IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No. BZCV2016/001
BZ Civil Appeal No.25 of 2013

BETWEEN

FROYLAN GILHARRY SR.
d.b.a GILHARRY'S BUS LINE **APPELLANT**

AND

TRANSPORT BOARD
CHIEF TRANSPORT OFFICER
MINISTER OF TRANSPORT
THE ATTORNEY GENERAL

RESPONDENTS

Before The Right Honourable and the Honourables

Sir Dennis Byron, President
Mr Justice Saunders
Mr Justice Wit
Mr Justice Hayton
Mme Justice Rajnauth-Lee

Appearances
Fred Lumor, SC and Sheena Pitts for the Appellant

Nigel Hawke and Ms. Agassi Finnegan for the Respondents

JUDGMENT
of
The Right Honourable Sir Dennis Byron, President, and the Honourable Justices Saunders, Wit, Hayton and Rajnauth-Lee

Delivered by
The Honourable Mr. Justice Wit

on the 26th day of July, 2017

Introduction

[1] This is a case about a bus operator who had been in the transportation business in Belize for forty years. Six years ago, in 2011, after a turbulent consultation process, his permits were drastically reduced. Now he is before this Court but although he may have a good case, is it still possible to do justice? There are several difficulties. First of all, this Court is not in the business of primary fact finding; the case is, however, more about facts than it is about law. That is not insignificant. After all, facts matter a lot. Like the Devil, the Law is often in the details. This case is no exception. Its factual background is rather complex. Although the broad contours of this background loom out of the mist of time, many details remain unclear.

[2] The evidence in this matter is rather terse. It consists of several affidavits from the Appellant, an affidavit from the Chief Transport Officer, one of the respondents, and an affidavit from the Chairman of the Transport Board, another of the respondents, all with annexed exhibits. This would not have been a problem if these deponents had been properly cross-examined at the trial stage. But no cross-examination took place there. Thus, many questions that could have brought to light some important aspects of this case, remain unanswered. This is unsatisfactory as this Court now must build its judgment on an incomplete if not somewhat shaky factual foundation. On the other hand, the evidence before us, is the same as that which the courts below, particularly the trial judge, had before them and so, there is no proper reason for us to defer to their findings, even if these findings are concurrent. Of course, the judges in the courts below, or most of them, live in Belize, and they do not live there in ivory towers, so we must, and will, keep this in mind when we look at the facts as they found them.

[3] Although it is said that time heals all wounds, it can also make worse those that are untreated. This is often the case in litigation where justice delayed turns out to be justice denied. So here. While this matter was slowly meandering its way up to this Court, life in the Belizean transportation world went on and as the turbulence subsided , a new order of things on the transportation scene gradually emerged. So, when this case finally reached this Court, it was in a sense already dead upon arrival because if the Appellant was right to disagree with the way the authorities, particularly the Transport Board, had

dealt with him, and as we will see he was right, the options available for meaningful relief were severely reduced.

[4] Surely, it is too late now for this Court to provide any relief that would require the authorities to reconsider the issue of the permits as this would probably greatly upset the newly established order and disturb the relative peace, even though ordering a complete overhaul of the system in favour of the appellant might do justice in an abstract or theoretical sense. Law presupposes some form of normative order even though it must seek to season it with fundamental fairness. Judicial relief that leaves social chaos and instability in its wake or causes it to resurge is almost always wrong and is therefore to be avoided. That is where the buck stops. A fall-back position, also in administrative law, can then be found in an award of damages. But that cannot be done by way of an afterthought. That form of relief must be solidly founded and a basis for its calculation presented at the beginning of the case when it is still in the hands of the trial judge and not at the final stage of the litigation when all is said and done. If that rule or practice is not followed, there would be no end to litigation. Human justice, unfortunately, has its limitations.

The background of this case

[5] The Transport Board ("the Board") is a statutory body established under section 4(1) of the Motor Vehicle and Road Traffic Act, Cap 230 of the laws of Belize ("the Act") charged with the sole responsibility of considering and determining "all applications for road service permits and other consents required to operate omnibuses". Pursuant to section 4(6) of the Act, the Minister of Transport, assisted by the Board, is charged with the responsibility of formulation of policies and the development of regulations pertaining to public and road transport. All road service permits granted by the Board are issued for a period of two years at a time.

[6] Around 2008, a new "zoning policy" was developed to address safety on the highways and regulate the public transport system in Belize by dividing the country into three zones, a northern, southern and western zone, and restricting each bus operator to one of those zones. Before the newly created zoning policy could be implemented, however, several bus operators, National Transport, Guinea Grass Transport, Ladyville Transport

and Hattieville Transport, by way of Claim No. 728 of 2008, filed proceedings in the Supreme Court against the Board and the Chief Transportation Officer. On 2 December 2008, the Supreme Court granted an injunction restraining the Board and others from proceeding to grant road service permits for operating omnibuses on routes in parts of the northern zone of the country until the matter was determined.

[7] That determination never came. For more than two years the case lingered in the court, proceeding from adjournment to adjournment, until 27 January 2011, when Awich CJ (Ag.) on procedural grounds dismissed the claim and thereby all interim orders, including the injunction. During the period of December 2008 to 27 January 2011, when the injunction was in place, no road service permits were "granted" or renewed by the Board as it was of the view that the injunction created a complete bar to the granting of all road service permits to bus operators on the northern route and, further, that it was prohibited from taking any action against new bus operators ("snipers") who started to operate illegally on the northern route. This resulted in an undesirable, if not chaotic situation where all the bus operators on the northern route inclusive of the Appellant, Froylan Gilharry Sr, were operating without valid permits, expired or otherwise.

[8] Gilharry, who was doing business as Gilharry's Bus Line, has operated buses along the Northern Route, Santa Elena to Belize City and back ("the main route") for about 40 years; he had fifty-four (54) employees, eleven (11) buses and ten (10) vans. He had made considerable investments and facilitated the development of the transportation system in Belize. In 2006, his eleven (11) main route road service permits had been renewed for two years; these permits expired in May 2008. In addition to the main route runs, Gilharry also operated 10 vans from Corozal Town to a number of villages in the Corozal District ("the village runs") in accordance with a separate permit. In 2007, this road service permit for the village runs was renewed and subsequently expired in 2009. In addition to the runs on the main route, Gilharry was also allowed to run an additional schedule each Monday and Friday if there was public demand. Gilharry was one of the major bus operators on the Northern Route. Gilharry claims, and the Transport Board neither admits nor disputes, that in May 2008 the Transport Board authorised him to continue to operate on his existing road service permits and assured him that these permits would be renewed when the Board was in a position to do so. Further, according

to Gilharry, the Board had stated that at the time of the renewal, he would be asked to pay for "all arrears due in respect of the years for which the licences were not renewed." This was not the first time that Gilharry had been permitted to operate on expired permits, the Transport Department had authorised him and other bus operators to operate on expired road service permits on two prior occasions, sometime in 2004 and again in 2005.

[9] Not long after the injunction was lifted, the authorities sought to regularise the transportation system and began consultations with the old and the new bus operators. The Minister invited all bus operators to two meetings in Orange Walk Town. At the first meeting, the Chief Executive Officer for the Ministry of Transport, informed the bus operators that the injunction had been lifted and as a result licences would be published in the Gazette. After three weeks, all bus operators who were interested could apply for the additional routes previously held by Novelo's Northern Transport.

[10] Sometime after that meeting, Gilharry applied for the additional routes held by Novelo's Northern Transport and for the renewal of his road service permits for the Main Route and the Village Runs. Other bus operators also sent in their applications. The Board subsequently received and published a list with applications for new road service permits and renewal applications in Notice No. 141 in the Belize Gazette dated 12 March 2011 wherein the Board announced "a meeting on March 30, 2011 at 9:00 am at the Belize Cancer Society Conference Room, Belize City, to review the … applications". Gilharry's applications (dated 21 February 2011) were included in that list. Generally, when applications are made to the Board for the issuance of road service permits, the date of the meeting together with the particulars of the application must be published in three (3) consecutive issues of the Gazette and for renewals, it must be published in one (1) issue of the Gazette[1]. This time there was only one such notification published in the Gazette.

[11] The meeting as gazetted for 30 March, 2011, does not appear to have taken place. Instead, there were several meetings in May 2011. At the meeting of 10 May 2011, the bus operators were given the new schedules or routes which the Minister proposed to

[1] Motor Vehicles and Road Traffic Regulations, Chap 230 - Regulation 207.

implement on 22 May 2011. The bus operators protested as they were displeased with the schedules. Consequently, another meeting was held on 20 May 2011, where the Minister agreed to delay the implementation of the new schedules. However, the following day, the Minister implemented the schedules on the western route.

[12] The bus operators were furious. They caused the major highways to be blocked resulting in a nationwide disruption of the public transportation system. The Prime Minister intervened and a meeting was scheduled for 28 May 2011. At that meeting, the Minister of Transport, the Deputy Prime Minister and Minister of Works, the CEO of the Prime Minister's Office and other government officials (but apparently, so it seems, no members of the Transport Board) were present. At this meeting further changes were made to the schedules handed down on 10 May 2011. At a further meeting the Minister of Transport asked the northern bus operators to meet and work out among themselves new routes or schedules to be operated on the Northern Route. A committee of bus operators was formed which after deliberation proposed the new routes to the Minister. Gilharry disagreed with the proposals and walked out of the meeting.

[13] The Board formally approved the new schedule. It took the decision that it would observe how the new zoning policy and the schedule reflecting that policy operated before proper road service permits were issued. Therefore, the Board would grant temporary road service permits for three months to all bus operators in the north who had applied for and paid the requisite fees (based on the proposed new schedule) to operate their buses. On 15 June 2011 Gilharry was informed that the new schedules or routes were to be implemented on 19 June 2011. He was advised to take note of the new schedules and to pay and pick up the new road service permits issued to Gilharry Bus Line. Gilharry never paid these fees as he totally disagreed with the routes that were allotted to him. He would not get a renewal of his permit for the village runs, and for the main route runs he was to be issued eight instead of eleven permits, most of which were off-peak or for other reasons not lucrative. When the new schedule came into force on 19 June 2011, he decided to ignore the schedule and do the runs previously authorised by his road service permits, but he was stopped by the police. And so, undaunted, he took his case to court.

The judicial proceedings

[14] Initially, things went smooth and fast. Gilharry applied to the Supreme Court for permission to make a claim for judicial review of the Board's decision on 20 June 2011; the next day, 21 June, after a hearing, permission was granted. On 30 June 2011 Gilharry filed his application for judicial review, seeking an order of certiorari to quash the Board's decision to revoke or not renew his road service permits and other declaratory reliefs. The matter was heard on 21 July 2011, but on 9 August 2011 the judge, Legall J, upheld a preliminary objection and dismissed the application. The next day, 10 August 2011, the judge gave his written judgment. Gilharry filed a notice of appeal on 6 September 2011. The appeal was heard on 26 March 2012 and the Court of Appeal, allowing the appeal, delivered a judgment on 20 July 2012. Thus, a full year had passed and the case was back to square one. It returned to the Supreme Court, now before another judge, Arana J. who heard oral arguments on 10 December 2012 and delivered judgment on 18 April 2013, denying the claim and refusing relief. Gilharry again appealed to the Court of Appeal, now on 5 July 2013: another year had passed. Then, almost two years later, on 19 March 2015, the Court of Appeal held a case management conference where it was decided to dispose of the matter by written submissions. One year later, on 17 March 2016, the Court of Appeal delivered its judgment, dismissing the appeal. It is from this judgment that Gilharry appealed to this Court.

The issues

[15] The issues raised on appeal before this Court are substantively the same as those raised before the Supreme Court and the Court of Appeal and can be summarised as follows: The Board -

a. acted *ultra vires* its governing legislation *viz,* the Act and the Regulations;
b. had not acted fairly towards Gilharry and breached basic rules of natural justice; and
c. frustrated Gilharry's legitimate expectation.

[16] In more concrete and factual terms, Gilharry seeks to challenge the Board's (implicit) refusal to renew his permits on the following grounds.

- First, the Board abdicated its duty to consider and decide the operators', including his, applications for road service permits to the Minister of Transport, the Department of Transport and the bus operators themselves. In other words, the routes or runs the Board eventually allotted and the road service permits it ultimately issued to the operators (and apparently had been willing to issue to Gilharry) were the result of considerations and decisions by others, the Board's role being nothing more than "rubberstamping" these decisions when issuing the permits.

- Second, even if the Board itself considered and decided the issuance and distribution of the permits, it did not do so based on the applications of the bus operators, at least not in the case of Gilharry.

- Third, even if the Board did consider and decide the applications of Gilharry, it did not do so properly and fairly, more specifically: neither in accordance with its statutory remit (Regulation 207) nor with the basic rules of "natural justice" (or procedural fairness), as the Board did not consider all the relevant factors and did not offer Gilharry the opportunity to be (properly) heard.

- Finally, the Board frustrated Gilharry' substantive legitimate expectation that his expired road service permits were going to be renewed when the Board would be able to do so, as the Board had promised him in April 2008, around the time his permits expired.

[17] Both the trial judge and the Court of Appeal rejected these grounds for roughly the same reasons. Gilharry argues that these courts were wrong and wants this Court to declare that the Transport Board (a) acted ultra vires and did not exercise its licensing powers lawfully in accordance with its statute and regulations, (b) did not lawfully and properly consider the renewal application of the applicant, and (c) frustrated his legitimate expectation. He further asks the Court to order the Transport Board to consider his renewal applications in accordance with the statute and regulations, or, in the alternative, to order that damages be assessed and be paid to him for the losses or damages he suffered because of the non-renewal of his licences, plus an order for costs and such further or other orders as the Court deems just. The Board, on the other hand,

agrees with the lower courts and their reasoning, and asks this Court to dismiss the appeal.

The relevant legislation

[18] Before turning to the issues, it is necessary to outline the relevant parts of the legislative scheme governing the Board which is found in section 4 of the Act and Regulations 206 and 207. Section 4 of the Act provides:

> 4(1) "There is hereby established a body to be known as the Transport Board consisting of seven members appointed by the Minister as follows:
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> (a) the Chief Transport Officer or an officer from within his Department designated by him who shall be Secretary to the Board;
> (b) the Commissioner of Police or an officer from within his Department designated by him;
> (c) a representative of the public transport providers;
> (d) the Chief Engineer or an officer of his Department designated by him; and
> (e) three members from the private sector, of whom two shall be persons with knowledge and experience of the transportation business and one shall be a representative of the users of public transport, appointed by the Minister in his discretion.
>
> (2) The Minister shall appoint one member to be the Chairman of the Board, and another member to be the Deputy Chairman of the Board, and in the absence of the Chairman at any meeting of the Board, the Deputy Chairman shall act as Chairman.
>
> (3) Members of the Board referred to in paragraph (c) and (e) of subsection (1) above, shall, unless they earlier resign or have their appointments terminated, hold office for two years.
>
> (4) The Board shall meet at least once every two months.
>
> (5) A quorum at any meeting of the Board shall be four members, and decisions of the Board shall be by majority votes of the members present and voting at any meeting.

(6) The Board shall assist the Minister in the formulation of policies and the development of regulations pertaining to public road transport, and in particular the following:

(a) rates, fares, tolls, dues or other charges pertaining to public road transportation and in particular or the operation of omnibuses and taxis;
(b) registration, charges and fees in respect of motor and other vehicles;
(c) driving tests and restrictions on the issuance of driving licenses and omnibus licenses;
(d) such other duties as may be assigned to it under this Act and any regulations made thereunder.

(7) The Board shall consider and decide all applications for road service permits and other consents required to operate omnibuses, and for that purpose, a reference to the Department of Transport in Part XII of the Motor Vehicles and Road Traffic Regulations shall be read and construed as a reference to the Board.

(8) The Board shall regulate its own procedure.

(9) The Secretary to the Board shall maintain proper records of the proceedings of the Board.

(10) Where any person is aggrieved by a decision of the Board, he shall, within twenty-one days of such decision, appeal to the Minister whose decision thereon shall be final.

In addition to the procedures set out in the Act, the Regulations in part provide as follows:

Regulation 206:

"All applications shall be considered by the Licensing and [Transport Board] which shall have power to allow or disallow any application ..."

Regulation 207:

"The date of the meeting of the Licensing and [Transport Board] to consider applications together with particulars of the applications to be considered shall be published beforehand in three consecutive issues' of the Gazette, provided that

when only applications for renewal of road service permits are to be heard the date of the meeting of the Board shall be published in one issue of the Gazette. In considering an application the Board shall have regard to the following -

(a) the extent to which the proposed service is necessary or desirable in the public interests;

(b) the needs of the area as a whole which it is proposed to operate the service, including the provision of adequate, suitable and efficient transport services and the elimination of unnecessary and unremunerative services;

(c) the suitability of the routes and the conditions of the roads upon which it is proposed to operate the service, that the time table is not so arranged that the provisions of the Tenth Schedule to the Act are likely to be infringed;

(d) the number of the vehicles to be used on the services;

(e) that the fares to be charged are reasonable;

(f) that the fares are so fixed as to prevent wasteful competition with alternative means of transport on the proposed routes or any part of them;

(g) any representations which may be made by persons who are already providing transport facilities along or near to the proposed routes or any part of them;

(h) any representations which may be made by any interested local authority."

The resolution of this appeal

[19] To resolve this appeal, the following questions need to be answered. Did the Board itself consider and decide the applications of Gilharry, as it was under a duty to do, or did it abdicate that duty to others? And if the Board genuinely considered and decided those applications itself, did it do so properly and fairly? Did the Board in April 2008 promise Gilharry that his permits would be renewed? Could they be renewed after they had expired, and if so, did this promise create and amount to a substantive legitimate expectation, and if so, was the Board bound to fully honour this expectation or was there sufficient justification for not honouring it?

Did the Board itself consider and decide the applications of the bus operators?

[20] As is clear from the evidence and was implicitly acknowledged by the courts below, the process resulting in the issuance of the road service permits in June 2011 was confusing and haphazard, and in any event unusual. Although the meeting of 30 March 2011 as announced in the Gazette probably never took place, there were multiple other meetings, most of them tumultuous, between the authorities and the bus operators. The affidavits of Gilharry reveal that at these meetings only some of the members of the Board were present, usually Gareth Murillo, the Chief Transport Officer. It appears that most of the time the Minister of Transport and officials of the Department of Transport consulted with the bus operators, sometimes also other ministers. Nowhere in his affidavits does Gilharry mention the presence of "the Board". The affidavits of the Chairman of the Transport Board, Flowers, and the Chief Transport Officer, Murillo, do not shed much light on this aspect of the case either, although both deposed in rather general terms that on 10 May 2011 "(t)he Board met with all the Northern operators in Belmopan". On that particular day, however, according to Gilharry, only Murillo and three Bus Terminal Managers were present, at which occasion Murillo "handed out to all bus operators new schedules of routes."

The Trial Judge

[21] The trial judge found that the Board had not abdicated its duties. Accepting the evidence of Flowers and Murillo, she concluded that the factual circumstances of the case made clear that this was not an ordinary "run of the mill situation". The entire bus industry, she said, had been in a national crisis for years and the Transport Board was restrained by the injunction from doing anything to address the crisis. She was of the view that the evidence of "continuous dialogue" between the bus operators, including Gilharry, and "the Board" was demonstrative of a serious effort on the Board's part to act in good faith. As such, the trial judge found that the Board had not acted arbitrarily.

[22] The trial judge further found that the Board had not acted ultra vires the Act. She was of the view that Murillo's evidence (which she accepted as true) showed that the Board "met and then sanctioned" the schedules suggested by the bus operators which was in accordance with the Board's duties under the Act to "consider and decide" the applications. The trial judge noted that the Board did not just meet among themselves

and then, out of the blue, without having consulted them, "impose[d] the new schedules from on high with complete disregard or disrespect for the bus owners". On the contrary, the Board did consult them and so, the trial judge found no merit in this ground.

The Court of Appeal

[23] The Court of Appeal agreed with the trial judge. It found that the trial judge had not erred or misdirected herself in relation to the power of the Board to "consider and determine" applications for renewal. The court was of the view that the Board was the one who ultimately decided the schedules, granted permits and other consents. Further, when the trial judge used the term sanctioned, it meant "approved" which equally implied, that the Board had the power to disapprove any schedules or routes suggested by the bus operators. In this regard, the court held that the trial judge had correctly found that section 4(7) of the Act was satisfied.

The relevant facts and the law

[24] It is trite law that where a decision maker is granted the power under legislation to make a decision, it must make that decision itself and cannot allow itself to be dictated to on what to decide nor should it abdicate its responsibility to another person or body. The decision maker can solicit the opinions of others as well as other information on the subject so long as it does not allow a decision to be dictated to it. In the context of this case, it follows that the Board could act on suggestions, proposals or advice given to it by the bus operators and as such there was nothing illegal with the Board approving the proposed new schedules or bus routes which the bus operators worked out amongst themselves. The Board was entitled to consider these proposals and if it agreed with them, which it apparently did, to approve them. What the Board could not do was unlawfully to abdicate its own discretion in favour of the bus operators' views or those of others (politicians or otherwise). But did the Board act within its remit, did it act within its powers (intra vires) as laid down in the Act and the regulations? Did it consider all the things it should have considered?

[25] To start with, it is not very clear if and to what extent the Board itself consulted or had a "continuous dialogue" with the bus operators. It is not clear how these consultations were conducted. It does not seem that there was space for special presentations on behalf

of individual operators or that these took place. Although the Board must regulate its own procedure, we do not know if it did and what that procedure is supposed to be. When the Board met, who was present, was there a quorum and how did the voting go? And when the Board considered and decided the applications, did it have regard to all the factors it was required to consider? We do not know. Although the Secretary to the Board "shall maintain proper records of the proceedings of the Board", no such records were submitted.

[26] On the other hand, the conclusion that this situation was not a "run of the mill case" appears to be justified. It seems quite clear that there was a national crisis for years in the public transportation industry in Belize, which was exacerbated by the interim injunction, although it is awkward, to say the least, that the Board apparently did not approach the judge who imposed the injunction to have it removed or varied when the Board experienced the detrimental effects it says it had. Nothing in this case indicates that such an attempt was made. Be that as it may, as far as we can see and thereby sailing on the compass of the local judges, it can fairly be assumed that the situation required stern measures to correct some of the abuses that had become part of the transportation system. It would seem, also, that not only the "old" bus operators had to be accommodated but also "new" ones, some of whom previously worked in the western zone and had to be diverted from there to the northern zone because the authorities had allowed a new company to operate in the former. It was suggested that this was a result of political favouritism, but we are not in a position to verify that. What is unclear, also, is whether some of the "new" operators that were being considered were former "snipers" or not. To allow bus operators who made use of the confusing situation caused by the injunction to illegally enter the business to become regularised, would be something debatable, but, again, we do not have that information.

[27] We agree that the Board had to operate in a very unusual situation in the months of February to June 2011 when it had to deal with northern bus operators. It was involved in two contemporaneous but distinct processes that were nevertheless closely linked: (1) the process of regularisation of the transportation sector and implementing the new policy of zoning, which required input from both the Minister of Transport and his Department as the leading authority and the Board as adviser on the one hand, and (2)

the process of considering and deciding applications for new permits or renewal of permits, which exclusively belonged to the duties and remit of the Board, on the other hand.

[28] This may have led to the unusual mix of methods used by the Board, although that does not mean that this unusualness would justify any transgression of the Board's powers. We are simply not in a position to say, as the courts below did, that the Board did not overstep its powers. Nor, however, can we positively say that the Board did transgress and act beyond its powers. It is at this point that this Court has to fall back on the ancient but still valid presumption of regularity: *Omnia praesumuntur rite et solemniter esse acta*, or, in English, all things are presumed to have been done in due form. In other words, Gilharry failed to show that the Board acted ultra vires and therefore not in accordance with its powers and duties.

Did the Board consider and decide Gilharry's applications?

[29] One of Gilharry's complaints is that the Board never considered or decided his applications for a renewal of the road service permits for the Northern route and the village runs. Instead, it decided to allot other routes to him for which it was willing to issue new permits (which he did not accept). The Court of Appeal noted in this respect that although Gilharry applied for the permits, he was the only one who never paid the required fees, a reason why his applications could not be considered. However, that reasoning is difficult to follow. Fees are not paid for applications to be considered but for permits to be issued (per regulation 213(4): "…fees shall be paid … for the initial issue or renewal of a road service permit…").

[30] The Court of Appeal referred in this respect to the affidavit of Murillo, where he stated that "(a)ll operators applied for and paid the required fees for the permits to operate (*sic!*) with the exception of the Claimant in this matter. The Claimant's application is still with the Transport Department awaiting the required fees by law." Upon close reading of Murillo's deposition, it becomes clear, however, that the applications to which he refers are not the applications that were published in the March Gazette. In the two preceding paragraphs of his affidavit, Murillo stated: "The new proposed schedule was worked out with all the operators and the Board met and sanctioned the schedules

which would have taken effect on the 19th June 2011. Applications were *then* (emphasis added) made for road service permits by all operators in the north including the Claimant in this action." It was supposedly these applications, and not the earlier ones published in the Gazette that were waiting to be processed. This part of Murillo's affidavit, moreover, does not find support in any other evidence and, given the legal infrastructure laid down in the Act and the regulations, it seems unlikely that the Board would have taken this course.

[31] A better or more plausible interpretation of the situation would seem to be that the Board did consider the applications of Gilharry (as well as those of the other operators) and decided to refuse most of them. Given the new zoning policy and the fact that Gilharry would continue to operate on the main roads, the Board must have decided that he should no longer be allowed to do the village runs and probably because there were more operators than before, it decided to give him fewer and other runs than he applied for. Whether the Board decided that in a proper and fair manner is, of course, something else. We will deal with that now.

Did the Board consider and decide the applications properly and fairly?

[32] This question was framed in terms of a natural justice issue. Was the Board's decision in accordance with the principles of natural justice?

The courts below

[33] The trial judge held that natural justice may be excluded for instance "where urgent action has to be taken to safeguard public health or safety", unless there was a legitimate expectation. Accepting there was a crisis, she found that the "Transport Board was obligated to deal with a situation that was verging on anarchy and threatening to undermine the entire system of transportation in the country". She saw this as an urgent situation which had public safety concerns and, as such, required the Board to act promptly in a manner that it saw fit for the proper administration of the transport system. The trial judge further held that Gilharry was not entitled to natural justice, especially because he like many others had been operating illegally, his licences having expired. Finally, she did not find it accurate to say that the decision to grant Gilharry fewer, and

less lucrative, routes destroyed his livelihood. The Court of Appeal agreed with the trial judge but added as another reason why Gilharry would not be entitled to natural justice the fact that he had not paid his fees required by law, an argument we have already considered and decisively rejected in paragraph [29].

The relevant facts and the law

[34] The common law imposes minimum standards of procedural fairness and due process which are now accepted as an additional limb to principles of natural justice. There are no rigid or universal rules as to what is needed to be procedurally fair. What is fair in relation to a case, depends on the circumstances of that case. There is a presumption that procedural fairness is required whenever the exercise of a power adversely affects an individual's rights protected by common law or statute. This presumption is even stronger where licences are to be revoked, varied, suspended or refused, especially if these licences embody some form of property which is a fundamental right protected by the Constitution.

[35] The primary consideration in deciding whether there is a right to be heard in a particular instance, is fairness. Moreover, the question whether there is a right to be heard in an administrative process may be subsumed in the broader question of whether the course of action adopted by the decision-maker was fair. But what is fair? It is a very broad concept that might require some mapping exercise in the field of administrative law, for example by focussing on principles of proper and fair administration, such as the duty to apply due care when preparing a decision or the principle of proportionality.

[36] In this case, we need not explore these principles too much as the duty to allow an "old" bus operator an opportunity to make a representation, surely one that goes beyond a simple group consultation, is laid down in regulation 207(g) which requires the Board to have specific regard to "any representations which may be made by *persons who are already providing transport facilities* along or near to the proposed routes or any part of them (emphasis added).

[37] The argument that the situation was so urgent that the Board could not be expected to spend time on a separate hearing cannot be accepted. Although we agree that the Board

had to act promptly, we note that the deliberations and consultations took place over a period of more than a month with regular intervals in between. This is not a situation which precluded the Board from doing its duty. There was ample time to hear Gilharry's objections.

[38] The Board's argument that Gilharry was not entitled to a fair procedure as he was operating illegally, unfortunately accepted by the courts below, does not hold water either and almost borders on the audacity of what could be called a *chutzpah*[2]. Although it is true that Gilharry, like everyone else, operated his buses with expired permits, he cannot be blamed for that as this situation was caused not by him but originated at the Board who fully accepted it and even acted towards Gilharry as if he still had his permits.

[39] Given the fact that Gilharry was one of the major bus operators on the northern route with a long track record and 54 employees, having made significant investments and having assisted in the development of the transportation system in Belize, and having regard to the clearly severe consequences of the proposed schedule for him, his business and his employees, the Board should not have approved that schedule before giving him a special opportunity to present his case, even though the new schedule would not have destroyed his livelihood completely. Regulation 207 (properly construed), fairness, due care and proportionality required so much, whether or not Gilharry had a legitimate expectation that his permits would be renewed.

[40] Of course, an additional reason requiring the Board to offer Gilharry a proper opportunity to make a presentation to them would have existed if it can be established that he had a legitimate expectation based on the assurances the Board allegedly gave him. We therefore now turn to that question.

Did Gilharry have a legitimate expectation?

[41] The first question that needs to be answered is: did the Board in April 2008 promise Gilharry that his permits would be renewed when the Board was in a position to do so?

[2] The classic definition of 'chutzpah' is that quality enshrined in a man, who having killed his mother and father, throws himself upon the mercy of the court because he is an orphan (Leo Rosten, *The Joys of Yiddish*). See also J.A. Guggenheim, *The Evolution of Chutzpah as a Legal Term: The Chutzpah Championship, Chutzpah Award, Chutzpah Doctrine and Now, the Supreme Court*, 87 Kentucky Law Journal 417 1998-1999.

Given the evidence, as set out in [8], we have no difficulty in finding that that promise was indeed made. But could these permits be renewed after they had expired? It is clear that the Board had allowed Gilharry to operate on expired permits on two separate occasions and subsequently renewed his road service permits, although that does not necessarily mean that the Board's approach was appropriate or legal.

The Courts below

[42] Both the trial judge and the Court of Appeal held that the licences held by the bus operators came to an end due to the effluxion of time. Therefore, when the injunction was lifted there was no licence to be renewed. It would be illegal for the Board to renew licences that had already expired, hence the promise to renew them could not be the basis for a claim of legitimate expectation as one cannot have a legitimate expectation based on something that is contrary to the law: (R v. Department of Education ex parte Begbie [2000]1 WLR 1115). Legitimate expectations must be grounded on a legal basis, which, the Court of Appeal held, "would have been a valid license which is coming to an end and needed to be renewed". Even if Gilharry had a legitimate expectation , he could not complain about the Board having frustrated that expectation when he applied for his permits but chose not to pay the prescribed fees. The Court of Appeal further added that the promise, if any, made by the Board in May 2008 to Gilharry was no longer relevant because of the change of policy, ie the introduction of the zoning.

The relevant facts and the law

[43] When ascertaining whether a substantive legitimate expectation has arisen, the focus should be not on what the representee subjectively expects, but rather, upon what he or she is entitled to expect as a result of "a specific undertaking, directed to a particular individual or group, by which the relevant policy's continuance is assured."[3] Additionally, there needs to be "a clear and unambiguous representation, devoid of relevant qualification" so that effect can be given to such representation."[4]

[3] Pharsalus v. Commissioner of the Guyana Geology and Mines Commission per Hayton JCCJ (2013 83 WIR 401)
[4] Ibid

[44] The promise the Board made to Gilharry in May 2008 was such a representation: the Board undertook to, retroactively it would seem, renew his soon to expire or recently expired permits when it was ready to do so and Gilharry would at that time have to pay the fees for those renewals. As a result, he was entitled to expect to receive permits that would retroactively cover the past period upon payment of the required fees. In our view, there is nothing illegal in retroactive renewals of road service permits. By making the promise, the Board did basically renew the permits without in fact issuing them in the required form. That may be irregular but it does not constitute an illegal situation. However, even if a renewal would be illegal, Gilharry, was entitled to expect at least to receive a new permit at the time of his application as a result of the Board's promise. It is clear, he could only expect this upon payment of both the fees he should have paid in 2008 and 2010 (in case of renewals) or the new fees of 2011 (in case of new permits). That Gilharry could not complain about his treatment by the Board because he chose not to pay the latter fees, is not correct as these were fees for permits he did not want instead of fees for the ones he applied for. We therefore do not agree with the courts below that there was no legal basis for claiming a legitimate expectation. In our view, Gilhary had a legitimate expectation, which was not honoured by the Board.

[45] That is, of course not the end of the story. Even where the facts give rise to a substantive legitimate expectation, as they do in this case, there may be instances where an overriding public interest justifies the frustration of the legitimate expectation.[5] This Court in *Pharsalus* has also noted that:

> "while the claimant and the public have an interest in persons being able to rely upon legal certainty and fair, good governance, authorities … normally have to be allowed discretionary leeway in the developing public interest to formulate and re-formulate policy, balancing competing interests across a wide spectrum and deciding the content and pace of change."[6]

The reason for this is that the courts must not usurp the discretion of the public authority which is empowered to take the decisions under law.

[5] Paponette v. Attorney General [2011] 3 LRC 45
[6] Ibid at [29]

[46] In the case at bar, for some time there had been ongoing problems with the transportation system in Belize which were exacerbated by an interim injunction that was in place for more than two years. After this injunction was lifted, the transportation sector was in turmoil for months, measures had to be taken and a new policy had to be implemented, on one occasion causing nation-wide disruption of the public transportation system. In those circumstances, it may be fair to find that the overriding public interest would have justified a frustration of Gilharry's legitimate expectation. However, the question is not just if such a frustration would be justified but also to what extent it would have been. The balancing of interests could very well have led to the conclusion that Gilharry needed to allow some water in his legitimate expectation wine but not as much as the Board now forced him to. This needed to be assessed by applying the principle of proportionality. This test has not been applied by the courts below nor, it would seem, by the Board. The consultation method that was used was clearly not suited for such an exercise. Whenever it seems justified for an authority to renege on a promise or frustrate a legitimate expectation, no action should be taken before giving the representee an opportunity to make representations. This has not happened here which was undoubtedly unfair to Gilharry. He is therefore entitled to appropriate declarations.

Relief

[47] Having found that the Transport Board was in breach of the principles of natural justice, we turn now to the reliefs sought by Gilharry. Apart from declaratory relief, he initially asked this Court to grant an order that the Transport Board consider the renewal of his application in accordance with the Act and the Regulations. At the hearing, however, counsel for Gilharry, surrendering to reality, stated that he would no longer pursue this relief. Instead, he maintained his alternative request, that damages be assessed and paid for the losses that Gilharry has suffered as a result of non-renewal of his licences.

[48] It is trite law that damages must be pleaded and particularised. The Court must be satisfied that there was some damage or loss suffered, how it was suffered, and sufficient evidence of that loss must be placed before the Court so that the Court can exercise its discretion as to whether to make an award of damages and as to the quantum. At the trial in the Supreme Court, Gilharry in his claim for judicial review sought, *"Damages, cost and any other just orders."* The extent of his claim for damages is found in his third

Affidavit, before the Supreme Court at paragraph 37, where he deposed as follows: "*For each day that the claimant is unable to operate on the Main Route the claimant suffers loss in the sum of $30,000.00 each week in respect of the eleven (11) buses inclusive of $7,500.00 paid as emoluments to the 54 employees and $14,000.00 spent on fuel plus other operating expenses.*"

[49] No details of pecuniary loss were sufficiently pleaded or particularised in any document before the court of first instance. Additionally, when appealing to the Court of Appeal, no ground of appeal was raised relating to the failure of the Supreme Court to award damages. This request for damages was again brought up and revisited at this Court. Although Gilharry clearly suffered pecuniary loss, it is difficult if not impossible for us to establish the extent of the losses that could be attributed to the Board's wrongful action as we do not know what would have been the result of the Board's considerations and "balancing act" if it had properly directed its attention to Gilharry's arguments. Moreover, there is a duty to mitigate losses, a duty Gilharry did not comply with. He could have accepted, without prejudice, the permits that were offered to him, thus limiting the damaging effects of the Board's decision, but he did not. Instead, he ignored the new schedule, kept his buses off the highway, refused to make any of the runs allotted to him, and went straight to the courts on an all-or-nothing streak (not always the wisest thing to do). Given these difficulties, there is insufficient evidence that the Court can rely on to arrive at an appropriate figure whereas it would be an exercise in futility to send the case back to the Supreme Court. The only pecuniary relief that the Court can give Gilharry is an order directing the Board (and the rest of the Respondents) to pay his costs in this Court and those in the courts below on an indemnity basis and in an expedited manner.

Disposal

[50] The Appeal is allowed.

[51] It is declared that the Transport Board:

1. did not lawfully and properly consider the renewal application of the Appellant;
2. frustrated the legitimate expectation of the Appellant.

[52] It is ordered that the Respondents pay the Appellant's costs before this Court and the courts below. The Appellant shall submit to the Respondents his statement of costs incurred before all three courts on an indemnity basis within 30 days; the Respondents, if they do not agree with that statement, will have liberty to apply to this Court within 30 days upon receipt of the statement of costs, failing which the costs are deemed to be agreed; in the meantime the Respondents shall forthwith make an advance payment to the Appellant in the amount of BZ$40,000.00 (being the basic costs of the procedure before this Court).

[53] All other applications are dismissed.

/s/ CMD Byron

The Rt. Hon. Sir Dennis Byron, President

/s/ A. Saunders

The Hon Mr Justice A Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee