[2014] JMSC Civ. 143

IN THE SUPREME COURT OF JUDICATURE

THE CIVIL DIVISION

CLAIM NO. 2014 HCV02278

BETWEEN	**RURAL TRANSIT ASSOCIATION LIMITED**	**APPLICANT**
AND	**JAMAICA URBAN TRANSIT COMPANY LIMITED**	**1st RESPONDENT**
AND	**COMMISSIONER OF POLICE**	**2nd RESPONDENT**
AND	**OFFICE OF UTILITIES REGULATION**	**3rd RESPONDENT**

IN CHAMBERS

Mr. Hugh Wildman and Ms. Keiva Marshall, instructed by Hugh Wildman & Co. for the Applicant.

Mr. Walter H. Scott, Q.C. and Mr. Matthieu Beckford instructed by Rattary Patterson Rattary for the 1st Respondent.

Miss. Carlene Larmond instructed by Director of State Proceedings for the 2nd Respondent.

Mr. Allan S. Wood, Q.C and Mrs. Daniella R. Gentles-Silvera instructed by Livingston, Alexander Levy for the 3rd Respondent.

Heard: 1st July 2014, 3rd July 2014 & 29th September 2014.

Judicial Review – Application for leave to apply for Judicial Review – Sufficient interest to seek leave for Judicial Review – No identification of decision-maker to make determination of whether or not the decision making process was unlawful – Whether JUTC is amenable to Judicial Review – Whether OUR is the sole regulator of public transportation – Application for Prerogative writs refused – Application for Injunctive relief refused –No leave needed for Declaratory relief – Application for leave in respect of constitutional relief granted.

CAMPBELL, J,

[1] The Applicant, Rural Transit Association Limited, (hereinafter "RTA") is incorporated under the Companies Act of Jamaica, to inter alia, represent and promote the interest of private individuals who are engaged in the provision of public passenger transportation in Jamaica.

[2] The 1st Respondent, Jamaica Urban Transit Company Limited, (hereinafter "JUTC") is a private company incorporated under the Companies Act of 1998. Its sole shareholder is the Accountant General of Jamaica

[3] The 2nd Respondent, the Commissioner of Police, is the head of the Jamaica Constabulary Force, including the Traffic Division in Jamaica.

[4] The 3rd Respondent, the Office of Utilities Regulation, (hereinafter "the Office") is a body established under Section 3(1) of the Office of Utilities Regulation Act, 1995 (hereinafter "OUR Act").

[5] During the month of March 2014, Mr. Colin Campbell, Managing Director of the 1st Respondent, made statements to the effect that he would seek to amend Clause 2, of the four (4) year licence issued by the Transport Authority (hereinafter "the Authority"). Such an amendment would prevent the relevant licencees who are travelling from points outside the Kingston Metropolitan Transportation Region (hereinafter "KMTR") to destinations within the KMTR from dropping off and picking up passengers within the KMTR.

[6] On the 12th May 2014, the Applicant filed a notice for leave to apply for judicial review seeking several declarations, and the prerogative remedies of Certiorari, Prohibition and Mandamus. The Applicant also sought permanent injunctions.

[7] The summarized grounds on which the Applicant sought the Orders were, inter alia;

i. The Authority has no power or capacity in law to regulate the provision of Public Passenger Transportation in the country, as Section 4(1) of the Transport Authority Act of 1987, which allowed for the Authority to regulate Public Passenger Transportation in the country, has been impliedly repealed by Section 4(1) (a) of the OUR Act of 1995 and the First Schedule therein.

ii. JUTC has no power or capacity in law to regulate the provision of Public Passenger Transportation in the KMTR, as the sole body that is statutorily empowered to regulate Public Passenger Transportation in the country is

the Office acting under Section 4(1)(a) of the OUR Act of 1995 and the First Schedule therein.

iii. The Authority has no power or capacity in law to grant a license to JUTC to operate Public Passenger Transportation in the KMTR.

iv. JUTC has no power or capacity in law to grant sub-franchise licenses to members of the Applicant engaged in the provision of Public Passenger Transportation.

v. The Authority has no power or capacity in law, acting by itself or in conjunction with JUTC, to impose fees on members of the Applicant engaged in the provision of Public Passenger Transportation in the country or KMTR.

vi. The Applicant has a legitimate expectation that the Office will carry out the statutory duty by engaging in the process of receiving applications for the licensing of persons such as the Applicant who are interested in the provision of Public Passenger Transportation in the country. Accordingly the actions of the Authority and JUTC in regulating the provision of Public Passenger Transportation in Jamaica, if allowed to continue, would destroy and defeat those expectations and rob the Applicant of the statutory protection guaranteed under the OUR Act of 1995.

The Applicant's Case

[8] Mr. Wildman submitted that the recent amendment to the OUR Act by Parliament has no bearing on these proceedings. The amendment has no retroactive effect to take away civil rights. He further submitted that there is presently no body regulating public passenger transport. In 1995, a single entity, the Office, was established to regulate all the utility services, including the provision of public passenger transportation. See 1st Schedule to the OUR Act, which relieved the Transport Authority Act (hereinafter "TAA") of its responsibility. (See paragraph 4, 5 & 6, of Applicant's Skeleton Submissions.)

[9] Section 4 of the **OUR Act** has impliedly repealed Section 4 (1) of the **TAA**. Counsel relied on **Statutory Interpretation**, 4th Edition, by Francis Binion, which stated at page 254:

> "*Where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the*

provisions of the later enactment are contrary to those of the earlier, the later by implication repeals the earlier in accordance with the maxim ***leges posterios priores contrarias abrogant.****"*

[10] Counsel relied on the Privy Council decision of **Mossel (Jamaica) Limited (T/A Digicel) v Office of Utilities Regulations, Cable & Wireless Jamaica Limited & Centennial Jamaica Limited** (2010) UKPC 1.,where Lord Phillips, in outlining the background to the case, said at paragraph 8;

"*Up to 2000 C&WJ enjoyed a monopoly in respect of the supply of telecommunications services in Jamaica. That monopoly had been granted for a 50 year period that was due to expire in 2012. Under that monopoly C&WJ provided both fixed line and mobile services. Like other monopoly providers of utility services, namely transport, sewerage, electricity and water, C&WJ was brought under the regulation of the OUR by the Office of Utility Regulation Act, 1995."*

[11] An illegality can be raised at any time in the proceedings. In the context of this case, the Constitution is being breached, in that, fundamental rights were breached. The law was flouted by JUTC, and the Commissioner of Police. Whatever remains is illegal, null and void. The company; Rural Transit Association Limited, is an appropriate person to bring the case. See, **R v Liverpool Corporation, Ex p. Liverpool Taxi Fleet Operators Association** [1972] 2 QB 299. The affiant in support of the application, Godfrey James; is a member of the company, not a busybody. The Office abdicated its responsibility by not enforcing the law to prevent JUTC and the police from embarking on such a policy. The fact that the Office has not carried out the law is no defence.

[12] The reserving for buses belonging to the 1st Respondent, travelling from Spanish Town to Kingston the sole occupation of a lane between Mondays and Fridays, from 6.00am to 8.00pm, is in breach of the Applicant's constitutional rights in Section 13(3)(h), of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendments 2011) Act**. This section guarantees the right to equitable and humane treatment by any public authority in the exercise of any function.

The Respondents' Case

[13] Counsels for the Respondents have contended that the Applicant has no standing to seek an application for leave to apply for judicial review. In accordance with **Part 56 of the Civil Procedure Rules**, (hereinafter "CPR") the Applicant does not have sufficient interest nor is directly aggrieved. It was posited that Mr. Godfery James and Mr. Lloyd Thompson are the persons who have an interest and not the Rural Transit Association Limited (hereinafter "RTA"). It was challenged that Mr. James and Mr. Thompson did not have representative capacity as they were not authorized by members of the RTA to represent their interest pursuant to **Part 21 of the CPR**. Consequently, they have to seek leave from the court to proceed in this regard. It was asserted that the Applicant is using private law principles in public law sphere and this is impermissible.

JUTC is not amenable to judicial review because it is also a licencee under the **Public Passenger Transport (KMTR) Act** (hereinafter "the Act"). As a result, neither the statute nor licence granted thereunder conveys any regulatory or supervisory or other powers to JUTC to oversee public passenger transportation within the KMTR. In light of this, it cannot be said that JUTC is the decision-maker. Therefore, in the absence of clear, cogent, credible evidence, JUTC is not amenable to judicial review.

The police are empowered by the **Road Traffic Act** of Jamaica to regulate traffic. There is no evidence that the police have been doing otherwise. Additionally, the Commissioner of Police made no decision in relation to the demarcation of the bus lane at Mandela Highway.

There is no evidence of a decision and therefore the remedies sought cannot be granted. Additionally, the application for leave to apply for judicial review must be refused. The Applicant has not identified the decision-maker and if the alleged decision-maker exists; it is not before the court.

Which legislation regulates public passenger transportation?

[14] The **TAA** was promulgated on the 8th July 1987. It established an Authority, with one of its function being to regulate and monitor public passenger transport throughout the island and to perform such duties that had previously been undertaken by Licensing Authorities under the **Road Traffic Act** and the **Public Passenger Transport (KMTR) Board of Control and the Public Passenger Transport (Rural Area) Board of Control**.

[15] The Act empowered the Minister to designate as Inspectors, public officials, for the purpose of inspecting and monitoring the operations of all public passenger vehicle, who could stop and inspect any public passenger vehicles to ensure compliance with its road licence, or any vehicle which he reasonably suspects is operating as a public passenger vehicle contrary to the road traffic law. These Inspectors could also check the frequency of the buses on the route, the conductors and drivers and their respective licences.

[16] The Inspector or police officer could seize vehicles for non-compliance with the terms of their road licence, or any vehicle operating as a public passenger vehicle without the requisite licence. The Inspector could give directions, consistent with the road licence to any operator driver etc. of a public passenger transport to ensure safe and orderly operation in any area. He had powers to enter the business premises of a holder of a road licence, for the purpose of examining books etc. and making copies of same.

[17] The **TAA** allowed for the taking, storage, sale and payment of proceeds of such vehicles. The legislation provided sanctions for disobeying, assaulting or threatening an Inspector in the lawful execution of his duties. Importantly, the Authority, with the approval of the Minister could prescribe fares payable on any public passenger vehicle. The Minister could make regulations generally to give effect to the provisions of the Act.

[18] There is no contest on the issue, that the **TAA**, 1987 constituted the main regulatory framework for the public passenger transport sector from its promulgation to 1995. **The Public Passengers Transport Acts 1947 and 1970, (KMTR) and (Rural Area)**, respectively also regulated the sector.

[19] In 1995, the **OUR Act** was passed. The objective of the OUR Act was to repeal **The Public Utility Commission Act** (hereinafter "PUCA") and to make new provisions for the supervision of utility services. Section 18 (a) provided that any reference in an enabling instrument to PUCA after the commencement of the OUR Act shall be construed as a reference to the OUR Act.

[20] Some of the prescribed services enumerated in the First Schedule of the 2000 amendment of the OUR Act, had previously come under the jurisdiction of PUCA. The effect of Section 18, of the OUR Act was to terminate the Commission's jurisdiction over those services. Section 18, went further to ensure that there could be no doubt, that the Office was the sole regulator of those services by providing that any reference in an enabling instrument to the Commission would be a reference to the Office, or any reference to the repealed PUCA would be a

reference to the OUR Act. At the time the Commission was repealed and terminated, the regulatory framework of public passenger transportation was left intact. Public passenger transportation was never under the regulation of the Commission, so its regulator was not expressly repealed as was with the case of electricity and telecommunication. Therefore, unlike telecommunication and the supply of electricity services, reference to the Authority, in the enabling instrument was not a reference to the Office. Neither was it expressed that reference to the TAA was a reference to the OUR Act.

[21] In **The Public Utility Protection Act**, 1928, Section 2, defined "public utility as follows;

> "*shall include any electric, tramway, telephone, telegraph, gas, water, cable or wireless service, system or undertaking and any other service, system or undertaking which the Minister may from time to time declare to be a public utility for the purposes of this Act."*

Telecommunication and the supply of electricity were subject to the control of the Commission, in their respective enabling law.

[22] In 2000, the OUR Act was amended to apply to; (1) specified organization and (2) licencees, for the purpose of regulating the prescribed services they provided. A specified organization was defined to be, "*an organization or body of persons which immediately before 11th October 2000 was providing one of the prescribed services pursuant to an enabling instrument*. An enabling instrument was defined as an Act, (not being the OUR Act) or a permit or instrument in writing issued pursuant to a statutory power authorizing the provision of a prescribed service.

[23] One of the driving forces in the enactment of the OUR Act was the development of private power generation in the energy sector. This development meant that there would no longer be a monopoly for the supply of electricity in the island. Private generators would now produce energy for sale to the national grid. Agreements would have to be struck among distributor, transmitter and generator. These new arrangements were recognized by the amendment of the First Schedule, which changed the description of the prescribed service in electricity in 2000, from *the supply of electricity* to the description in the present Act, *the generation, transmission, distribution and supply of electricity.* This entire process would be overseen by the regulatory body. As noted in the Privy Council judgment in **Mossel**, at paragraph 9, the monopoly in the telecommunications

was also displaced with the emergence of several players in the mobile phone market.

[24] Mr. Walter Scott Q.C, submitted that the relevant principles as to implied repeal were examined in the recent decision of the Supreme Court in **Minister of Transport, Works and Housing v The Contractor General** [2013] JMSC CIV. 12. The court held that the Contractor General Act was not repealed by an amendment which inserted a Part dealing with a National Contracts Committee, whose main function the court found was*, "to examine applications for government contracts and assessing the capacity of the applicants to perform the contracts*." The Court found support in Section 56 of the **Interpretation Act**, which provides;

> *"Where one Act amends another Act the amending Act shall, so far as it is consistent with the tenor thereof, and unless the contrary intention appears, be construed as one with the amended Act."*

[25] Reliance was also placed on the learning in **The Attorney General of Antigua and Barbuda and Anor v Lewis (Artland**) (1995) 51 WIR 89 where the court had before it a contention for the partial or implied repeal of a statute by an amending legislation. The Court of Appeal commented on the lack of favor with which the principle of repeal by implication is held by the Courts. The main reason for that stance being, it is felt that if Parliament was inclined to repeal the statute, why not expressly so state. It is recognized however, that there may be a determination that Parliament, so intended, if the provisions of both statutes are so inconsistent or repugnant that they are unable to stand together, it is deemed that, Parliament, must have meant the existing legislation to fall away.

[26] Both Acts, the **TAA** and the **OUR Act** have existed together since 1995, the amendment of 13th June 2014, is nothing more than a formalization of the comparative status of both entities in public transportation**.** Why would Parliament having so directly and carefully repealed the regulatory framework for *telecommunication* and *the supply of electricity*, to the extent of expunging the name of the repealed Act and the name of the Commission from the enabling instrument, leave the Authority in place, for it to be implied that the prescribed service of *public passenger transportation* has been repealed? Again, why would Parliament having observed, that the regulatory framework which it had intended to repeal and replace with the Office, was still functioning, did not act to bring about its intentions? I am also unable to draw an inference of an implied repeal, on the grounds of inconsistency or repugnancy between the two Acts. Both Acts

have co-existed since the commencement of the OUR Act and there has been adduced before me no evidence of this inconsistency such as to indicate that the legislations could not stand together.

Does the Applicant have sufficient interest to seek leave for judicial review?

[27] Pursuant to **Part 56.2 (1) of the Civil Procedure Rules**, it is required that an Applicant for judicial review be a person, group or body *which has sufficient interest in the subject matter of the application.* The Respondents have challenged the locus standi of the Applicant, for a lack of sufficient interest in the subject-matter. Queen's Counsel, Mr. Walter Scott, has submitted that, **Part 21 of the CPR** sets out the procedural scheme for representative claimants and requires these representative claimants to apply to get an order from the Court to proceed as a representative claimant. He further submitted that the company itself was not involved in the business of public passenger transportation, and it is not enough that its members are operators who have an interest in the subject-matter.

[28] The case law is supportive of the principle that the business of public bodies should not be hindered or stymied by overzealous challenges of their decisions. The CPR require, a sufficient interest in the subject-matter by the Applicant, an explanation why an alternative redress was not pursued where such a remedy is available or why judicial review is more appropriate. Additionally, whether the application has been made promptly and in any event within three months of when grounds for the application first arose. It is also a consideration, pursuant to **Part 56.3 (g) of the CPR** whether the Applicant is personally or directly affected by the decision about which complaint is made; or (h) where the Applicant is not personally or directly affected, what public or other interest the Applicant has in the matter.

[29] In deciding the question of sufficiency of interest, the Court is engaged in encouraging the involvement of the individual citizen in governance and dissuading the busybody from interfering in matters that do not concern him. The learned authors of **De Smith's, Judicial Review of Administrative Law**, Fourth Edition, J.M . Edwards at page 409, says;

> "*All developed legal systems have had to face the problem of adjusting conflicts between two aspects of the public interest – the desirability of encouraging the individual citizens to participate actively in the enforcement of the law,*

and the undesirability of encouraging the professional litigant and the meddlesome interloper to invoke the jurisdictions of the court in matters that do not concern him."

[30] **Part 56 (2) of the CPR**, gives an inclusive definition of "sufficient interest", the list at paragraph (a) – (f), is not a complete definition, but includes within its ambit;

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

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

[31] Counsel for the 1st Respondent, in contending that the Applicant lacked capacity, relied on the dicta in **R v Darlington BC Ex p. Association of Darlington Taxi Owners (1994) C.O.D 42**4 Times, January 13th, 1994, where it was held that an unincorporated association lacked legal capacity to apply for judicial review notwithstanding that each member of the association individually had standing to apply for judicial review. Counsel had made the distinction between an association and an incorporated private entity, which had a separate legal personality, separate and apart from its membership.

[32] It seems to me that Mr. Godfrey James and Mr. Lloyd Thompson are both persons who would be entitled to apply under **Rule 56 (2) (a) of the CPR** as persons who have been adversely affected by the decisions which are the subject of this application. The Applicant, would therefore be entitled to apply at the request of Mr. Godfrey James and Mr. Thompson, pursuant to **Rule 56 (2)(b) of the CPR** as representing the views of its members who may have been adversely affected by the decision which is the subject of the application. The RTA seems to be able to argue that they represent their views. I find that the Applicant has sufficient interest to make this application.

Decisions sought to be impugned by way of Judicial Review

[33] **Part 56.16(1) of the CPR** states;

"Where the claimant seeks an order or writ of certiorari to remove any proceedings for the purpose of quashing them, the claimant may not question the validity of any order, warrant, commitment, conviction or record unless-

(a) before the trial the claimant has lodged with the registry a copy of the order, etc. verified by affidavit; or

(b) can account for the failure to do so to the satisfaction of the court."

[34] The Applicant seeks to impugn by way of judicial review, two decisions. Firstly, the decision amending clause 2, of the 4 year licence and secondly, the decision that has given JUTC, exclusive use of the Mandela Highway at particular periods.

[35] Mr. Lloyd Henry, in his affidavit in support of the application, says at paragraph 15';

> *"Sometime in the month of March 2014, the new Managing Director of the Jamaica Urban Transit Company (JUTC), Mr. Colin Campbell, made a public statement by radio and National Television, stating that Clause 2 of the 4 year old licence to persons like myself would be amended."*

In his written submissions, dealing with the issue of delay, Mr. Hugh Wildman, says inter alia, at paragraph 24;

> "*The actions complained of by Messers Henry and Thompson, are recent and took place between the months of March 2014 and April 2014…No questions of delay arise…'*

[36] Mr. Godfrey James, in his affidavit dated 6th May 2014, in support of the application, says at paragraph 10;

> *"Sometime in November 2013, a directive was issued by the Police Traffic Division, headed then by Senior Supt. Radcliffe Lewis, that the Police would be demarcating a portion of the Mandela Highway, to allow JUTC buses travelling from Spanish Town to Kingston, to have sole occupation of that lane between Mondays to Fridays from 6:00 am to 8:00 am and at paragraph 20; " I have checked with the Government printing office and verily believe, that the said policy has not yet been officially Gazetted."*

[37] Mr. Walter Scott Q.C., submitted that there was no evidence of a decision taken which was susceptible to judicial review. He further argued that there was not one iota of evidence that any of these Respondents took this decision. According

to learned Queen's Counsel, the correspondence points to JUTC being a beneficiary and not a decision-maker.

[38] Crown Counsel opposed the grant of leave on the grounds that there is no evidence that the Traffic Division of the Constabulary Force made any decision that is being complained of, either in the affidavit of Godfrey James or in the proceedings before this Court. The exclusive use of the bus lane on the Mandela Highway started in November 2013. It was extended in January 2014 to April 2014 and further extended to December 2014. Crown Counsel submitted that the police have, as a part of its normal function, the responsibility of regulating traffic under the **Road Traffic Act**. There is evidence of a request from JUTC to the Minister asking for an extension of the exclusive use of the lane for a further six months, such a request is inconsistent with JUTC having made the decision.

Discussion on decision or order to be quashed

[39] The identification, of the order, direction or record whose validity is being questioned is a necessary pre-condition before a claimant can embark upon a trial to quash such order, direction or record by seeking a writ of Certiorari. This identification is key because of the nature of the writ of Certiorari, which is an examination on the face of the record to be impugned. The origin of the writ of Certiorari and its use in governance is aptly demonstrated by the dicta in the Canadian case of **R v Titchmarsh** (1915) , 22 D.L.R272, 277-278;

> *"The theory is that the Sovereign has been appealed to by someone of his subjects who complains to him of an injustice done to him by an inferior court; whereupon the Sovereign, saying he wished to be certified -Certiorari - of the matter, orders that the record, etc. be transmitted into court in which he is sitting."*

[40] In the circumstances of this case, there are three Respondents before the Court, regulated by three distinct statutes. The evidence adduced by the Applicant, admits its inability to identify the source of the decision. According to Mr. Wildman the Authority and the JUTC both blame each other and he was unable to locate any Gazetted Order in relation to the decision. Counsel has made no attempt other than the unavailability of the Gazetted Order, to explain his failure to produce. It cannot be sufficient for the Applicant to present to the Court two Respondents and ask the court to select one. In any event there is evidence before the court that the decision-maker is not before the court. How can the

court judge the lawfulness of the decision, if the decision-maker is not known? All the Court is concerned with is the legality of the decision, was it within the limited powers that Parliament had conferred upon the decision-maker? It was also open to the Applicant to lay before the court, the procedures for the reservation of a bus lane, and the failure to comply with those procedures. Without, the Applicant identifying the source of the decision, who can say if the process is unlawful?

[41] **In the Application of Jules Bernard** – HCA No 2361 of 1993 (TT), Ramlogan J, stated;

> "*there is nothing to indicate that anything has been done or not done which taints the process. The letter, in my view, does not constitute a decision to retire the Applicant. It merely says that the Commission would be considering whether it ought to retire the Applicant. The Applicant's contention seems to be that the Commission has indicated its intention to retire him. That is a very different thing from what the letter says. The letter is seeking to get information so that the Commission could consider whether the Applicant should be retired. It is a mere preliminary step. In any case, how has the Commission erred in arriving at the decision that it ought to consider whether the Applicant should retire? There is no breach of the rule of natural justice. What is there to be reviewed? The court should not interfere unless some injustice has been done or injustice is inevitable. Whether or not that is so must be determined by looking at the matter as a whole. One cannot just look at one step. There is nothing to suggest that any injustice has been done or that injustice is inevitable. The Commission should not be bogged down by mere technicalities emanating from flights of the imagination. At this stage the Court must do what it can to ensure that Judicial Review is not used to stultify the bona fide efforts of the Commission. It seems to me that if this application for leave were to be granted, it would be an unnecessary interference with the Commission in the performance of its duties. The public interest demands that the issue as to whether the Applicant ought to be retired or not be expeditiously dealt with. In these matters private rights must be protected but the public interest cannot be ignored. If there is ground for intervention by the Court at a*

later stage the Applicant can be heard. But the Police Service Commission must be allowed to continue with its work."

What is here to be reviewed? I agree that the Court should not interfere until there is a demonstration that some injustice has been done. To simply demonstrate a step taken by an agency, without showing its illegality, irrationality or procedural impropriety is not sufficient. The Applicant has been unable to do that in the absence of the source and the decision-maker. I respectfully adopt the reasoning of Ramolagan J.

Is the 1st Respondent amenable to Judicial Review?

[42] Mr. Wildman had argued that JUTC is a private company owned by government and it assumes public functions. He submitted that the Courts do not look at the source, but the functions of the power.

Mr. Wood, Q.C. submitted that JUTC, is a licencee pursuant to the **Act**. The Minister has the power to grant an exclusive licence, for operation within the KMTR. Neither the statute nor the licence granted thereunder conveys any regulatory, supervisory or other powers to oversee public passenger transport within KMTR. JUTC, is not amenable to judicial review. The court was referred to the matter of **R v Panel for Takeovers and Mergers Ex p Datafin** [1987] 1 QB 815**.**

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

[44] **The Act** requires that reasonable arrangements be made for the acquisition of the interests of every other person holding a road licence within the KMTR in respect of any stage or express carriage who will be prejudicially affected by the grant of an exclusive licence. JUTC is also permitted pursuant **Section 3 (6) (9) of the Act** to amend the exclusive licence granted by the Minister.

Statutory impositions on JUTC

[45] **Section 5 of the Act** mandates that JUTC provides such services whether of stage carriages or express carriages as may become necessary from time to time in the public interest. JUTC is also required to serve "*without wasteful or unjustifiable expense*" the needs of the KMTR or sections of that area. These services should be adequate and efficient. The Board constituted by **Section 7 of the Act** has a general duty to ensure that the mandates of **Section 5 of the Act** are observed by JUTC.

Licencee's right of Appeal to Court of Appeal

[46] JUTC has a right to appeal to the Court of Appeal if it is dissatisfied with any order made by the Board in exercise of their powers under the Act. JUTC may also appeal the refusal or failure of the Board to make an order on its application. The grant of a market service licence or its terms as well as the Board's refusal or failure to issue or revoke, are matters all appealable by JUTC to the Court of Appeal.

[47] Among the orders made by the Board in exercise of their powers under the exclusive licence are those enumerated in **Section 9 (2) of the Act**. These orders, the Board should consider, in all the circumstances, to be just and reasonable, whether in the interests of the public or the licencee. The Board's opinion should be held, having regard to the safety or convenience of the public or with a view to the maintenance, of suitable and efficient service. Having so considered, the Board may effectively supplant JUTC's decisions, to charge fares that are reasonable, operate on roads that are suitable for the service offered and at such a frequency, which is not excessive or insufficient, with a time-table which is convenient to the public. For all these decisions of the Board, with which JUTC is dissatisfied it may pursue the statutory right of appeal. JUTC has no statutory right of appeal from matters concerning the non-applicability or modification of any order made by the Minister for any service offered by the licencee or for the exercise of any of the powers by the Board under the exclusive licence.

[48] **The Act** is therefore the source of JUTC's power to consent in writing to the grant or holding of licence for some operators. JUTC is obliged to make reasonable arrangements for the acquisition of the interests of every other person at the time when it is granted the exclusive licence. **The Act** imposes conditions of stewardship and accountability on JUTC, pursuant to **Section 5**.

The functions that are required to be performed by JUTC, are "*public passenger transport services within and throughout the KMTR.*" Such services are to be provided "*as may from time to time be necessary or desirable in the public interest to serve without wasteful or unjustifiable expense the needs of the KMTR adequately and efficiently."*

[49] It is clear that JUTC has direct statutory powers. Equally, it is clear that the provision of transportation services in the KMTR, is required to be done to facilitate the mass transportation of the travelling public. It operates in the public domain; its service affects transportation in the KMTR as defined by **the Act**. It may give its consent to the grant or variation of market service licence, which permits transportation services, from the rural district of the Corporate Area to any market within the KMTR. This service is what allows the agricultural produce to be brought to the markets in the KMTR and is therefore likely to have an effect on the price of and the availability of agricultural produce in the KMTR.

[50] In addition, it issues road licences for contract carriage service, hackney carriage, express service within the KMTR. The power to grant these licences, would have economic implications for the operators of these licences. The nature of the service it provides, and the consequences of its decisions, indicate that JUTC is performing a public duty when engaged in the performance of its statutory functions. The grant of the exclusive licence is the Minister's decision. The Board has a duty to secure the provision by JUTC of the services as may be necessary or desirable in the public interest. JUTC has public law duties, imposed by statutes which are amenable to judicial review.

[51] In **R v Panel on Mergers and Takeovers Ex Parte Datafin** (1987) 1QB 815, the court held that the supervisory jurisdiction of the High Court was adaptable and could be extended to anybody which performed or operated as an integral part of a system which performed public law duties. The judgment of Lloyd LJ, recognized that the source of power was not the only test as to whether a body is subject to judicial review –

> "*determining whether the decisions of a particular body were subject to judicial review, the court was not confined to considering the source of that body's powers and duties but could also look to their nature. Accordingly, if the duty imposed on a body, whether expressly or by implication, was a public duty and the body was exercising public law functions the court had jurisdiction to entertain an application for judicial review of that body's decisions. Having regard to*

the wide-ranging nature and importance of the matters covered by the City Code on Take-overs and Mergers and to the public consequences of non-compliance with the code, the Panel on Take-overs and Mergers was performing a public duty when prescribing and administering the code and its rules and was subject to public law remedies. Accordingly, an application for judicial review of its decisions would lie in an appropriate case."

[52] A finding that JUTC, as a body is amenable to judicial review does not make all its decisions reviewable. A public body often times achieves its statutory objectives by contractual or private arrangements or means; therefore, not every activity of a public body will be amenable to review. Justice Evan Brown highlighted the distinction, in **Karen Thames v National Irrigational Commission**, 2009HCV04341, a decision of the Supreme Court .delivered on the 11th November 2011, at paragraph 13;

"The court therefore called upon to decide, first, whether the NIC, a private corporation licenced to be the National Irrigation Authority, is a body that is subject to judicial review? And that question must be answered by an examination of the source and nature of the power of the NIC. Secondly, if the NIC is found to be amenable to judicial review generally, is the decision which brought the parties to this court similarly susceptible? It has long been the law that the reviewability of a body does not make its every decision subject to review, simply by establishing that it's a body whose decisions come within the court's supervisory jurisdiction. Consequently, to decide if the impugned decision is reviewable, the court must define the nature of the relationship that existed between the parties. Lastly, if application is refused, how should the court treat with the claim?"

[53] I find that there is a statutory source for many of the duties of JUTC. In addition, the nature of the powers it exercises is part of the government's framework for the regulation of the public passenger transportation within the KMTR, and as we have seen has the support of statutory powers, it was under a statutory duty to be reasonable and efficient, and was under a duty to exercise what amounted to public law duties. This court has jurisdiction to review those decisions of JUTC.

Injunctive Relief

[54] The Applicant applied for injunctions, and was therefore required to raise serious triable issues. The applications were refused for the reasons that the Applicant had stumbled at the first hurdle by failing to demonstrate that he had a real prospect of succeeding in obtaining a permanent injunction. The prospect for success should not be fanciful, far- fetched and unlikely. Further, although the Court was satisfied that damages were an adequate remedy and easily quantifiable, this is not generally so in public law matters because of the absence of any general right to damages for loss caused by unlawful administrative action per se. Two great jurists have commented on the question of a serious issue to be tried on an application for injunctive relief.

Lord Diplock, in the **American Cyanamid Co. v Ethicon Limited** (1975) AC 396, at 406G, said:

> *"In the context if the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief, the Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial."*

[55] And Megarry VC, in **Mothercare Ltd. v Robson** (1979) FSR 466, identified that the initial hurdle raised, of a serious issue to be tried, will be not be cleared if it;

> "*fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial.*

[56] Lord Diplock, further noted in the **American Cyanamid case**, that if the Applicant passes the first hurdle of a serious issue to be tried, the court must go on to address the issue of adequacy of damages. At page 408, he said:

> *"The court should go on to consider whether… if the claimant were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately*

compensated by an award of damages for the loss he sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of application and the time of trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If on the other hand damages could not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages as for the loss he would have sustained from being prevented from doing so between the time of the application and the time of trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction."

Lord Diplock at page 408E of the **American Cyanamid case** in addressing the balance of convenience stated;

> *"it is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises."*

[57] In the event I am wrong in respect of the Applicant failing to demonstrate a serious issue and whether damages are an adequate compensation, the next consideration is the balance of convenience. It is recognized that there is difficulty in saying whether damages or the cross-undertaking will be an adequate remedy. Many Applicants in the area of public law may not have sufficient means to give a cross-undertaking in damages; it is a matter for the court's discretion. The attempt is to take the path that will lead to the least irremediable harm, in the event the wrong determination is made at the interlocutory stage. Lord Hoffman, in **National Commercial Bank Jamaica Ltd. v Olint Corporation Ltd.** [2009]1 WLR 1405, in part at paragraph 1 stated;

> *"the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice and to what extent, if it turns out that the injunction should not have been granted or withheld as the case may be. The basic principle is, the court should take whatever course seems likely to cause the least irremediable prejudice to one party or the other."*

[58] In whose favor does the balance lie? What is the course that will lead to the least irremediable prejudice, in the event the wrong determination is made? The Respondents are agents involved in the regulation of the public passenger transportation. The observation of Cooke J, in **Jamaica Association of Local Government Offices and National Workers Union v The Attorney-General** (1995) 32 JLR 49 that, "*cabinet shall be the principal instrument of policy and shall be charged with the general direction and control of the Government of Jamaica*" is appropriate. The balance of convenience must be looked at widely taking into account the interest of the general public to whom the duties are owned. (See **Secretary of State for Transport, ex p. Factortame Ltd**. (No. 2) (1991) 1A.C.603, 672-673. The court has to keep before it the importance of upholding the law of the land and the duty placed on the Respondents to enforce and regulate in the public interest. The charge of the regulatory agency is the expeditious, safe and economic transportation of the passengers. It is in the general interest of the public that these objectives be met. An efficient system impacts every factor of the passenger's life. Is it in the interest of the general public that there is expeditious movement of large numbers of passengers in large buses? Are there economies of scale to be gained from such high volume movement? Does it help to lessen congestion on these roads, which connect dormitories or communities with the capital city? The regulation of mass transportation includes the market services and their function of transporting the agricultural provision from rural areas of the KMTR to the markets. It must inure to the greater good, the general public, to be able to move more people expeditiously from point to point.

[59] The major complaint of the licenced operators is a fall off in revenue. The exclusive use of the lane is restricted to particular periods. I find that more irremediable prejudice will be done by allowing the injunctions. The applications are refused.

[60] Section 19(4) of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment 2011) Act** states;

> *"Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.*

In **Adrian Nation v Director of Public Prosecution & Attorney General of Jamaica**, Claim No. 2010 HCV 5201, Marsh J, in looking at constitutional relief and alternative remedies noted that before dealing with the substantive, the question of whether there were appropriate remedies, alternative to constitutional relief open to the applicants must be dealt with. The principles, as set out by the Privy Council in the case of **Harrikissoon v AG of Trinidad and Tobago** (1979) 31 WIR 348, are indeed correct. Their Lordships said at page 349 e;

> "*The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the ...the Constitution is fallacious."*

This authority was cited with approval by the Jamaican Court of Appeal in **Doris Fuller v Attorney General** (1998) 56 WIR 337. The Court of Appeal went on to say at page 339:

> *"The meaning to be attached to the words "adequate means of redress" is clear from the opinion of their Lordships in the Maharaj (no. 2) case. There must be a remedy available at law which will be sufficient for the purpose of enforcing or securing the enforcement of the alleged contravention."*

[61] The application for leave for constitutional relief will not be granted where there are other means of redress available to the Applicant. However, when it is alleged, as it is here that the state has, by legislative enactment, infringed on a citizen's fundamental rights, there can be no other adequate remedy than the determination that that law is unconstitutional and void. To do otherwise would tantamount to the court aiding and abetting the legislature in its violation of the citizen's constitutional right. Therefore, leave is granted to pursue the constitutional relief.

[62] The declaratory orders sought were based on the submission, that the Office was the sole regulator of public passenger transportation. This is a submission that this court rejects. Nonetheless, the Applicant is not required to seek leave for an application for declaratory relief.

[63] In the circumstances and considering all that was placed before this court, the court grants the following orders:

1. The application for leave in respect of the prerogative remedies of Certiorari, Prohibition and Mandamus are refused.
2. The application for injunctive relief is refused.
3. The application for leave in respect of constitutional relief is granted.
4. No order as to costs.