IN THE FIJI COURT OF APPEAL
(AT SUVA)

CIVIL JURISDICTION

CIVIL APPEAL NO. 24 OF 1991
(Judicial Review No. 18 of 1988)

BETWEEN:

SUNBEAM TRANSPORT LIMITED — APPELLANT

-and-

TRANSPORT CONTROL BOARD
DHARMENDRA PRASAD
SUMER SINGH t/a
VATUKOULA EXPRESS SERVICE — RESPONDENTS

Mr. S.M. Koya for the Appellant
Mr. R. Matebalavu for the first Respondent
No Appearance for the second and third Respondents

Date of Hearing : 19th November, 1992
Date of Delivery of Judgment : 11th November, 1993

JUDGMENT OF THE COURT

In deference to the arguments that were addressed to us, we propose to set out in some detail the background facts that are claimed to have a bearing on the outcome of this appeal.

It is an appeal by Sunbeam Transport Ltd from a decision given in the High Court upon an application for judicial review. The Transport Control Board (the Board, the first respondent) had granted a bus licence to an applicant firm trading as Vatukoula Express Service (the second respondent) to operate a service between Vatukoula and Suva along the Kings Road in competition

with a service operated by the appellant. The appellant challenged the grant in an application for judicial review and sought to have it set aside; it was refused relief. It then appealed to this Court.

The whole problem here concerns bus licences, or road service licences (RSL), their grant or refusal. It concerns the rights and duties of the Board in relation to them pursuant to certain provisions of the Traffic Act (Cap 176). It is therefore necessary to examine the provisions of that Act which govern the situation. We propose to annex to these reasons for judgment the sections of the Act which we believe bear upon the solution to the problems that have been raised in this appeal.

We now turn to the facts.

From 1981 Sunbeam held certain licences to operate its buses over the Kings Road, or portions thereof, on services from and to Suva. The record before us refers to them. But no matter how hard we try, we cannot, in 521 pages of record, ascertain when some of them were granted and some expired. So we assume that does not matter, although in relation to one of the submissions made to us it could. There appear to be five relevant ones, some appear to be for a period expiring in 1991, others in 1997 or 1998.

Vatukoula had a bus licence, RSL 12/9/46, granted on 8th July 1981, to operate to and from Vatukoula. The licence was for a period of five years expiring on 8th July 1986. On 28th May 1986 it made an application for renewal as it was entitled to do under the Act and, by virtue of s.69(2) of the Act, the licence continued in force until that application was disposed of. No doubt as a result of the procedures connected with such an application, Sunbeam made a competing application; it was given a number, RSL 12/9/78. The Board proceeded to hear the applications together and, after some delays not caused by it, it gave a decision on 9th October 1986 in which it refused to grant either licence. On an application by Vatukoula to review the finding it refused again. On 20th October 1986 Vatukoula made an application to the relevant Minister and was again refused.

Nothing daunted, on 7th November 1986, Vatukoula made an application for a temporary licence under s.74. On 13th November 1986 that was refused. It then went to Court. On the same day it made an ex parte application to a Judge of the High Court for judicial review and an injunction. It was granted an interim injunction to restrain the Board from preventing it operating under RSL 12/9/46 (proceedings No 22/86). On 5th March 1987 Sunbeam applied to have the injunction dissolved and on 1st April 1987 the injunction was discharged. A further application by Vatukoula on 7th April was refused on 16th April 1987. Here endeth RSL 12/9/46 (almost).

On 18th October 1988 Vatukoula lodged an application for a licence to operate a service between Vatukoula and Suva, later numbered RSL 12/9/98; this was pursuant to s.64. On 1st November 1988 it was issued with a temporary licence RSL 12/9/98 pursuant to s.74.

On the same day, 1st November 1988, Vatukoula purported to discontinue proceedings No 22/86 - purported, because it did not have the consent of Sunbeam or (presumably) of the Board, and this is claimed to invalidate the discontinuance.

This ensued:

3rd November 1988: Publication by Board of application by Vatukoula made under s.64 [s.65(1)] - number RSL 12/9/98

11th November 1988: Receipt of competing application by Sunbeam made under s.65(1)

25th November 1988: Publication by Board of grant of temporary licence under s.74 - number RSL 12//9/98 (note - we believe this notice was defective for reasons we shall give later)

26th November 1988: Publication by Board of notice of meetings to be held on 15th and 16th December to consider (inter alia) the s.64 application of Vatukoula (note - we believe it is necessary to come back to this notice)

5th December 1988: Application to High Court by Sunbeam for judicial review of decisions of the Board (i) of 18th October to receive and thereafter publish Vatukoula's s.64 application and (ii) of 1st November to issue to it a temporary licence (s.74); and for injunction

7th December 1988: Ex parte order granting leave and stay of proceedings

20th January 1989: Injunction refused

7th November 1990: Hearing of proceedings in High Court

12th March 1991: Judgment

The Court dismissed Sunbeam's application for judicial review. It is from that dismissal that this appeal has been brought.

At this stage we mention three matters.

Firstly, the publication of 25th November 1988 of the grant of the temporary licence to Vatukoula pursuant to s.74. Subsection (3) of that section requires publication not only of notice of the grant but also the date of expiry and an invitation for applications under s.65. The notice here published, assuming that it was not practicable to publish it before the lapse of over three weeks, did not have reference to either of those things.

Secondly, the publication of the notice of hearing of the s.64 application of Vatukoula in the newspaper the following day (26th November) was headed thus:

> *"MEETING OF THE BOARD WILL BE HELD IN THE DEPARTMENT OF ROAD TRANSPORT MEETING ROOM, VALELEVU, SUVA AT 10.00 AM ON THURSDAY 15TH DECEMBER, 1988 AND ADJOURNED TO FRIDAY, 16TH DECEMBER 1988 IF THE ITEMS ON THE AGENDA ARE NOT COMPLETED. EVIDENCE WILL BE RECEIVED IN PUBLIC FOR OR AGAINST THE APPLICATIONS FOR ROAD SERVICE LICENCES, AMENDMENTS, TRANSFERS AND RENEWALS OF ROAD SERVICE LICENCES."*

Thereunder there appeared a reference to forty-seven applications, the last two reading as follows:

> *"SECTION 74 OF THE TRAFFIC ACT*
>
> *Temporary Road Service Licence for skeleton Sunday Services approved on 1.11.88, 3.11.88 and 8.11.88.*
>
> *RSL 12/9/98 VATUKOULA EXPRESS SERVICE*
>
> *As advertised in The Fiji Times on 3.11.88 and approved under Section 74 of the Traffic Act"*

Anything more confusing as a purported notice of the hearing of a s.64 application would be hard to imagine. We suppose it could be suggested that because the issue of a s.74 temporary licence does not require a hearing, a person wishing to oppose the issue of a s.65 licence is required to assume that the above quoted notice refers to such a hearing. We would hold that such a person is not required to guess, or assume anything, but is entitled to be given a proper notice. We mention here that we believe the notice of 26th November may have been deficient for another reason which we shall come to later.

The third matter is that the Board, some two years before all this, had refused to renew Vatukoula's licence that expired in 1986. The proceedings and the orders that were made did not in our view effect the operation of this refusal. The Board refused to grant a temporary licence. So we are going to assume that Vatukoula was not operating a service as at 1988 and had not been doing so for about two years.

When the appeal came on for hearing before us it was confirmed that the only matter to be determined was whether there had been a valid issue of a temporary licence by the Board to Vatukoula on 1st November 1988. This, so far as any effect on the parties was concerned, was an academic question; whether it had been validly issued or not, it would have expired in any event three months later. The Court would not ordinarily entertain an appeal where no orders are sought and nothing done requires to be undone. However, there was an application for a declaration included in the relief sought, and both Sunbeam and the Board (Vatukoula did not appear on the appeal) stated that the parties were very anxious to have the relevant sections of the Act construed so that the position might be clarified for the future, and we agreed to proceed.

However, so that any declaration could be properly founded upon the facts of the present case, we required the parties to formulate precisely the problems that the relevant sections of the Act posed with reference to the facts of this case. They did so as follows:

> *"1. What is the interpretation to be given to the words "new service" appearing in Section 74(1) of the Traffic Act Cap. 176.*
>
> *2. What interpretation should be assigned to the words "public interest" appearing in section 74(1) of the Traffic Act Cap. 176.*
>
> *3. Whether there is a need for written application to be made under the Traffic Act for a Temporary Licence to be issued under*

Section 74 of the Traffic Act Cap. 176, unless it is granted by the Board on its own motion under Section 72 of the Act.

4. Whether in the light of the provisions of Section 73 of the Traffic Act, dealing with temporary amendments to Road Service Licence, one can read into Section 74 an authority in the Board to act on its own volition and proceed to grant a Temporary Licence under Section 74(1)."

Section 65(1) provides for the giving of a public notice of the receipt of an application except in those instances specified in it. The notice must refer to the receipt of the application, the details, that the Board will receive representations for or against it within ten days and, in the case of an application for a licence, that it will receive competing applications also. We might pause to note that the notice published by the Board on 3rd November 1988 in this case did just that. If the Board receives any representations or, as was the case here, any competing applications, it shall publish another notice; this is the notice of hearing, in effect. However, this notice must "specify the name of <u>any</u> applicant for the proposed service and appoint a day..." etc (emphasis added). That means the name of the original applicant whose application put the process in motion as well as the name of any competing applicant. The reason - to enable both applications to be heard together. Were it not so, the Board might be required to treat the competing application as an application under s.64 and start the whole process once more in relation to that application.

We mentioned earlier the matter of the notice of hearing published on 26th November. It did not specify the name of the competing applicant Sunbeam. We believe that it is important that the terms of the section be complied with, so that the competing applicant will know that its application is to be dealt with at the same time, and be ready. This defect coupled with the wording of the notice to which we have already drawn attention would seem to us to mean that in law there was no compliance with s.65(3). As it turns out, we are not required to decide what might be the consequences of such non-compliance.

We turn now to the Act. It is necessary to look at those sections of the Act which deal with bus licences and which are dealt with for the purposes of these proceedings in Division 3 of Part V of the Act. It is unnecessary, in our opinion, to examine all 12 sections in that Division which do so and we have extracted and annexed to these reasons for judgment those which we consider relevant. The provisions of these seem complicated and difficult, but they fall completely into place and provide a sensible and cohesive pattern if one keeps firmly in mind that there is only one instance where the Act allows the Board to act **"of its own motion"**. The first sentence of s.72 makes it clear that it empowers the Board to act without the necessity of having a relevant application before it. We shall endeavour to explain.

Section 63 provides that no one can operate a bus without having a licence granted by the Board. Subsection (3) of that

section makes an exception in the case of death of the licensee, but that is immaterial here.

Section 64 provides for applications to be made for the issue of a bus licence.

Section 65 deals with what is to happen when an application for a licence is received. It relates not only to an application for a licence, which in this context must mean a new licence, but also for the renewal, transfer or amendment of an existing licence. It requires the Board to give notice of the receipt of the application. In the case of an application for any of the four types mentioned above the notice must specify that the Board will receive representations for or against the application. In the case of a new licence or renewal, the notice must also state that it will receive applications from others. There are two exceptions to this which need not be discussed here. The section then goes on to detail what steps the Board must then take and thereafter it has a discretion to grant or refuse the application. There are other implementation provisions which need not be considered here.

Section 66 deals with matters that the Board is to consider before deciding to grant or refuse a licence. Section 67 relates to conditions that the Board may attach to a licence. Section 68 gives power to revoke, vary or suspend a licence. Section 69 deals with duration.

Section 70 prescribes the form and time for an application for a renewal and provides that every such application "shall be deemed to be an application for a new licence and shall be made and dealt with accordingly". This throws one back to ss.64 and 65.

Section 71 relates to transfers. It will be recalled that s.64 deals, inter alia, with applications for transfers. This section quite clearly does not take away any of the requirements of the previous sections which relate to the manner in which applications under s.64 are to be processed; it provides for some additional matters in relation to such applications. It is only relevant to the extent that it emphasises the need for applications to be made and for their processing under s.65 and other provisions.

Notwithstanding that the terms of s.72 are annexed, we set out the provisions of s.72(1) & (4):-

> *"72.-(1) During the currency of any road service licence, the Board may, of its own motion or on the application of the licensee, amend the licence by altering or revoking any of the terms or conditions of the licence or by adding any new terms or conditions that, in its opinion, are necessary in the public interest.*
>
> .....
>
> *(4) Where the Board intends of its own motion to amend any licence under this section, the provisions of section 65 shall, with the necessary modifications apply, as if the Board had received an application*

> *for the proposed amendment. In any such case, a copy of the public notice given under that section shall be given to the licensee not less than 7 clear days before the expiry of the time specified in the public notice for the receipt of written representations against the proposed amendment."*

The following matters are clear: (1) The section relates only to amendment of an existing licence. (2) The Board may initiate the action to amend, or the licensee may seek the amendments by application made under s.64. (3) Where the Board makes the amendment "of its own motion", the process shall thereafter be treated, as far as possible, as if the licensee had made an application under s.64 and the procedure under s.65 shall be followed as far as possible with one further requirement as to notice. We do not consider that the section leaves any doubt about how it was intended to operate.

Section 73 relates to a temporary amendment by the secretary and does not bear upon what we have said or what we are about to say. Despite the reference to this section in issue 4, it is clearly only a power of temporary amendment given to the secretary in order to allow immediate implementation of an amendment being requested pending the next meeting of the Board at which the application will be considered in the usual manner under sections 72 and 65.

Section 74 is really the crucial section for the purposes of this appeal. However, we believe it falls quite comfortably into

place by giving effect to its terms. Section 74, so far as relevant for this analysis provides:-

> *"74.-(1) Where the Board considers that the public interest necessitates the immediate establishment of a new service or the amendment of an existing road service licence, the Board may issue a new road service licence for such service or may amend such existing road service licence without complying with the provisions of section 65.*
>
> *(2) A new road service licence issued under this section shall expire 3 months after the date of issue:*
>
> *.....*
>
> *(3) Where the Board issues under this section a new road service licence, it shall as soon as practicable thereafter publish a notice in a newspaper published and circulating in Fiji stating that a new road service licence has been granted under this section, specifying the service and the date upon which the licence will expire and stating that application may be made under the provisions of section 65, not later than the expiry of 4 weeks from the date of such notice, for a road service licence to take effect after the expiry of the licence granted under this section.*
>
> *(4) Where the Board amends under this section an existing road service licence, it shall, as soon as practicable, deal with the matter as if no amendment had been made under the provisions of subsection (1)."*

The issue is whether the Board must have before it an application under section 64 for a new service or for the amendment of a existing service before it can exercise its power to issue a new 3 month licence or a temporary amendment before

the procedures under section 65 have been completed.

The first matter to be emphasised is that the words "of its own motion" do not appear in this section, as distinct from s.72. Some reason for this must exist and the rules of legal interpretation require notice to be taken of that and effect given to the difference if it is possible to do so. It is not difficult to do so in this instance.

The second matter is that s.74(1) enables the Board to proceed "without complying with the provisions of section 65". It makes no reference to by-passing s.64. Section 65 is what might be called the procedural section, detailing the action to be taken by the Board "on receipt of an application". So s.74 was intended to allow the issue of a new licence or an amendment where "the Board considers that the public interest necessitates" the immediate establishment of a new service or immediate amendment of an existing licence.

The third matter is that the procedures required to be followed under s.65 need some time, perhaps considerable time, before the Board can decide whether to grant or refuse an application.

The clear requirement for action by the Board is the immediacy of the need for the new service or for the amendment of a licence. When the Board considers the need is of that nature,

the section allows immediate action before complying with the procedural requirements of section 65. However, the Board must then, pursuant to subsections (3) and (4), put into train the procedural steps such an application ordinarily requires.

In the case of amendment there will, of course, always be an existing licence to amend and the Board has the extra powers under section 72 to act of its own motion. Thus, where there is an application to amend a current licence under section 64 or where the Board decides of its own motion to amend, it may then consider whether there is an immediate need in the public interest to amend. If so it can proceed under section 74 but it must thereafter, as soon as practicable, deal with the matter under sections 72 and 65.

In our opinion this interpretation accords with the terms of the Act and with common sense. In the case of amendment, the Board knows there is an existing licence, so whether it acts of its own motion or an application, it knows there is an operator on the route either indicating by his application he is willing and able to modify his service or who can be required to do so for a limited period.

The Board has no function and no power to decide there is a public need for the immediate issue of a new licence until an application is made.

It cannot, for example, foist a new licence upon an unsuspecting operator who has not made an application for it. Once there has been an application for a new service, the Board knows that there is at least one operator willing to run it. In those cases it can safely go ahead and grant that operator a temporary licence or temporary amendment if it is of opinion that the circumstances warrant immediate action before the somewhat lengthy procedures normally required can be completed.

We suppose the position could be summed up by saying that the function of the Board in this area is to decide applications, not to create them. There is one instance when it can do the latter, namely under section 72 where there is an existing operator and the need arises. We believe this conclusion meets the needs of (i) the words "of its own motion", (ii) the sections themselves, (iii) common sense.

Questions 3 and 4 are :

3 *Whether there is a need for written application to be made under the Traffic Act for a Temporary Licence to be issued under Section 74 of the Traffic Act Cap.176, unless it is granted by the Board on its own motion under Section 72 of the Act.*

4 *Whether in the light of the provisions of Section 73 of the Traffic Act, dealing with temporary amendments to Road Service Licence, one can read into Section 74 an authority in the Board to act on its own volition and proceed to grant a Temporary Licence under Section 74(1)."*

We would answer the question posed in the first part of the 3rd question in the affirmative. The second part is meaningless. A temporary licence under section 74 is one issued for a new service. Section 72 applies only to existing licences and so the powers under that section can only apply in section 74 to temporary amendments.

That also means the answer to question 4 is 'No'.

Now, turning to the remaining questions, the first one is:

> *"1. What is the interpretation to be given to the words "new service" appearing in Section 74(1) of the Traffic Act Cap. 176."*

We see no reason to place any restrictive meaning on the words "new service" where they appear in s.74. They simply mean a service that did not previously exist. We consider "service" is different from 'route'. If, for example, a particular route was the subject of a licence, the Board might still be of the view that the public interest necessitated an immediate increase in the services already provided, or the alteration of a timetable. If, for some valid reason, the Board did not wish to amend the current operator's licence to accommodate this, or if the current operator was unable or unwilling to make an application for an amendment of his licence, then naturally the

Board would wish to issue a new licence. There is no reason why it should be restricted from doing so merely because someone was already operating a service over the same or substantially the same route. We do not believe that the word "new" was intended to achieve such a restriction. The word means "a service that does not already exist", and which, of course, needs a licence to be issued to an operator to enable him to run it.

The second question is:

> *"2. What interpretation should be assigned to the words "public interest" appearing in Section 74(1) of the Traffic Act Cap. 176."*

We can see no justification for reading down the words of s.74 so as to have them mean that the section only applies when there is an emergency - whatever that might mean. The Board is there to serve the public interest in relation to the grant, refusal and so on of, inter alia, road service licences. There may be many reasons why the public interest might necessitate the immediate establishment of a new service, whether or not there is one already operating over the proposed route, without there being what could be termed an emergency. For example, suppose the current operator was not providing a service as required by its licence and the Board was considering some action under s.68 of the Act; the grant of a temporary licence for 3 months or an amendment for a limited period might be the optimum way of

ensuring that the public interest was properly served in such event. It is unnecessary to think up other possible examples. The point is that there is, in our opinion, no warrant for limiting the powers of the Board under s.74 when considering what is the public interest that necessitates a licence being granted. The need for an "emergency" would tend to do so.

We have not overlooked the requirement that the Board must under Section 66, when granting or refusing a licence, have regard to the extent the service is necessary or desirable in the public interest (section 66(2)(a)). That must clearly mean something other than the extent to which the needs of the area are already being met or the desirability of encouraging adequate and efficient services and eliminating unnecessary and unremunerative ones (section 66(2) (b) & (c)). When amending a licence under section 72 it should allow what in its opinion is necessary in the public interest (sect 72(1)) or, in the case of the amendments included in section 72(2), what it considers desirable in the public interest.

In section 74 necessity alone is the kick starter but this difference does not alter the meaning of public interest in that section from the meaning in the preceding ones.

We have already answered questions 3 and 4 in the earlier reference to the construction of s.74.

As we have stated, by the time this appeal was listed, it was an academic question. We agreed to proceed in order to clarify the relevant provisions of the Act on the basis of the four questions agreed by the appellant and the first respondent.

Having given our views, we do not consider it necessary or appropriate to make any order on the appeal itself or on costs.

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Justice Michael M. Helsham
President Fiji Court of Appeal

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Justice Gordon Ward
Judge of Appeal