IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2009: 120

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE MOTOR CAR ACT 1951

AND IN THE MATTER OF THE MOTOR CAR AMENDMENT (NO 3) ACT 2008

AND IN THE MATTER OF A POLICY WHICH CONDONED THE FAILURE TO LICENSE VARIOUS MOTOR TAXIS

AND IN THE MATTER OF THE MINISTER OF TRANSPORT'S DECISION TO BRING THE MOTOR CAR AMENDMENT (NO 3) ACT 2008 INTO FORCE ON 23RD JANUARY 2009

BETWEEN:

BERMUDA TAXI RADIO CABS LTD.

Applicant

-v-

THE MINISTER OF TRANSPORT

1st Respondent

-and-

THE TRANSPORT CONTROL DEPARTMENT

2nd Respondent

-and-

THE PUBLIC SERVICE VEHICLE LICENSING BOARD

Directly Affected Party

JUDGMENT

Date of Hearing: July 21, 2009
Date of Judgment: August 21, 2009

Mr. Eugene Johnston, Trott & Duncan, for the Applicant
Mr. Melvin Douglas, Senior Crown Counsel, for the Respondents

Introductory

1. In or about 2006, the Motor Car Act 1951 was amended with a view to requiring taxis to use new global satellite positioning ("GPS") equipment. It is a notorious fact that this legislation has met with vigorous opposition from certain segments of the Bermudian taxi industry. This opposition, combined with the rational need for time to acquire and install the new technology, appears to explain the staggered implementation of various provisions over a period of more than two years.

2. The present case arises from the Applicant taxi despatching company's contentious interactions with the Transport authorities in relation to the implementation of this legislative scheme. On February 25, 2009, the Applicant applied for leave to apply for judicial review in respect of (1) the Second Respondent's policy of failing motor taxis which did not have GPS equipment fitted ("the Policy"), and (2) the First Respondent's decision to bring the Motor Car Amendment (No.3) Act 2008 into force on January 23, 2009 ("the Decision"). On March 6, 2009, without a hearing, I granted leave in respect of the Policy, but refused leave in respect of the Decision.

3. At a renewed application for leave on March 31, 2009, I explained that no leave was required for relief under section 15 of the Bermuda Constitution, which ought ordinarily to form the subject of a separate application, unless it was obvious that the judicial review applicant's administrative law claim was bound to fail. On April 2, 2009, I granted leave in respect of the public law challenge to the Decision, Mr. Johnston having persuaded me that, contrary to my preliminary view, this point was indeed an arguable one.

4. The Affidavits of Randolph Rochester and Cherie Whitter, sworn on June 13, 2009 and June 17, 2009, respectively, on behalf of the Respondents, each conceded that the Policy was unlawful while quibbling with the precise form of declaration which ought to be granted. At the substantive hearing of the application, Mr. Johnston was happy to accept a declaration in the terms proposed by the Respondents.

5. Accordingly, the only contentious issue was the legality of the Decision.

The Decision

6. It is common ground that with effect from January 23, 2009, the Premier, acting in his capacity as the Minister responsible for Transport purportedly pursuant to powers conferred by section 4 of the Motor Car Amendment (No.3) Act 2008 ("the Act"), brought the Act into force by notice published in the Official Gazette[1]. The Act was assented to on March 26, 2008 and most significantly amended the principal act to make it an offence to (a) operate a taxi without the GPS equipment operating and switched on (section 35B), and (b) operate a despatching service without the GPS equipment operating and switched on (section 37A). Section 4 of the Act provided, in terms which were not contended to be otherwise than standard for a commencement clause:

> "*This Act comes into operation on a day to be appointed by the Minister responsible for Transport by notice published in the Gazette.*"

[1] BR 7/2009 dated January 15, 2009.

7. The Affidavit of Edward Darrell sworn on February 25, 2009 makes the following averments relating to the Decision (paragraphs 3 to 6). Firstly it is deposed that the Applicant carries on business as a taxi despatching service which is utilised by approximately 180 taxi operators. Secondly, it is averred that in 2007, the Applicant applied to the Board to increase its charges to its operators, which increase was required to offset the expenses of operating with the new GPS technology. At this time it was well known that the Applicant's competitors had similar applications approved by the Board, but the Applicant's application was refused. An appeal was lodged with the Magistrates' Court on July 23, 2007, but no hearing had been arranged. The effect of the Decision was to require the Applicant to incur the expense of using the new technology, including utilising an overseas subscriber, with no means of recompense for this additional expense having regard to the refusal of the Board to allow the Applicant to increase its charges. Moreover, the Decision was made both during an economic downturn and during the slow season when it was a matter of public record that the Bermudian taxi industry was under financial stress.

8. The majority of the Darrell Affidavit deals with the Policy and complains that the Applicant is being unfairly targeted, against the background of the Minister having in January 2006 expressed the view that all three taxi despatching services might not survive the introduction of the GPS system. The Applicant through its counsel argued that the timing of the bringing into force of the Act coincided with the Applicant robustly challenging the Policy, although there is no record of any threat of judicial review proceedings until after the Decision was made. The Policy involved failing to pass taxis which were not fitted with GPS equipment at a time when the Act had yet been brought into force.

9. In the Rochester Affidavit, the Director of Transport deposes (paragraphs 8 to 18) that when the Applicant applied to the Board to increase its subscription charges, it had already admittedly implemented an increase without permission. The Application was refused by letter dated July 27, 2007 because there was no evidence that the Applicant was using the GPS equipment it claimed justified the increase in charges. Since then, no documentary support for the increases sought has been provided. The Applicant appealed by letter dated August 8, 2007. The Second Respondent forwarded the appeal documentation to the Senior Magistrate on December 11, 2007. The Respondents' counsel pointed out in argument that the Applicant had done nothing since then to encourage the Magistrates' Court to bring on the appeal for hearing.

10. In paragraph 8 of the Whitter Affidavit, the Permanent Secretary explains the timing of the Decision as follows:

> "*On the 2nd January, 2009 the 1st Respondent was advised by the 2nd Respondent that a number of taxis were not compliant with the Amendment Act 2008. The Ministry of Transport and Tourism reminded*

the 2nd Respondent that the Amendment Act 2008 had not been brought into force. Soon thereafter the Minister of Tourism and Transport (the Minister) decided to bring into effect the Amendment Act 2008 which was brought into force by the Minister on 23rd January, 2009."

11. She further deposes (paragraphs 9-12) that at no time prior to February 2009 did the Applicant represent that nearly 200 taxis would be unable to comply with the Act. On the contrary, the Applicant had previously represented that it had installed its own GPS equipment and the main problem was drivers refusing to switch their own devices on. The assertion that significant financial loss would be sustained if the Applicant was not permitted to increase its subscription rates could not be accepted in the absence of any evidence supporting this bare complaint, although the increase was a matter for the Board, not the Minister. The Minister was aware of the economic conditions facing the taxi industry when he made the decision to bring the Act into force. The Applicant had been afforded two years to implement the new digital despatching system in place of the old voice operated despatching system since all taxis had been required to be appropriately equipped by August 5, 2006.

The Applicable law

12. The present application gives rise to two important points of principle. Firstly, does this Court possess the jurisdictional competence to declare on an application under Order 53 of the Rules of the Supreme Court that the decision of a Minister authorised by Parliament to bring an Act into force by duly publishing the requisite commencement notice is unlawful? And, secondly, assuming that the requisite jurisdictional competence exists, what implied conditions for the exercise of the power conferred by section 4 of the Act in the present case has the Applicant demonstrated have been breached?

13. Mr. Johnston persuasively argued, against the background of a carefully crafted application which did not explicitly seek to impugn the validity of the entry into force of the Act itself, that a decision to exercise a commencement power was, like any other statutory discretion, an administrative power amenable to judicial review. He placed primary reliance on the House of Lords decision in *R –v- Secretary of State for the Home Department, Ex parte Fire Brigades Union* [1995] 2 A.C. 513, to support this crucial submission. In this case a criminal injuries compensation scheme in the UK was introduced by provisions of the Criminal Justice Act 1988 which were to come into force "*on such day as the Secretary of State may…appoint*". In 1993, the Secretary of State announced that he did not intend to bring the statutory provisions into force and proposed instead to introduce a non-statutory scheme. The House of Lords held firstly (by a majority) that the commencement clause in the 1988 Act imposed a continuing duty on the Secretary of State to consider when it was appropriate to bring the

14. statutory provisions into force, which duty was breached by a decision not to exercise the statutory power at all. Secondly, the House held (unanimously) that the commencement clause did not create a legally enforceable duty to bring the provisions into force as soon as was reasonably practicable, with no discretion to determine the most appropriate commencement day.

15. The Applicant's counsel relied upon the first finding in this high authority as supporting the wider proposition that the statutory power to decide when to bring statutory provisions into effect was amenable to judicial review. It mattered not, he contended, whether the impugned decision involved failing to exercise the commencement power at all or exercising the power in an impermissible manner. Mr. Douglas for the Respondent clearly demonstrated that the *Fire Brigades Union* case provides no direct support for this wider proposition. The *ratio* of the case, as illustrated by the judgment of Sir Thomas Bingham MR (as he then was) in the Court of Appeal, supports the contrary proposition: "*…plainly the decision when to bring the provisions into force is entrusted to him* [the Secretary of State]*….The subsection does not in terms confer any power or discretion on the Secretary of State to decide whether the provisions should ever come into force.*" If such a standard commencement provision confers an unfettered discretion on the Minister to decide when the relevant statutory provisions ought to come into force, the Minister cannot be held to be acting unlawfully for publishing the commencement notice at a particular time or failing to do so at a particular time. Only deciding never to exercise the commencement power at all is unlawful. The Respondent's counsel also referred to the speech of Lord Nicholls in the House of Lords to like effect (at pages 570 G-H-571 A-B).

16. As Mr. Johnston submitted, the House of Lords in *R –v- Secretary of State for the Home Department, Ex parte Fire Brigades Union* [1995] 2 A.C. 513 clearly decided that this standard form of commencement provision does not confer a wholly unfettered discretion as to when to exercise the commencement day power. This was demonstrated by reference to the speeches of Lord Browne-Wilkinson (at 550H-551A-C, G), Lord Mustill (at 560H-561A, 567C-568B), and Lord Nicholls (at 574G-575A). Of these various passages, Counsel relied in particular on the following dictum of Lord Nicholls to demonstrate the sort of matters which had to be taken into account when deciding when to bring statutory provisions into force:

> "*Thirdly, although the purpose of the commencement day provision is to facilitate bringing legislation into effect, the width of the discretion given to the minister ought not to be rigidly or narrowly confined. The common form commencement day provision is applicable to all manner of legislation and it falls to be applied in widely differing circumstances. The range of unexpected happenings is infinite. In the course of drafting the necessary regulations, a serious flaw in the statute might come to light. An economic crisis might arise. The government might consider it was no*

> *longer practicable, or politic, to seek to raise or appropriate the money needed to implement the legislation for the time being. In considering whether the moment has come to appoint a day, as a matter of law the minister must be able to take such matters into account. Of particular relevance for present purposes, as a matter of law the minister must be entitled to take financial considerations into account when considering whether to exercise his power and appoint a day.*"

17. This reasoning would seem to suggest that the Minister in the present case was required by section 4 of the Act to have regard to whether the economic conditions in Bermuda were ripe for bringing the Act into force. In particular, account arguably ought to have been taken of whether the taxi industry was suitably prepared for being compelled by threat of criminal penalties to utilise the new GPS technology. If this is right, it would seem to follow as Mr. Johnston contended that the Minister would be amenable to judicial review if he acted irrationally in exercising the commencement day powers, failed to take into relevant considerations and/or took into account irrelevant considerations. However, having regard to the fact that commencement day powers are primarily designed to give effect to the Legislature's intention that statutory provisions which have been enacted ought to be brought into effect, it would require highly unusual circumstances for a judicial review applicant to be able to demonstrate that a Minister had misused a commencement day power by actually bringing the relevant statutory provisions into force. It is surely not coincidental that Counsel was unable to refer to any case where such an application had ever been made, let only succeeded.

18. Mr. Douglas also raised a more fundamental objection to the Applicant's challenge to the legality of the Minister's exercise of the commencement day power contained in section 4 of the Act in the context of a judicial review application. De Smith's '*Judicial Review*', 6th edition[2] at paragraph 3-019 list the following as one of three public law areas falling outside the purview of judicial review:

> "*Challenges to decisions relating to the validity of provisions contained in Acts of Parliament, reflecting the constitutional principle of the supremacy of Parliament. This is now subject to a number of exceptions…*"

19. The Applicant did not challenge for judicial review purposes (while foreshadowing a potential constitutional challenge for breach of fundamental property rights under section 13 of the Constitution) the fact that the Act had been validly brought into force. Instead, it was sought to impugn the decision to bring the Act into force on the basis that the decision was severable from its legal

[2] Sweet & Maxwell: London, 2007

20. effects. However, the Court was invited to construe the Act and to interpret the legality of the Minister's decision with a view to avoiding (as far as possible) any interference with the Applicant's constitutional property rights. Again, it may well be legally viable in abstract conceptual terms to impugn an administrative law decision without contending that all consequences flowing from the legal decision are null and void and have no legal effect. For instance, a particular judicial review applicant may be able to challenge the validity of the application of the general law to them, based on a substantive legitimate expectation that a previous mistaken interpretation of the law would not be departed from without prior notice: *Simons et al –v-Accountant General* [1999] Bda LR 43.

21. It will therefore in most cases require unusual facts for a judicial review applicant, who concedes that legislative provisions have been validly brought into force for the world at large, to succeed in establishing that the exercise of the relevant commencement day powers have breached the applicant's personal public law rights.

Findings

22. In my judgment there is nothing in the provisions of the Act or in the Applicant's evidence, carefully considered in light of the applicable legal principles, which supports a finding that the Minister acted unlawfully in bringing the Act into force on January 23, 2009.

23. The Act itself does not expressly deal with when its provisions were to be brought into force. It may perhaps be inferred that taxi operators and despatching companies ought to have been given a reasonable opportunity to install their equipment, but this (unsurprisingly, in light of the chronology of the various GPS amendments) is not the complaint made. One complaint is that the Minister did not take into account economic conditions in January 2009. The Permanent Secretary says that he did take this matter into consideration and the Applicant was in no position to contradict this evidence. There is in any event no or sufficient basis for inferring that it would be a misuse of the power conferred by section 4 of the Act to bring the Act into force during an economic downturn, either in the Act itself or in the Applicant's evidence which does not provide any support from this conclusion by reference to the legislative history of the relevant statutory provisions.

24. The main complaint made by the Applicant was that the Minister had misused his powers under section 4 by bringing the Act into force at a time when the Board had improperly prevented the Applicant from obtaining proper recompense for the increased costs of compliance in light of (a) the Board's wrongful refusal of the Applicant's fee increase application, and (b) the Department's failure to progress the Applicant's appeal against this decision. It is also suggested (more clearly by way of argument than by direct evidence) that the Minister and/or the Department

25. and/or the Board were involved in a campaign designed to put the Applicant out of business. None of these complaints have sufficient substance to justify a finding that the decision to bring the Act into force breached the Applicant's public law rights.

26. Firstly, there is no factual basis on the material before the Court for finding that the Respondents or any of them are culpable for the Applicant's appeal against the Board's decision still being outstanding. The Department was required by law to refer the matter to the Magistrates' Court and did so on or about December 11, 2007. It was then open to the Applicant as the party most interested in the appeal to press the Court to bring the appeal on for hearing. There is no suggestion that the Applicant took any such steps, let alone any suggestion that the Minister or the Department has lifted a finger to delay the adjudication of the appeal.

27. Secondly, as regards the suggestion that the commencement day decision was improperly motivated by malice towards the Applicant, this is supported only by the most tenuous evidence. The Board's rejection of the fee increase appeal appears to have been primarily influenced by the fact that the Applicant had admittedly increased its fees without obtaining prior permission, and secondly by the absence of any financial data to support the increase. The Applicant itself has not sought to expedite this appeal, which hardly suggests that it regards the appeal as having obviously strong prospects of success. It is plausible that the Policy affected the Applicant more than its competitors, but it seems most probable that if the Policy had this effect this was more because of the intransigence of taxi operators linked to the Applicant rather than due to regulatory action targeting the Applicant as a despatch company.

28. Moreover, there is no basis for rejecting the Permanent Secretary's evidence that the now admittedly unlawful Policy was implemented on the mistaken basis that the Act was already in force. When it was discovered that the Act had not been brought into force, the Minister decided to promptly make the commencement day decision. Accordingly, the best available evidence strongly suggests that the dominant motivation behind bringing the Act into force was to give effect to Parliament's legislative intent rather than attributable to any unlawful extraneous motives.

29. Finally, in my judgment none of these findings is impacted upon to any material extent by section 13 of the Constitution, having regard to the material presently before this Court. The bare assertion that the Applicant will suffer financial loss if it is required to comply with the Act was evidentially meaningless in the absence of any tangible financial evidence as to what loss would flow from the bringing into force of the Act's provisions. In any event, as Mr. Douglas aptly pointed out, citing the Judicial Committee of the Privy Council decision in *Société United Docks-v- Government of Mauritius* [1985] 1 A.C 585 at 603D : '*The Constitution does not afford protection against progress or provide compensation for a business which is lost as a result of technological advance.*' This finding in no

30. way ignores the fact that if the Applicant can demonstrate increased operational costs flowing from its use of the new technology, it may well be entitled to increase its rates. It was indicated through counsel in the course of the hearing, that the Board may well be willing to entertain a fresh fee increase application, provided it is accompanied by appropriate financial data.

31. Accordingly, the Applicant's complaint that the Decision was unlawful as a matter of public law must be dismissed.

Conclusion

32. The Applicant's challenge to the validity of the Decision fails on the grounds that no or no sufficient evidence was adduced which was capable of impugning the legality of the Minister's decision to bring the Act into force, it being conceded that the Act had validly entered into force pursuant to the impugned commencement notice.

33. The Applicant's challenge to the validity of the Policy was not the subject of argument, it having been conceded in the Respondents' evidence filed on or about June 17, 2009 that the policy was unlawful. Subject to hearing counsel as to costs, the appropriate order would appear to be to award the costs of the application generally to the Applicant, but to award the costs after service of the Respondents' reply evidence which are attributable solely to preparing for and attending the hearing of the Applicant's unsuccessful attack on the Decision to the Respondents in any event.

Dated this 21st day of August, 2009 _____
KAWALEY J