starlet" and "Sunny" as stated in the Applicants' Affidavits are \$72,000.00 and \$74,000.00, respectively, greater than the Mazda at \$70,000.00.

The policy stated in the Ministry Paper was "directed towards the most efficient use of foreign exchange for imports of motor vehicles".

The criticism is unjustified.

3 (d) The need to balance competing interests.

This was categorised as an improper and unlawful exercise of his discretion. The allocation of \$2.6 million out of \$4.0 million to Executive Motors Ltd. and Crown Motors Ltd. which are both owned and controlled by Desmond Panton was a flagrant and palpable imbalance.

This criticism confuses the perceived result of the exercise of the discretion with the discretion itself.

The Minister states he took this factor into consideration.

In order to arrive at an equitable distribution of a fixed allocation, regard should be had to balancing competing interests.

3 (c) Abuse of the system

An ingenious argument was advanced to the effect that the Minister in this paragraph and by reference to paragraph 3(a) supra, had found the applicants guilty of abuse of the system without having afforded them an opportunity to be heard.

If the Minister became aware of possible abuses of the system it would be a dereliction of duty if he failed to consider such abuses and take the necessary measures to prevent them. The Minister has made no allegation against the applicants.

Lord Greene, M.R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1947] 2 All ER 680 said at page 682.

"In the present case we have heard a great deal about the meaning of the word 'unreasonable'. It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must also call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington, L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head."

It has not been demonstrated that Minister Vaz acted unreasonably
This ground also fails.

3. Procedural Impropriety

The grounds under this head may be summarised thus:

- (1) The refusal of Minister Marsh to show the orders he received when requested so to do by the first-named applicants.

This has already been dealt with under the previous head.

- (2) The frustrated legitimate expectations of the applicants.

Lord Fraser who gave the opinion of the Judicial Committee in Attorney General of Hong Kong v. Ng Yuen Shiu /1983/ 2 All ER 346 said at 350:

"The narrower proposition for which the respondent contended was that a person is entitled to a fair hearing before a decision adversely affecting his interests is made by a public official or body, if he has 'a legitimate expectation' of being accorded such a hearing. The phrase 'legitimate expectation' in this context originated in the judgment of Lord Denning MR in Schmidt v. Secretary of State for Home Affairs /1969/ 1 All ER 904 at 909, /1969/ 2 Ch 149 at 170. It is in many ways an apt one to express the underlying principle, though it is somewhat lacking in precision. In Salomi v. Minister for Immigration and Ethnic Affairs (No. 2) (1977) 14 ALR 1 at 7 Barwick CJ construed the word 'legitimate' in that phrase as expressing the concept of 'entitlement or recognition by law'. So understood, the expression (as the learned Chief Justice rightly observed) 'adds little, if anything to the concept of a right'. With great respect to the learned Chief Justice, their Lordships consider that the word 'legitimate' in that expression falls to be read as meaning 'reasonable'. Accordingly 'legitimate expectations' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis: see R v. Criminal Injuries Compensation Board, ex p Lain /1967/ 2 All ER 770, /1967/ 2 QB 364. So it was held in R v. Hull Prison Board of Visitors, ex p St. Germain (No. 2) /1979/ 3 All ER 545, /1979/ 1 WLR 1401 that a prisoner is entitled to challenge, by judicial review, a decision by a prison board of visitors, awarding him loss of remission of sentence, although he has no legal right to remission, but only a reasonable expectation of receiving it;" and "the expectations may be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an injury."

24.

In Council of Civil Service Unions and others v. Minister for the Civil Service /1984/ 3 All ER 935 Lord Fraser reiterated the concept at 943 - 944.

Lord Diplock said at 949:

"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.

(I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a 'legitimate expectation' rather than a 'reasonable expectation', in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a 'reasonable' man, would not necessarily have such consequences. The recent decision of this House in Findlay v. Secretary of State for the Home Dept. /1984/ 3 All ER 801, /1984/ 3 WLR 1159 presents an example of the latter kind of expectation. 'Reasonable' furthermore bears different meanings according to whether the context in which it is being used is that of private law or of public law. To eliminate confusion it is best avoided in the latter.)"

and Lord Roskill said at 954:

"The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had 'a reasonable expectation' of some occurrence or action preceding the decision complained of and that that 'reasonable expectation' was not in the event fulfilled.

The introduction of the phrase 'reasonable expectation' into this branch of our administrative law appears to owe its origin to Lord Denning MR in Schmidt v. Secretary of State for Home Affairs /1969/ 1 All ER 904 at 909, /1969/ 2 Ch 149 at 170 (when he used the phrase 'legitimate expectation').

Its judicial evolution is traced in the opinion of the Judicial Committee delivered by Lord Fraser in *A - G of Hong Kong v. Ng Yuen Shiu* [1983] 2 All ER 346 at 350-351, [1983] 2 AC 629 at 636-638. Though the two phrases can, I think, now safely be treated as synonymous for the reasons there given by my noble and learned friend, I prefer the use of the adjective 'legitimate' in this context and use it in this speech even though in argument it was the adjective 'reasonable' which was generally used. The principle may now said to be firmly entrenched in this branch of the law. As the cases show, the principle is closely connected with 'a right to be heard'. Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations, especially where the aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure."

Mr. Small submitted that legitimate expectations arose from:

- (1) The Ministry Paper
- (2) The Policy in force from 1979, and
- (3) Representations made by Minister Marsh on behalf of Minister Vaz.

(1) The Ministry Paper did not establish criteria for the allocation of motor vehicles. It sets out the objectives of the policy for importation and the methods of achieving such objectives.

In the light of the passages quoted above, it is difficult to appreciate what legitimate expectation accrued to the applicants.

(2) The policy in force from 1979

The Affidavit of Mr. Matalon for the first-named applicant states at paragraph 18:

"Based on the representations made by the Minister of State to the dealers that allocations would be based on orders received from U-Drive operators, the first-named Applicant was led to believe that the allocations would be made on the actual orders received. (emphasis added)."

Mr. Sinclair for the second-named Applicant states at paragraph 14 of his Affidavit:

"The Minister of State advised that important consideration for allocation would lie in the 'A' forms submitted and the preference for various make (sic) motor vehicles."

26.

Mr. Chin See submitted, in my view correctly, that this expectation was no more than a frustrated expectation which is not a ground for judicial review.

(3) In my opinion the only legitimate expectation was that which arose from the meeting on or about the 15th July, 1986 at which Minister Marsh accepted the decision to make the allocation to the U-Drive operators.

A meeting was to be held later that day, to which the applicants were not invited, to decide on the quantum of the allocation. At this meeting the decision was reversed and the allocation would now be made to the dealers.

This latter decision was in keeping with the motor vehicle (Sales and Distribution) Order 1985 which provided that the motor vehicles shall be allocated among dealers.

Minister Marsh advised the applicants of the change. Their representatives were present at a subsequent meeting with Minister Marsh. They were afforded the opportunity to make representations. The first-named applicants requested the Minister to show the orders, he refused. The first-named applicants sent letters to Minister Marsh, some were copied to Minister Vaz. The Prime Minister was addressed on the subject. The final determination of the allocation was made on the 15th August, 1986, one month after the decision was taken.

The applicants were not denied a fair hearing. There was no procedural impropriety.

For these reasons I would dismiss the application.


Judge.

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HARRISON, J

This is an application to the Full Court by United Motors Limited and Pacific Motors Limited (hereinafter called the Applicants) for an order of certiorari to bring up and quash a determination of the Honourable Minister of Industry and Commerce (hereinafter called the Minister) contained in a letter to the Jamaica Commodity Trading Company (hereinafter called the JCTC) dated the 15th day of August, 1986 and which refers to a letter dated the 14th day of August, 1986 from the Honourable Minister of State in the Ministry of Construction (hereinafter called the Minister of State), in respect of the allocation of quotas for the importation of motor vehicles for use in the "U-Drive" industry.

The facts are as follows:

Since 1979 and prior to 1985 because of the limited amount of foreign exchange available for the importation of motor cars, a system was introduced, whereby the fund available for this purpose - for the U-Drive industry - was divided proportionately among U-Drive operators in relation to the amount of foreign exchange earned by the said operators in the conduct of his business during the previous year and verified by the Bank of Jamaica as lodged in the bank. There was no provision of such funds for the year 1985.

The Motor Vehicle (Sale and Distribution) Order, was made and brought into force as from the 22nd day of February, 1986 under the provisions of Section 8 of the Trade Act.

At a meeting in May, 1986 between the Minister of State and certain dealers in the motor car industry, including the applicants, the said Minister of State advised them that the sum available for the importation of motor cars for the U-Drive industry was US\$4,000,000.00 and that they should negotiate with their respective overseas principals for credit on certain specified terms.

On or about the 3rd day of June, 1986 there was another meeting between the Minister of State and the dealers when the credit

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offers were reviewed

On or about the 11th day of June, 1986, there was a further meeting between the same parties; the credit facilities of the first applicant were discussed and the Minister of State instructed the dealers that they should solicit orders for motor cars from U-Drive operators which orders were to be submitted to him, the Minister of State by the U-Drive operators directly. The said Minister represented to the dealers that 'allocations would be based on orders received from U-Drive operators."

The first named applicant secured 748 orders for motor cars.

The second named applicant secured 501 orders for motor cars.

On the 15th day of July, 1986 at a meeting of dealers, U-Drive operators and the Minister of State, the said Minister of State proposed "a change in the system of allocation of motor vehicles for the year 1986 whereby motor vehicles would be allocated to the dealers instead of to the U-Drive operators, which was earlier objected to by the first named applicant. By a near majority. This proposal was rejected by the dealers and operators who advised the Minister of State that they wished the system in use from 1979 whereby motor vehicles were allocated to the U-Drive operators directly, be retained. The Minister of State accepted the decision of the dealers and operators alike to retain the existing system."

A second meeting was held on the same day in the afternoon between representatives of the U-Drive Association and the said Minister of State.

Both applicants allege that at the first meeting held on the said 15th July, 1986, "all persons present at the meeting including the Minister of State understood when the adjournment was taken that the sole purpose of the further meeting was to make the allocation."

Subsequently, the Minister of State advised the dealers that allocation of motor vehicles would be made to them, the dealers.

At a further meeting, the Minister of State advised the dealers of their respective allocations, based on orders which he had received from W-Drive operators.

The first named applicant who during the years 1982 to 1984 had received 63.3% 62.1% and 54.4% approximately of the market, was now allocated "23% of the total demand."

The second named applicant who for the said quoted period had received 10.4%, 6.57% and 13.79% approximately of the market was now allocated "4% of the total demand."

Nine (9) dealers in all received allocations; this included a Mr. Richard Stewart who received an allocation of US\$350,000.00 which effectively increased the sum available to US\$4,350,000.00.

The first named applicant has been engaged in business as a motor car dealer for 55 years, is the sole agent for Toyota motor cars, has servicing facilities for the said cars and a stock of spare parts therefor in excess of \$10,000,000.00.

The second named applicant has been engaged in a similar business for 13 years and are the sole agents for Nissan motor vehicles.

At a meeting in July, 1986 the Minister of State told the dealers that the allocations were based on the copy orders which he had received. Each applicant alleges that this statement "was in direct conflict with the signed orders ... received" by the said applicant. The first named applicant requested the said Minister of State, in the presence of the dealers and operators, to disclose the orders upon which he allegedly based his decision, and "The Minister of State forcefully declined to do so."

Each applicant complains that he has never seen the orders "used as a basis for making the allocation."

Crown Motors Limited, one of the motor car dealers, incorporated in 1981 are the agents for Honda motor cars and received 32% of the allocation.

Executive Motors Limited, incorporated in 1982 are agents for Mazda motor cars and received 34% of the allocation.

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Mr. Desmond Panton is the majority shareholder in each of the said companies which together received over 63% of the total allocation.

No Mazda motor cars had been imported for the U-Drive industry since 1979.

In September, 1985 the Minister had published a Ministry Paper No. 30 setting out the motor vehicle import policy and objectives, naming the composition of a Motor Vehicle Imports Committee and its functions, and stating that "this programme should be spearheaded by the Ministry of Construction (Works) in collaboration with other Ministries and Agencies as part of an overall Motor Vehicle Imports Committee."

The JCTC is the only authorised importer of motor vehicles into Jamaica.

The Minister of State, describing himself as "Chairman of the Motor Vehicle Sub-Committee" wrote to Mr. George Johnson, President of the U-Drive Association, by letter dated the 12th day of June, 1986, stating, inter alia,

"Further to our meeting yesterday and after discussion with the Motor Vehicle Imports Committee the decision was taken that US Dollar earnings will not be used as a means to determine motor vehicle allotment to U-Drive Operators ... the following method set out will be applied U-Drive Operator is to submit to me ... a total list of all units acquired by his company in 1985 The operators must, in order to qualify for allotment must substantiate their ... arrangements with reputable financial institutions Allocation to operators will be considered on the basis of a percentage ... total vehicles placed in their fleet during 1985."

This letter was copied to, among others, "Dealers, J.C.T.C., P.S. Ministry of Trade and Minister Vaz."

One of the functions cited in Ministry Paper 30, is that the Motor Vehicle Imports Committee "will also from time to time, review distribution arrangements between dealers, ... and make appropriate recommendations as it sees fit."

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Mr. Patrick Rousseau, Chairman of the first named applicant wrote to the Minister of State by letter dated the 15th day of June, 1986 in which he stated, inter alia,

"Dear Minister,

For the third consecutive time, this Company was faced with an attempt to change the rules and exclude us from participating in the import of motor vehicles to Jamaica. We have disputed and resisted all previous attempts and feel obliged to state our case and continue to vigorously resist any attempt to exclude us from a position which we have earned over the years.

....

The first attempt to change the quota basis took place in 1983

The second attempt was in 1985 ... which we considered drastic and unfair and protested vigorously. A letter dated the 8th February, 1985 from Mr. Vernon Matalon to Minister Samuda gives a picture of our objections.

.... As long as there is inadequate foreign exchange and therefore no free market, then a system of allocation of imports by quota should continue in force and be established on existing accepted principles

We disagree with the proposed approach and suggest that you follow your Government's stated policy of operating as close to a 'free market' as is possible in the circumstances. What we propose is that the quota system as applied in the past be continued by you for 1986"

This letter was copied to the Honourable Douglas Vaz, the Permanent Secretary, Ministry of Trade, JCTC and U-Drive Operators, among others.

Mr. Rousseau in the said capacity wrote again to the Minister of State, a letter dated the 7th day of July, 1986, stating inter alia,

"Further to our letter of the 4th July, we are writing to comment on two (2) further issues.

Before doing so however, we would like to point out that we object vigorously to a quota being allocated to our Company instead of the U-Drive operators. Such procedure lends itself to improprieties and suggestions of improprieties by the trade."

This letter was copied to the same said parties. Apparently there were no replies by the Minister of State to any of Mr. Rousseau's letters.

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He again wrote to the Minister of State by letter dated the 16th day of July, 1986 referring to the meeting of the 15th day of July, 1986 with the dealers and U-Drive operators, recited the decisions taken at the said meeting and said:

"The persons who met with you in the afternoon ... were there for the sole purpose of advising you of the formula to be used in allocating the quota to the U-Drive Operators. They had no mandate or authority to decide on who should get the quotas. That decision had already been made by the vast majority at the meeting in the morning and accepted by you.

A change of the method of allocating the quotas without any reference to a meeting of all the parties (dealers and U-Drive Operators) would be a breach of the principles of natural justice and non-democratic.

We call on you to withdraw your letter of July 16, 1986 since you are aware that Mr. George Johnson et al have no legal authority to agree to any such decision with you on behalf of the group."

Mr. Rousseau wrote a second letter dated the 16th July, 1986 to the Minister of State maintaining the same posture.

There does not seem to have been any replies to Mr. Rousseau's letters of the 16th day of July, 1986.

The Minister of State by a letter dated the 14th day of August, 1986 to the Minister stated:

"Dear Minister Vaz,

Further to my copy letter to the Prime Minister of August 8 I am advised by Jamaica Commodity Trading Company that they are unaware of the allocations to the dealers for cars for the U-Drive Operators.

....

Would you be kind enough to instruct Jamaica Commodity Trading Company to have the contracts prepared, so that the cars can be ordered. Please see below quotas for Dealers based on preference to cars ordered by the Operators:

Executive Motors Ltd	-	\$1,360,000
Crown Motors Ltd	-	1,280,000
John Crook Ltd	-	40,000
K.I.G. Ltd	-	40,000
Pacific Motors	-	160,000
Premier Motors	-	160,000
United Motors Ltd	-	920,000
Vehicles & Supplies	-	40,000

Mr. Richard Stewart ... is to re-confirm the original prices of vehicles submitted by him. As soon as confirmation is received, a further \$350,000 will be allotted to him"

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The Minister wrote to Mr. Paul Ellis of the JCTC by letter dated the 15th day of August, 1986:

"Please proceed immediately with the ordering of motor vehicles for the U-Drive Operators, in keeping with the contractual agreements entered into between the operators and the respective dealers, and as reflected in letter dated 14th August, 1986 from the Hon. Robert Marsh to me, and copied to the JCTC"

It is this letter of the Minister of the 15th day of August, 1986 that is the subject of this application before this Court.

The statutory statement filed with the application recited the grounds argued on behalf of the applicants.

Mr. Hugh Small, Q.C. who appeared on behalf of the first named applicant argued that the Minister of State had no status under the Ministry Paper No. 30 because no reference is made therein authorising the appointment of a sub-committee of the Motor Vehicle Imports Committee. That under paragraph 3 of the Motor Vehicle (Sale and Distribution) Order 1985, the Minister had no power to allocate the said motor vehicles prior to their entry into the Island because the reference is to "approved motor vehicles" meaning motor vehicles already imported into the Island under credit facilities guaranteed by the Government of Jamaica. He further argued that there was procedural unfairness in the Minister of State's conduct, in that he did not treat the 7th 8 orders of the first applicant fairly and refused to permit the first applicant to see the orders which the said Minister of State alleges that he received from the U-Drive operators, which latter orders affected him; that the Minister's representations in Ministry Paper No. 30 gave rise to reasonable expectations that the policy therein would be implemented, taking proper account of ensuring "savings in terms of overheads and inventory costs in holding stocks of spare parts ... to service a considerably reduced range of makes and models," and that the review distribution arrangements would be undertaken by the said Committee - such policy was not followed.

Mr. Small continued that Minister Marsh had given an undertaking that the policy of allocation of motor cars to U-Drive operators which policy had existed since 1979, would be adhered to and so he was not entitled to resile from it and in doing so he acted unfairly and in breach of natural justice. He said that the applicants had a legitimate expectation that public policy would be adhered to, that the conduct of the Minister was analogous to a breach of contract or a misrepresentation in that he should not change the rules and allocate the motor cars on a different basis without prior consultation before the change of policy and after the change of policy, informing the parties of the new policy, giving them adequate notice of it and an opportunity to make representations; this was not afforded to the applicants.

Mr. Small submitted that the letters dated the 9th day of July, 1986 and the 16th day of July, 1986 from the Minister of State to Mr. Vernon Matalon showed that the said Minister of State had taken a decision and allocated the motor cars and thereby wrongly assumed power - usurped the discretion that was given to and which resided in the Minister of Industry and Commerce. Mr. Small conceded that the Minister could change policy without giving reasons, that the Courts were not concerned with policy changes unless it amounted to a procedural impropriety, but that the policy change should be one that the Minister was able to make within the enabling statute. He cited the cases Inland Commissioner of Revenue v. Self Employed & Small Business (1981) 2 All E.R. 93, Preston v. Inland Revenue Commissioner (1985) 2 All E.R. 327, Re Liverpool Taxi Owners Association (1972) 2 All E.R. 589, Attorney General of Hong Kong v. Ng Yuen Shiu (1983) 2 All E.R. 346, R v. Security of State for Home Department, Ex parte Khan (1985) 1 All E.R. 40 and Nottingham County Council v. Secretary of State for Environment (1986) 1 All E.R. 190.

Mr. Leo Phynie, Q. C. for the second applicant adopted Mr. Small's arguments and submitted that a discretionary power

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conferred upon a specified Minister by a statutory provision may not be exercised in his name by another Minister, that the decision as to the allocation of the motor vehicles was not in substance that of the Minister, but that of the Minister of State who was a statutory stranger and so was ultra vires and invalid, and that the Minister was acting under the dictation of the Minister of State in that there was no conscious application of the mind of the Minister to the determination.

He submitted further that no absolute discretion is conferred on the Minister under the Trade Act - its exercise is reviewable by the Courts, that Ministry Paper No. 30 established the criteria and procedure, and that in the exercise of that discretion he must have regard to relevant considerations and disregard the irrelevant. He argued that the Minister failed to take into account the relevant factors in Ministry Paper 30, failed to take into account the comparative price of the Toyota Starlet and the Nissan Sunny, ignored the second applicant's contention that pursuant to the Minister of State's directive he solicited orders for 500 Nissan cars and having regard to the allocation of the Minister of State that was not taken into consideration, particularly in view of the conduct of the Minister of State in unreasonably and forcefully refusing to show all the orders received from U-Drive Operators.

Mr. Leo Rhynie argued further that the Minister in his affidavit by stating that he considered the "need to balance competing private interests" was referring to an unlawful purpose, irrelevant to his determination and inconsistent with the policy and objects of the Trade Act. The Minister disregarded the fact that Executive Motors and Crown Motors, which are effectively controlled by one individual, together received an allocation of US\$2.6 Million, that the allegation that the previous system gave rise to abuse, if examined along with what were punitive allocations to the applicants having regard to their past performance, was accusing them without giving them an opportunity

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to be aware of the charges and an opportunity to answer them and was thereby committing a breach of natural justice.

He concluded that the Minister should have collaborated with the interested parties and give them an opportunity to be heard and to influence the formulation of a new formula; instead the Minister arbitrarily substituted a system giving to the Minister of State the power to determine which dealer should be preferred, ^{and} thereby promoted an interest alien to the Act, acted arbitrarily, not in good faith and in a way that no reasonable authority would have acted. He cited cases in support of his arguments.

Mr. Langrin, Q.C. Senior Assistant Attorney General, on behalf of the Minister, submitted that judicial review of administrative action may be obtained either on the ground of illegality, irrationality or procedural impropriety; the applicants in the instant case may only plead the ground of procedural impropriety in that they had a legitimate expectation to be consulted or to make representations. The applicants had extensive consultations and full opportunity to make recommendations, and so there was no failure to observe the rules of natural justice. Public policy may be changed and competing policy considerations in the exercise of Executive discretion are of such a nature that Courts are ill equipped to determine such issues. He argued further, that the Motor Vehicle (Sale and Distribution) Order validly made under the Trade Act gave the Minister absolute discretion to allocate among the dealers, "approved motor vehicles" which includes by definition, motor vehicles to be imported into the Island, under credit facilities guaranteed by the Government of Jamaica. The Court, Mr. Langrin continued, should look at the Minister's acts and what he said he took into consideration and then examine them to see if he took the correct matters into consideration and if his decision is not outrageous, the Court should not intervene. The said matters should be used by the Court not to decide on the merits, but to see whether or not the Minister acted capriciously.

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The Minister employed the Minister of State as his agent and the said Minister made a proper determination under the Act.

He argued further that the onus, of proof, a heavy one, is on the applicants to prove that the Minister did not make the determination and allocation as required and had delegated his duties and that the inferences from assertions by the applicants that the Minister did not do so is mere suspicion and conjecture and does not discharge that burden. He concluded that a public body cannot by its own acts or representations be estopped from performing a statutory duty, that is, acts done in lawful exercise of an administrative action.

He cited, in support, among others, R v. Boundary Commission for England Ex parte Foot (1983) 1 All E.R. 1099, Findlay v. Secretary of State for Home Department and another (1984) 3 All E.R. 801, Council of Civil Service Unions & others v. Minister for the Civil Service (1984) 2 All E.R. 935.

Mr. Chin See, Q.C. who appeared on behalf of JCTC submitted that the applicants needed to show that they had a legitimate expectation and so acquire the status to make their applications for judicial review. The applicants should accept the Minister's statement that orders submitted by U-Drive operators were dealt with on a "ratio basis" and if the Court finds that they had a legitimate expectation, the Court should apply the Wednesbury principle. The Minister of State was bound by an allocation to dealers and there was no obligation to show orders from the U-Drive operators. The only change in policy is that it is no longer based on foreign exchange earnings, there is no change in the system of allocation. The allocation to dealers based on the preference of U-Drive operators is not incompatible with the Trade Act nor the Order made thereunder. Even if the Court finds that there exists procedural impropriety resulting in unfairness, the Court should not grant certiorari because of third party rights which had accrued as a result of the

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contracts which had been entered into pursuant to the allocation.

Mr. Vassell, who appeared along with Mr. Chin See submitted that the act of delegation of duty or acting under dictation required a positive act of delegation or a positive abdication by the repository of the power and cannot conclusively be inferred from the acts and conduct of the alleged delegate or other person, as this would not discharge the burden of proof on the applicants. The Minister of State was the agent of the Minister and the said Order under the Act ought not to be interpreted to mean that there is an obligation on the Minister to act personally in all the antecedent meetings. He argued further that there was no obligation or duty on the Minister to advise the dealers and so no adverse inference should be drawn from the action of the Minister of State in advising the first applicant of its allocation; that the letter dated the 14th day of August, 1986 from the Minister of State to the Minister was a recognition by the former that he was not the determining authority and that the Minister's letter dated the 15th day of August, 1986 showed that he considered the matter and made the determination. Mr. Vassell concluded that if the Court finds that there has been a delegation - having regard to the scope, purpose and object of the Act - the Court should imply that there exists such a power to delegate.

All the submissions were supported by authorities.

Lord Diplock, in Council of Civil Service Unions and others v. Minister for the Civil Service supra, said at page 950,

"Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'

By 'illegality' ... I mean that the decision-maker must understand correctly the law that regulates his decision-making power By

'irrationality' I mean what can by now be referred to as 'Wednesbury unreasonableness' ... a decision 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

As respects 'procedural impropriety' ... where the decision is one which does not alter rights or obligations enforceable in private law but only deprives a person of legitimate expectations, 'procedural impropriety' will normally provide the only ground on which the decision is open to judicial review."

Lord Roskill, in the said case, at page 954, described the principle of "legitimate expectation" as,

"... closely connected with 'a right to be heard.' Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations, especially where the aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reason justifying such a departure."

In that case the Minister responsible for the Civil Service withdrew the rights of certain civil servants to be members of a union. Their Lordships held that because of the existence of a regular practice of consultation, the civil servants had a legitimate expectation, that the said Minister would not withdraw their rights before such consultation, that he would act fairly and so they were entitled to judicial review of the Minister's instructions. The appeal was however dismissed on the ground of national security.

In re Liverpool Taxi Owners' Association, supra, the undertaking given by the chairman of the sub-committee of the corporation to the association was regarded as binding on the corporation and which they were not at liberty to disregard "until they had given due and proper consideration to the representations of all those interested."

Lord Denning, Master of the Rolls, said at page 594,

"... the corporation were not at liberty to disregard their undertaking. They were bound by it so long as it was not in conflict with

their statutory duty So long as the undertaking is compatible with their public duty, they must honour it." (emphasis added)

In the case of Attorney General of Hong Kong v. Ng Yuen, supra, it was held that a public authority was bound by its undertaking as to the procedure it would follow provided it did not conflict with its statutory duty.

As to the exercise of a discretion, it was stated in de Smith's Judicial Review of Administrative Action, 4th Edition at page 285,

"In general a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: It must not act under the dictation of another body or disable itself from exercising a discretion in each individual case It must act in good faith, must have regard to all relevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously."

and at page 322,

"... if it is claimed that the authority for the exercise of a discretion ... is statutory, the courts begin by determining whether the power has been exercised in conformity with the express words of the statute and may then go on to determine whether it has been exercised in a manner that complies with certain legal requirements."

and at page 295,

"The Courts have generally declined to construe ... words as investing the authority with an absolute discretion to do as it pleases."

de Smith's at page 298 recites,

"A discretionary power must, in general be exercised only by the authority to which it has been committed. It is a well known principle of law that when a power has been confided to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another. This principle which has often been applied in the law of agency ... is expressed in the form of the maxim delegatus non potest delegare."

In Padfield v. Minister of Agriculture, Fisheries & Food (A.C. 997), the Minister refused to appoint a committee to investigate a complaint by milk producers as to a price differential for milk. It was argued that the said Minister had an "unfettered" discretion.

the Minister's discretion.

Lord Reid said, at page 1030,

'Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court ... if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court.'

Of this 'unfettered' discretion, Lord Upjohn in the same case, said, at page 1060,

'... even if the section did not contain that adjective I doubt if it would make any difference in law to his powers But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely, that in exercising their powers the latter must act lawfully'

In the instant case, the questions that arise are these -

1. Was there a valid order made under the Trade Act which legally precluded the return to the 1979 policy? Would the Minister have been in breach of his statutory duties if he had entertained the wishes of the applicants? If he would not have been in breach to do so, did the applicants consequently have a legitimate expectation? If they did have a legitimate expectation, did the Minister commit an act of procedural impropriety?
2. Did the conduct of the Minister of State amount to a usurpation of functions? Did the Minister abdicate his power of determination under the Order to the Minister of State who in fact exercised the discretion thereunder or was there a valid delegation?
3. If the determination and allocation was that of the Minister, was it an unfair, arbitrary and capricious allocation to the applicants and therefore invalid? Was it just and fair and as a consequence valid?

4. Did the applicants ignore the 1985 Order made under the Trade Act, misinform themselves of the system then legally in force, restrict their own soliciting of orders and so limit their chances of receiving a larger allocation? Or, was there procedural impropriety followed by an outrageous allocation on the part of the Minister?

One of the objects of the Trade Act is reflected in Section 8 of the said Act, which reads,

" 8 - (1) Subject to the provisions of subsection (2), the Minister may by Order provide for -

(a)

(b)

(c) regulating the distribution, purchase or sale of goods or any class or description of goods;"

In the exercise of the powers conferred under the said Section, the Minister made the Motor Vehicle (Sale and Distribution) Order which was published on the 22nd day of February, 1985.

Paragraph 2 of the said Order defines "approved motor vehicle" as a vehicle "imported into the Island under credit facilities guaranteed by the Government of Jamaica" and the word "import" is defined in the said Trade Act as "to bring or to be concerned in the bringing, into Jamaica"

The affidavit of Mrs. Gloria Priestly, Permanent Secretary in the Ministry of Industry and Commerce dated the 30th day of September, 1986 stated that in respect of the several contracts entered into as a result of the determination of the said Minister on the 15th day of August, 1986 the credit facilities had been guaranteed by the Government of Jamaica.

Paragraph 3 of the said Order reads -

"All approved motor vehicles shall be allocated among dealers in such manner and in such numbers and subject to such terms and conditions as the Minister may, in his absolute discretion, determine."

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Paragraph 4 reads -

" ... (1) The Minister shall notify in writing each specified importer of the determination made pursuant to paragraph 3.

(2) The specified importer shall notify in writing all dealers affected by the determination communicated to him by the Minister."

Prior to February, 1985 when the said Order was made, the system of allocation of approved motor vehicles was to the U-Drive operators based on the formula using foreign exchange earnings of the year previously, as verified by the Bank of Jamaica.

The U-Drive operators therefore could clearly compute the probable allocation to each of them based on this formula - a demonstration of the rewards for ones efforts in the competitiveness of a free market system - but within the ambit of the available foreign exchange.

The Minister had the power and validly made the said Order in February, 1985 that "all approved motor vehicles shall be allocated to dealers in his absolute discretion"

In September, 1985 the said Minister published Ministry Paper No. 30 setting out the policy and reciting the guidelines that governed the importation of motor vehicles.

All parties were therefore well aware of the existence of the said Order and the published Ministry Paper prior to 1986, and in particular the fact that within the said Order was now the provision that allocation would be made to "dealers" as opposed to the practice of allocation to U-Drive operators.

The directive to dealers to solicit orders from U-Drive operators was acquiesced in by the dealers - acquiescence in the new formula - evidence of a full opportunity for further competition in a free market system within the limits of the allocated fund of US\$4Mllion.

By his letter dated the 12th day of June, 1986 to Mr. George Johnson, the Minister of State further forewarned him of

the change in the formula of allocation, namely;

".... Further to our meeting yesterday 11th June, 1986 and after discussion with the Motor Vehicle Imports Committee, the decision was taken that U.S. Dollar earnings will not be used as a means to determine motor vehicle allotment to U-Drive Operators (sic)"

Curiously, the Minister of State here refers, imprecisely, to "allotment to U-Drive Operators", this letter was copied to all interested parties including the applicants.

Thereafter followed a series of letters previously referred to, written on behalf of the first applicant objecting "... vigorously to a quota ... allocated to our Company instead of to U-Drive operators."

What the first applicant was in substance asking for, is a retention of the formula of a proportionate division, an allocation based on the foreign exchange earnings. Two of these letters from Mr. Rousseau were written prior to the meeting of the 15th day of July, 1986. The applicant chose this medium to make representations to the said Minister.

I therefore hold that representations were in fact made to the Minister by the first applicant when it was announced that ^{new} the formula was due to be applied.

Both applicants were present at the meeting of the 15th day of July when the matter was again discussed and in the words of Mr. Vernon Matalon "By a near majority this proposal was rejected by the dealers and operators" showing once more an application of the minds and voices of the applicants to the issue and representations made on their behalf.

In this regard, I hold that there was no procedural impropriety in as far as the applicants did exercise their right to be heard - their legitimate expectation was satisfied.

The Minister of State who has been described as "Chairman of the Motor Vehicle Sub Committee" and as "Chairman of the Motor

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Vehicle Technical Advisory Sub-Committee" was principally involved in all the meetings with the applicants and his conduct led the applicants to complain that the allocation was that of the Minister of State and not that of the Minister who had the statutory power.

The letter dated the 9th day of July, 1986 from the Minister of State to Mr. Matalon, advised Mr. Matalon of the "quota ... of US\$882,000", the letter dated the 16th day of July, 1986 advised Mr. Matalon that "... the decision reached by them ... dealers would be given a money allocation."

In both these letters the Minister of State was advising Mr. Matalon of the allocation to the first applicant. Though one may in some circumstances construe this as the exercise of a power to allocate - I hold that on an overall view of the other facts of this case, that is not so.

Mr. Matalon's letter dated the 25th day of August, 1986 to Mr. Levers of the JCTC expressing puzzlement at the reference by Mr. Levers to the letter of the 14th August, 1986 written by the Minister of State instead of coming from the Minister, may again be construed as a complaint in relation to an assumption by the Minister of State of the power which he did not have.

Nowhere has the Minister of State stated "I have allocated" - If he had so said - it would have been conclusive proof. One has to look also at the action of the Minister himself - because unlike the Minister of Housing who clearly abdicated his functions to the Minister of Agriculture and Fisheries in the case of Lavender and Son Ltd. v. Minister of Housing and Local Government, supra, the Minister in the instant case has not expressly delegated his functions nor expressly abdicated his obligations.

I hold that the Minister of State acted as a mere agent of the Minister who as he stated was "at all material times ... in close consultation with the Honourable Robert Marsh ...; Chairman,

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Motor Vehicle Technical Advisory Sub-Committee who has consulted with all the dealers and U-Drive Operators on my behalf."

This declaration by the Minister was a statement contained in his affidavit dated 22nd October, 1986 as filed. It is evidence; it is an issue to be taken into consideration and decided by the Court - it is unchallenged and so its evidential effect is not eroded by any contrary evidence.

The Minister stated in the said affidavit "I approved the motor vehicle allocation among Dealers on the 15th day of August, 1986 based on the following monetary quotas," he thereafter recited the quota contained in the letter of the Minister of State dated the 14th day of August, 1986. I hold that this declaration by the Minister is an assertion of the application of his mind to the apportionment of the sum, and so the effective date of allocation is the 15th day of August, 1986; there was no delegation of his discretion to the Minister of State.

The letter of the Minister of State dated 14th August, 1986 to the Minister, inter alia, which reads,

".... Would you be kind enough to instruct JCTC to have the contracts prepared, so that the cars can be ordered"

is an indication that the Minister of State did not regard himself as exercising the power that was in fact placed in the hands of the Minister and so he stopped short of notifying "... in writing each specified importer of the determination made pursuant to paragraph 3" as is required by the provisions of paragraph 4 (1) of the said Order to be done by the Minister.

It seems to me that the Minister of State may have been afforded the opportunity to assume proportions of unusual size in the respective meetings and his imprudent refusal to disclose the orders which he had received from the U-Drive Operators other than the applicants as requested by the representative of the first applicant merely fueled the suspicion of the applicants.

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I make no pronouncements on the obligation of the Minister of State or otherwise to show these orders to the applicants, but seeing that the discussion and representations had been conducted on the basis of an ongoing dialogue, it was unwise for the Minister of State to have taken such an un-bending stance, and would have avoided the suspicions that subsequently arose.

The applicants have not stated that no such orders from the U-Drive operators existed. Indeed, if such was the assertion, the burden of proof on the applicants would have been of the highest nature. Each applicant complains that the refusal of the Minister of State to show these orders was an unfair dealing with the said applicant.

Each applicant stated in his affidavit "... the Minister stated that the allocations were based on the copy orders which he had received from U-Drive operators." As this statement was in conflict with the signed Orders which the applicant had received, a request of the Minister of State to disclose the orders was made.

There is no evidence that no such orders existed. The Minister in his affidavit dated the 22nd day of October stated that;

"... in the exercise of my discretion pursuant to the said Order and in exercising my judgment as a matter of policy under the aforesaid Order, I allocated motor vehicles to the applicants after due consultations and after taking into consideration the concerns of all the Dealers including the applicants and U-Drive Operators."

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Evidentially, this is an assertion from which one may draw the inference that the consultations between the Minister and the Minister of State revealed the existence of the relevant orders from U-Drive Operators - I so hold.

The formula in force was based on the signed Orders from U-Drive Operators. The applicants were told of this and they

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acquiesced therein by obtaining those signed orders.

A further complaint of the applicants was that the Minister of State had agreed with the decision of the meeting of the 15th day of July, 1986 to retain the system in force since 1979. It seems that even if the Minister of State thought he had the authority to do so it was not lawful, as the request would have been for the Minister to take a decision which the statute did not lawfully permit him to do - it would have been contrary to his statutory duty - the Order of February, 1985 being then in force.

Even assuming that there was an obligation to have further discussions after the afternoon meeting of the 15th day of July, 1986, and I hold that there was none, this could not ^{existing} affect the ~~the~~ statutory system of allocation to "dealers" to the exclusion of the 1979 formula. In any event, the first applicant's representative made further representations by letters from Mr. Rousseau.

The matters that the Minister said he took into consideration, are in my view substantially the matters stated in Ministry Paper 30 - the guidelines published in September, 1985 to govern the importation of cars under the Trade Act.

For the above reasons I hold that the applications should be refused.



J.

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FANTON, J.

The applicants seek "an Order of Certiorari to remove into this Honourable Court for the purpose of its being quashed a decision and/or determination and/or order and/or directive of the Honourable Douglas Vaz, Minister of Industry and Commerce to the Jamaica Commodity Trading Co. Ltd. contained in a letter dated 15th August, 1986, directing the said Jamaica Commodity Trading Co. Ltd. to proceed immediately to order and/or import motor vehicles for use in the U-Drive industry in keeping with contractual agreements entered into between the operators and the respective dealers and in accordance with a letter dated 14th August, 1986, from the Honourable Robert Marsh, Minister of State in the Ministry of Construction to the Honourable Minister of Industry and Commerce"

The grounds on which this order is sought may be summarised thus: -

1. The decision of the Minister of Industry and Commerce contained in the letter dated 15th August, 1986, was unlawful and/or ultra vires and/or an abuse of the power conferred by the Trade Act.
2. The Minister of Industry and Commerce breached the maxim "delegatus non potest delegare" by purporting to delegate his authority and power in relation to the allocation of motor vehicles to the Minister of State in the Ministry of Construction.
3. The Minister of Industry and Commerce acted under the dictation of the Minister of State in the Ministry of Construction, thereby failing to exercise the discretionary power entrusted to him by Parliament.

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4. In making his decision, the Minister of Industry and Commerce took irrelevant matters into account or failed to consider relevant matters.
5. The decision of the Minister of Industry and Commerce constituted an abuse or excess of power as-
 - (a) it was unreasonable to the extent that no reasonable authority would have made it; and
 - (b) it was tainted with procedural impropriety

THE BACKGROUND

The Motor Vehicle (Sale and Distribution) Order, 1985, gives the Minister of Industry and Commerce the power to allocate "approved motor vehicles among dealers in such manner and in such numbers and subject to such terms and conditions as the Minister may, in his absolute discretion, determine" (See para. 3).

By virtue of paragraph 4(1), the Minister is required to notify in writing each specified importer of the determination made pursuant to paragraph 3. The specified importer is in turn required by paragraph 4(2) to notify in writing all dealers affected by the determination communicated to him by the Minister. Paragraph 5 provides that every specified importer shall give effect to the Minister's determination and, upon receipt of payment from the dealer of the price of the approved motor vehicle, shall forthwith deliver or cause to be delivered such motor vehicle to the dealer.

Following upon this Order which is dated 22nd February, 1985, the Minister, in September, 1985, published the Government's motor vehicle import policy in Ministry Paper No. 30. That policy document spoke of the need for a rationalisation programme aimed at reducing drastically the proliferation of makes and models of cars being imported. The pace of the rationalisation programme will inevitably, it said, be affected by the availability of lines of credit and Jamaica's

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obligation in terms of international and bilateral agreements. With a view to addressing what Ministry Paper 30 refers to as the problems of abuses and irregularities in the area of the importation of motor cars and "setting the stage for the further development of a policy of rationalisation" a Motor Vehicle Imports Committee was established to operate under strict policy guidelines from the Ministry of Industry and Commerce.

This committee was established under the chairmanship of the Trade Administrator. One important function of the Committee is the negotiation of credit terms for imported motor vehicles. From time to time, the Committee would also review distribution arrangements between dealers. In relation to the programme of rationalisation, the Ministry Paper indicated that the Government's policy was that that programme should be spearheaded by the Minister of Construction (Works) in collaboration with other Ministries and Agencies as part of the overall Motor Vehicle Imports Committee. This Committee comprised a single representative from each of the following: Collector General's Department, Bureau of Management Support in the office of the Prime Minister, Supply Division in the Ministry of Finance, Ministry of Construction (Works), Ministry of Industry and Commerce, Jamaica Commodity Trading Co. Ltd., Jamaica National Investment Promotions Ltd. with the chairman being the Trade Administrator.

It appears that the Hon. Robert Marsh, Minister of State, was the representative of the Ministry of Construction (Works) on this Committee. He was also Chairman of a group known as The Motor Vehicle Technical Advisory Sub-Committee. This latter body is referred to in the affidavit of the Honourable Douglas Vaz, Minister of Industry and Commerce.

PRE - 1985

According to Vernon Matalon, a director of United Motors Ltd., in 1979 he urged Government to import cars for the U-Drive Industry,

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making allocations to members on the basis of foreign currency earnings lodged to the Bank of Jamaica. Government accepted this proposal. Under this system, approximately 80% of the total allocation in terms of foreign currency available for the purchase of motor vehicles was pro-rated amongst certain U-Drive operators, based on their respective foreign exchange lodgments as confirmed by the Bank of Jamaica for the previous year. The remaining 20% allowed for consideration of hardship cases and also made provision for new persons coming into the industry who would usually be given a base fleet of say 10 cars.

The quotas were given directly to U-Drive operators and they selected vehicles of their choice and negotiated contracts with the dealers for the vehicles of their choice.

Between 1980 and 1984, the Ministry of Tourism indicated in each year the amount of the total allocation of foreign currency for the purchase of U-Drive cars and requested the U-Drive Association to submit information in relation to lodgments as verified by the Bank of Jamaica.

In each year, at Matalon's instigation, meetings were held between June and September to determine and finalize the amount of foreign currency which the Government would make available for purchase of motor vehicles for use in the U-Drive industry. Between 1982 and 1984, the first applicant enjoyed an average yearly allocation of 59.85% of the motor vehicles imported into the island for use as U-Drive cars; whereas the second applicant enjoyed an average of 10.11%

The events of 1986

In May 1986, the Honourable Robert Marsh advised dealers that the sum of US\$4 million was available for the U-Drive industry and that dealers should negotiate with their overseas principals for credit. In June 1986, he reviewed the credit offers and advised that 13 dealers would be eligible for participation in the scheme. He then contacted the manufacturers and exporting agents. He later advised

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that only 7 of the dealers' credit had been confirmed to his satisfaction. The first applicant was not one of the 7. However, after discussions, Minister Marsh instructed that the first applicant should be included. He further instructed the 8 to solicit orders from the U-Drive operators, which orders the U-Drive operators should submit to him the Minister directly.

The first applicant which deals in Toyota cars solicited orders for 748 motor vehicles. It calculated that there was a preference for its cars. The second applicant saw a demand for over 500 of its vehicles. Here, I would comment that this is an interesting situation as in his affidavit, Vernon Matalon stated that the history of the importation of cars for the industry showed that the amount imported each year was about 1200. If the orders received by the applicants were used as the only guide, the Minister would therefore, it seems, have no alternative but to allocate the 1200 cars to the two applicants.

To continue: in July 1986, Minister Marsh proposed a change in the system of allocation, whereby motor vehicles would be allocated to dealers instead of the U-Drive operators. This is strange as it is in fact what the Order requires. There was no other basis on which allocations could have been lawfully made.

The majority of dealers, for reasons best known to themselves, rejected Minister Marsh's proposal, expressing a preference for the previous system, that is, allocation to U-Drive operators. Minister Marsh accepted the dealer's rejection but at another meeting later that day he reverted to his original proposal - which is what the Order (the law) requires.

Subsequently, the first applicant was advised that it would be allotted 23.02% of the cars to be imported whereas it felt it had secured a percentage of orders which would have meant that it would have maintained its 60% share of the imports. In fact, the 748 orders that the first applicant received would have given it 62.33% of

"the historical figure of 1,200 cars per year imported for the industry". The second applicant was allotted 4.53% of the cars to be imported.

These allocations disturbed the applicants. Indeed, at a meeting with Minister Marsh, Matalon - apparently doubting the veracity of the Minister - requested to see the orders received by the Minister. This also was strange behaviour.

Both applicants have, before us, accused the Minister of favouring Executive Motors (which received 31.51% of the motor cars allocated) and Crown Motors which received 32.33%. The applicants complain of bad faith, bias, and a crushing of their legitimate expectations by the allocations.

The allocations

By a letter dated August 15, 1986, to Mr. Paul Ellis, Managing Director of the Jamaica Commodity Trading Co. Ltd., the Minister of Industry and Commerce wrote in part thus:

"Please proceed immediately with the ordering of motor vehicles for the U-Drive operators, in keeping with the contractual agreements entered into between the operators and the respective dealers, and as reflected in letter dated 14th August, 1986, from the Hon. Robert Marsh to me, and copied to the Jamaica Commodity Trading Company

Do impress upon the Ministry of Finance and the Bank of Jamaica, the necessity of placing the orders now, if, as is our objective, the upcoming Tourist Season is to benefit by the strengthening of the present emaciated and severely depleted fleet of U-Drive motor cars".

The letter dated 14th August, 1986, and referred to in Minister Vaz's letter reads thus, in part:

"Dear Minister Vaz,

Further to my copy letter to the Prime Minister of August 8, I am advised by Jamaica Commodity Trading Co.

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that they are unaware of the allocations to the Dealers for cars for the U-Drive operators.

The Dealers need to place these orders as quickly as possible for the cars to come in time for the Winter Season.

Would you be kind enough to instruct Jamaica Commodity Trading Co. to have the contracts prepared so that the cars can be ordered."

In his affidavit dated October 22, 1986, Minister Vaz deponed that he approved the allocations and that in doing so he considered among other things -

- (a) the protection of the interest of the Government in respect of the credit which the Government guarantees;
- (b) the transportation needs of the tourist industry, with particular reference to the type of vehicles required by U-Drive Operators;
- (c) the prices of the different types of vehicles;
- (d) the need to balance competing private interests; and
- (e) abuse of the system whereby operators would place orders with dealers.

He said further that at all material times he had been in close consultation with Minister Marsh who consulted with all the dealers and U-Drive operators on his (Vaz's) behalf. He also said that he had personally considered the representations and concerns of the dealers and operators as well as other interested parties in deciding the allocation of the vehicles.

It is important to note that there has been no evidential challenge of the Minister's affidavit.

SUBMISSIONS IN GENERAL

The submissions lasted eight days. They ranged far and wide, and touched on every single aspect of the facts and the law

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relevant to the applications. We are grateful to the five learned attorney-at-law who addressed us; they displayed much energy in research and skill in presentation.

On behalf of the applicants, it was urged that there was bias, unfairness, an abuse of power, procedural irregularity, and illegality on the part of Minister Vaz in how he dealt with the allocations. It was also particularly urged that he had merely rubber-stamped the allocations that had in fact, it was said, been made by Minister Marsh.

On behalf of the respondents, it was submitted that there was no unfairness, abuse of power, illegality or irregularity; further, that there were extensive consultations between the parties and between the two Ministers; that Minister Marsh was merely assisting Minister Vaz, and that the latter had in fact made the allocations after personally considering all the representations that had been made. The instant case, they claimed, arose out of frustrated, as opposed to legitimate, expectations on the part of the applicants.

THE LAW

In conducting this review of the Minister's determination, it is convenient to classify the grounds under the three heads that were listed by Lord Diplock in the case Council of Civil Service Unions and others v. Minister of the Civil Service (1984) 3 A.E.R. 935 at 950 (letters h - i). These are -

- (i) illegality;
- (ii) irrationality; and
- (iii) procedural impropriety.

Firstly, in the instant case, the applicants would be well on the way to success under head (1) if they showed that Minister Vaz did any of the following: -

- (a) delegated the exercise of the discretion;
- (b) acted outside the scope of the Order;

- (c) misdirected himself in law;
- (d) took irrelevant matters into consideration; and
- (e) ignored relevant matters.

Secondly, the applicants would surely succeed if they showed that the allocation was 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.

Thirdly, the applicants under head (iii) above would be required to show that the Minister, for example, breached the rules of natural justice.

The total picture must show that the Minister did not exhibit bad faith or an improper motive in the exercise of his discretion.

The burden on the applicants is not an easy one. It is not insignificant that as far as learned Queen's Counsel Mr. Small was concerned, the credibility of Minister Vaz was not at stake; there was no wish on his part to impugn Minister Vaz's integrity. Mr. Small may well have had in mind the words of Romer, J. in Land Realization Co. Ltd. v. Postmaster General (1950) Ch. 435 at 439. There the learned judge said -

"One has to bear in mind that when the legislature confers powers on a Minister, it is conferring powers on a person who, presumably, will use those powers, not only bona fide but in a responsible spirit and in the true interests of the public and in furtherance of the objects for the attainment of which the powers were conferred."

Notwithstanding the words of Romer, J., this Court had to carefully assess what the Minister did and said to see whether he was guilty of bad faith, unfairness and the like, or to see whether, being human, he simply erred. As Mr. Leo-Rhynie said on the final day of submissions, the Minister enjoys no special position or privilege.

(1) ILLEGALITY

It was submitted that the Minister had no power to allocate motor vehicles that had not yet been imported. Reference was made to

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paragraph 3 of the Order and the definition of "approved motor vehicle" in paragraph 2. On the face of it, this submission may seem sound. However, its apparent soundness disappears in the face of the clear definition of 'import' in the parent Act, the Trade Act.

In section 2 of the Act, "import" means to bring, or be concerned in bringing, into Jamaica or the territorial waters thereof, and "importation" shall be construed accordingly.

The Order does not define "import". If it did, such a definition would be the governing one. In the absence of a definition in the Order one should look to the Act and be governed accordingly. Statutes being a superior, and statutory instruments an inferior, form of legislation, statutes may of course be referred to for the purpose of interpreting statutory instruments. See Hargreaves v. Alderson (1962) 3 A.E.R. 1019 and Allford v. Allford (1964) 3 A.E.R. 220

Driedger's Construction of Statutes at page 199 states:

"It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation. The result is that the principles to be followed in construing statutes may require a double application - once the regulation and once to the statute."

Another submission was that the Order was ultra vires the Trade Act in that no absolute discretion was given to the Minister under the Trade Act so none can be given under the Order. As the attorneys-at-law for the respondents pointed out, this was not a ground of complaint by the applicants in the documents filed. However, I'll deal with the matter simply by saying that it seems that section 8 of the Trade Act, although it does not use the words "absolute discretion", does in fact contemplate the giving to the Minister of a free hand so long as he keeps within the provisions governing the making of the Order. Turning to Driedger once again, at page 200, he says:

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"Power to make regulations may be conferred by authorizing regulations for a specified purpose or a prescribed objective. Under such a formula, the regulation - making authority has power to make the complete law, the main principles as well as the details. The only limitation on the power is that the regulation must be found to be for the prescribed purpose or objective".

A further area of complaint was that Minister Vaz delegated his powers to allocate to Minister Marsh. Mr. Leo-Rhynie submitted that the principle "delegatus non potest delegare" applied and that Minister Vaz being the person on whom the power had been conferred had passed it on to Minister Marsh. He said that the principle is strictly applied by the Courts. And, here, I think he was quoting from the 4th edition of Wade's Administrative Law. The inescapable and un-challenged position, he said, was that the decision as to allocation was not in substance that of the Minister of Industry and Commerce, but rather it was that of the Minister of State in the Ministry of Construction who was a statutory stranger. The person, he said, who addressed his mind to the problem, who took the decision, was Minister Marsh, not Minister Vaz. Mr. Langrin, on the other hand, submitted that there is quite often a misconception as to the distinction between delegation and agency. There was, he said, no delegation in this case. A Minister may employ agents. The important thing was that the authority should take its decisions of policy itself and observe any statutory requirements scrupulously. The agent here is Minister Marsh who is, he said, merely assisting Minister Vaz to carry out his job; but in any event, it is Minister Vaz who did the determination. He referred to the affidavit of Minister Vaz and submitted that it was direct evidence which had not been challenged by other evidence, and that it could not be overridden by inference.

If Minister Marsh had determined the allocation, he would himself have written the directive to the Jamaica Commodity Trading Company.

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Mr. John Fassell submitted that delegation required a positive delegation or a positive abdication to or in favour of another. There is nothing in the Trade Act or Order to indicate that the statutory intention was for the Minister not only to make the final decision himself but to hold all the meetings, conduct all the investigations and receive all the representations from the interested parties. The Minister need not see to all antecedent matters. This, he said, would severely limit the practical workings of Government.

In my view, there is no doubt that the figure of Minister Marsh loomed large in the proceedings. The Ministry Paper, however, must not be forgotten. In that statement of policy which the applicants knew from September 1985, it was made clear that the programme of rationalisation would be spearheaded by the Minister of Construction (Works) and that that Ministry would have had a representative on the Motor Vehicle Import Committee. With that background, Minister Marsh may reasonably be seen as assisting Minister Vaz in implementing his policy. It may be said that it would have been a better policy to have had a representative of the Department of Industry and Commerce doing what Minister Marsh did; indeed, if it was necessary for a Minister to be spearheading this programme, it would have been desirable for that Minister to be one who was in the Ministry of Industry and Commerce. What is clear is that Minister Marsh's assistance was sought, and he gave it with much zeal. He held meetings with the dealers, consulted with Minister Vaz, wrote letters to the dealers, and in the end found it necessary to write to Minister Vaz to remind him that it was time for him to communicate with the Jamaica Commodity Trading Company to direct them on the allocations. Some may say that he was efficient. Others may say that he was too visible in the proceedings. Whatever view is taken, there is no basis - in the light of the affidavit of Minister Vaz and the two letters to which I referred earlier - for saying that Minister Vaz delegated his powers

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to Minister Marsh and that the former acted under the dictation of the latter.

Illegality, it was submitted, was disclosed in the contents of Minister Vaz's affidavit in that he considered irrelevant matters and ignored relevant matters. I have not been able to see the irrelevant matters that the Minister considered.

Mr. Leo-Rhynie boldly submitted that it was unlawful for the Minister to balance competing private interests in making the allocations. I have no note of any authority that he cited for this submission. However, in the light of the background that has been given, I can find nothing unlawful in balancing competing private interests. What can be unlawful with weighing the interests of all concerned, balancing the pros and cons, and then the Minister making a determination according to his perception of the interests involved and the overall policy that he is following - bearing in mind the absolute discretion given to him? What would be the alternative? A resort to the 1979 policy? Surely, he is entitled to change policy. Or should he allot all or most of the cars continually to one set of interests?

It was further submitted by Mr. Leo-Rhynie that the Minister in his affidavit, ignored certain relevant considerations chief of which was Ministry Paper 30. This, he said, compels the conclusion that he failed to take it into consideration.

I do not agree. This submission overlooks paragraph 3(e) of Minister Vaz's affidavit in which he states that he took into consideration the "abuse" of the system. When one considers that the Ministry Paper refers to the problems of "abuses and irregularities" in the area of the importation of motor cars, the only logical conclusion, to my mind, is that in paragraph 3(e) the Minister must have been indirectly referring to this statement in the Ministry Paper.

In the light of the foregoing, I am of the view that the Minister has acted in keeping with the express words and within the four corners of the Order, I see nothing illegal in what was done.

(ii) Irrationality

On this ground, the application fails hopelessly. This principle of irrationality may be referred to as the Wednesbury principle of unreasonableness. In the relevant case, Associated Provincial Picture House Ltd. v. Wednesbury Corp. (1947) 2 A.E.R.

680, Lord Greene M.R. had this to say:

"In the present case we have heard a great deal about the word "unreasonable". It is true that the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretion often used the word "unreasonable" in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington, L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head."

The affidavits do not disclose it, and the submissions have not moved me to hold that the Minister acted in a manner that ^{have} was so absurd that no sensible person could ever dreamt that it was within the Minister's powers so to act.

The prices of the units indicate that the Mazda is the cheapest of the cars that are to be imported. That dealer received 33.51% of the allocation. Where is the irrationality as defined?

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(iii) PROCEDURAL IMPROPRIETY

I now turn to procedural impropriety. In that regard it was urged that there was bias and unfairness. Executive Motors was said to be the "favourites" while the first applicant was the "sacrificial victims". It was further submitted that the Courts will intervene where there has been unreasonable and unfair departure from known policy. It was said that the Ministry Paper gave rise to reasonable expectations that the procedure therein would have been followed, but it wasn't; this resulted, it was said, in detriment or loss of advantage to the applicants. This is a strange submission as the applicants have, from day one, been very much opposed to the change from the 1979 policy to that set out in the Ministry Paper. Minister Marsh's conduct at the meetings on July 11, 1986, was also complained of in that he made representations in the morning/^{meeting} and changed his position in the afternoon meeting. It was said that the rules were changed and allocations made on a different basis from what is in Ministry Paper 30 and that there was no consultation with the dealers.

It was further submitted that the allocations were punitive having regard to the past performance of the applicants. The Minister, it was said, had found the applicants guilty of the abuse of the system and of the alleged exertion of pressure on the operators against their will.

It was even said that it was unfair for Minister Marsh not to disclose the orders which he had received.

In relation to these submissions, it seems to me that there is a misunderstanding as to what the Minister should do in the exercise of an absolute discretion. In my judgment, he is not required to conduct a trial when he is making or determining allocations. He need not disclose anything to any dealer. What he ought to do is ensure that every interested party is given an opportunity to

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consult with him. He is to ensure further that the policy is communicated to such persons as are likely to be affected. In the instant case, the Minister gave the applicants and others full opportunity to discuss the entire system of allocation of motor vehicles. He received several letters from them - some of them very caustic; he too wrote letters to them; he also had several meetings with them. They put their case in full. In the end, the determination was made by the Minister. The applicants are not pleased. They wanted more. As Mr. Chin See said, they have frustrated expectations. There has been no procedural impropriety. So on this ground also the application fails.

Frederick Cantor
J.