[2010] UKPC 32
Privy Council Appeal No 0009 of 2010

JUDGMENT

Francis Paponette and Others (3) *v* The Attorney General of Trinidad and Tobago

From the Court of Appeal of Trinidad and Tobago

before

Lord Phillips
Lady Hale
Lord Brown
Sir John Dyson, SCJ
Sir Malachy Higgins

JUDGMENT DELIVERED BY
Sir John Dyson, SCJ
ON

13 December 2010

Heard on 1 and 2 November 2010

Appellant	*Respondent*
Peter Knox QC Ramesh Lawrence Maharaj SC Robert Strang (Instructed by Collyer Bristow LLP)	Alan Newman QC (Instructed by Charles Russell LLP)

SIR JOHN DYSON SCJ

Introduction

1. The appellants are members of the Maxi-Taxi Association ("the Association") who own and operate maxi-taxis in Port-of-Spain, Trinidad. A maxi-taxi is defined by section 2 of the Maxi-Taxi Act 1992 Ch 48:53 as a public service motor vehicle with seating for not less than nine and not more than 25 passengers.

2. Trinidad has five maxi-taxi route areas, fixed by the Maxi-Taxi Regulations (No 109 of 1992). The members of the Association operate their maxi-taxis on routes 2 and 3. Until 1995 they operated from a taxi stand at Broadway in Port-of-Spain. They controlled and managed their own affairs and did not have to pay a levy or fee for the use of the taxi stand at Broadway, which was located on a public road.

3. In 1995 the government proposed moving the taxi stand for routes 2 and 3 from Broadway to a new location at the Port-of-Spain Transit Centre at City Gate in South Quay ("City Gate"). City Gate is situated on land owned by the Public Transport Service Corporation (PTSC). The PTSC is a body corporate established by the Public Transport Service Act 1965 Ch 48:02. It owns and operates the bus service in Trinidad and Tobago. At all material times, the maxi-taxi operators have regarded the PTSC as a competitor.

4. The Minister of Works and Transport, who is responsible for the management and operation of all taxi stands in Trinidad, held discussions with members of the Association, including the appellants, regarding the proposed move. The maxi-taxi owners and operators were reluctant to move, but in the end agreed to do so in reliance on assurances by the minister that (i) they would not be under the control or management of the PTSC; (ii) the National Insurance Property Development Co Ltd ("NIPDEC") would provide training so that the management of City Gate would be handed over to the Association within a period of three months: if NIPDEC within three months were to recommend that the Association was not ready for the responsibility of the management of the facility the period could be extended by three months; and (iii) a skywalk would be constructed to allow passengers a pathway from the city centre to City Gate. The Board will refer to these assurances as "the representations".

5. Following the relocation, between 1995 and 1997 NIPDEC managed the taxi stand at City Gate, but did not charge the maxi-taxi owners and operators a fee for

their use of it. The management was not handed over to the Association. Instead, the government decided that the PTSC should take over the management and control of City Gate. To this end, the government introduced the Port-of-Spain Transit Centre (Public Service Vehicle Station) Regulations (No 227 of 1997) ("the 1997 Regulations") which gave the PTSC the responsibility for managing City Gate and the power to charge members of the Association for its use. The 1997 Regulations required the maxi-taxi owners and operators to apply to the PTSC for a permit to operate from City Gate.

6. The PTSC took over the management and control of City Gate in about 1998. Initially, members of the Association were not charged for its use. But since August 2001, they have been required to purchase a card which is used to activate barriers at the exit and to pay a fee of $1.00 for each exit journey. Three-quarters of the user fee is retained by the PTSC and one quarter is given to the Association.

7. The maxi-taxi owners and operators on routes 2 and 3 are the only maxi-taxi operators who are required to pay a fee to use their taxi stand. They are also the only maxi-taxi owners and operators who are required to apply to the PTSC (or any state agency or public corporation) for a permit and who are required to satisfy the PTSC that they are fit and proper persons to use the taxi stand.

The statutory framework

8. The Constitution of Trinidad and Tobago provides so far as material:

> "4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely-
>
> > (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;
> >
> > (b) the right of the individual to equality before the law and the protection of the law;
> >
> > . . .

(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions;

. . .

5 (1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared."

9. The 1997 Regulations were made under sections 101 and 105 of the Motor Vehicles and Road Traffic Act 1934 Ch 48:50 (as amended). Section 101 provides that the minister responsible for "Passenger Transport" may make regulations for the purposes of sections 102 to 106. Section 105(1) provides:

"(1) Regulations under section 101 may make provision generally as to the conduct of persons using a station and in particular –

(a) for appointing any place, being the property of the Corporation or being part of a road, a station for public service vehicles;

(b) in the case of a road, for authorising the Corporation to do all thing as are necessary to adapt the station for use as such, and in particular to provide and maintain waiting rooms, ticket offices, refreshment places and lavatories and other similar accommodation in connection therewith;

(c) for authorising the Corporation to make reasonable charges for the use of, or to let on hire to any person, any accommodation so provided; and

(d) for the use of any such accommodation.

(2) In this section 'Corporation' means the Corporation established under the Public Transport Service Act, and 'station' includes bus stops and coach stations and terminals that may be used by public service vehicles belonging to the Corporation as parking places."

10. Regulation 3(2) of the 1997 Regulations provides:

"The Corporation is authorised to make reasonable charges for the use of any accommodation on its property so provided."

11. Regulation 4 provides:

"(1) The owner or operator of a public service vehicle who desires to use the Transit Centre shall apply to the Corporation in the manner set out in Form 1 of the Schedule.

(2) Upon receipt of an application form under subregulation (1) and the payment of a fee of one hundred dollars from an owner or twenty-five dollars from an operator, the Corporation upon being satisfied that such owner or operator is a fit and proper person to use the Transit Centre shall issue to such owner or operator a permit in the manner set out in Form 2 of the Schedule."

The proceedings

12. The appellants filed a constitutional motion in the High Court on 24 August 2004. They claimed inter alia that (i) the actions of the state had frustrated their legitimate expectations of a substantive benefit in a way which affected their property rights protected under section 4(a) of the Constitution; and (ii) they had been treated unfavourably by the government as compared with other maxi-taxi owners and that they had thereby suffered a breach of their right to equal treatment under section 4(d) of the Constitution. In short, their section 4(a) case was that, by making the 1997 Regulations which authorised the PTSC to manage and control City Gate and charge its users a fee for the use of the facilities, the government had acted in breach of the representations. Their section 4(d) case was that the circumstances of the owners and operators of routes 1, 4 and 5 (the comparators) were not materially different from their own so that their difference in treatment was not justified.

13. The motion was supported by an affidavit sworn by the appellants on 21 and 23 August 2004. At appendix A of that affidavit are the names and signatures of several hundred other maxi-taxi owners and operators on whose behalf the appellants brought the motion. In the event, the appellants' affidavit was the only evidence before the High Court at the hearing of the motion, because the respondent failed to comply with the deadlines set for filing its evidence.

14. On 3 May 2006, Ibrahim J refused the respondent's application for leave to extend the time for filing affidavits to 2 May 2006. As a result the affidavit of Roger Israel on behalf of the respondent which was filed on 2 May 2006 was not admitted as

evidence. On the same day Ibrahim J refused the oral application of the PTSC to be joined as a party to the proceedings.

15. Ibrahim J delivered his judgment on 20 June 2008. He granted declarations in the terms sought:

> "(a) A declaration that the conduct and/or action of the executive arm of the State in permitting the Public Transport Service Corporation to impose a mandatory $1.00 user fee and/or levy on Maxi Taxi Owners and/or Operators per exit trip from the Port of Spain Transit Centre is unconstitutional, null, void and of no effect in that it contravenes their right and those they represent to the enjoyment of their property as guaranteed to them in section 4(a) of the Constitution of the Republic of Trinidad and Tobago.
>
> (b) A declaration that the Applicants and those they represent have been treated unequally by the executive arm of the State in contravention of section 4(a) *(sic)* of the Constitution of the Republic of Trinidad and Tobago in that it authorised and/or facilitated that they pay an exit fee for the use of the Taxi stand at the Port of Spain Transit Centre while other Taxi drivers and/or Maxi Taxi Owners and/or operators do not have to pay such a fee."

16. The judge ordered that (i) the executive arm of the State take immediate steps to permit the appellants and those they represent to exit the Port-of-Spain Transit Centre without having first to pay the user fee of $1.00 or any other user fee; (ii) the respondent pay the appellants and those they represent monetary compensation for the infringement of their fundamental rights which he assessed as the refund of three quarters of the user fees that had been paid by them; and (iii) the respondent pay the appellants' costs.

17. The respondent appealed to the Court of Appeal inter alia on the grounds that the judge was wrong to hold that (i) the imposition of the user fee contravened the appellants' property rights; (ii) the appellants had a legitimate expectation which was not fulfilled; (iii) the other maxi-taxi owners and operators were similarly circumstanced to the appellants for the purposes of comparison; and (iv) the state's treatment of route 2 and 3 maxi-taxi owners and operators was in breach of section 4(d) of the Constitution.

18. In a judgment delivered on the 23 February 2009 by Warner JA (with whom Mendonca JA and Weekes JA agreed), the Court of Appeal allowed the appeal. The Board will refer to the judgment in more detail later. At this stage, it is sufficient to

say that the court held that there was no breach of section 4(a) because (i) there was no interference with property or any property right (para 67) and (ii) if there was such an interference, it was "by due process of law" within the meaning of section 4(a), since there was no frustration of any substantive legitimate expectation (paras 39 and 66). The court also held that there was no breach of section 4(d) because the circumstances of the owner/operators of routes 1,4 and 5 (the comparators) were materially different from those of the appellants (para 75).

Breach of section 4(a) of the Constitution

Was there an infringement of the appellants' right to the enjoyment of property?

19. The Court of Appeal considered a number of authorities. These included *Campbell-Rodriques v Attorney-General of Jamaica* [2007] UKPC 65. The judgment of the Board was given by Lord Carswell. It concerned the question whether the replacement of an inadequate public road and bridge by an improved road and a new bridge for which tolls were to be charged breached section 18 of the Constitution of Jamaica. Section 18(1) provides that "No property…shall be compulsorily taken possession of…except by or under the provisions of a law that (a) prescribes the principles on which and the manner in which compensation therefor is to be determined…". It was held that, on the facts of that case, there was no taking of possession of property. At paras 18 and 19, Lord Carswell said that regulation cases provided a persuasive analogy because:

> "They establish clearly that there are limits to the concept of taking property and that some types of state action which could linguistically be so regarded are not to be regarded as justiciable. It is well established that measures adopted for the regulation of activity in the public interest, such as planning control or the protection of public health, will not constitute the taking of property, notwithstanding the fact that they may have an adverse economic effect on the owners of certain properties."

20. The Court of Appeal also referred to the European Court of Human Rights decision in *Tre Traktörer Aktiebolag v Sweden* (1989) 13 EHRR 309. In that case, the applicant's licence to serve alcohol at its restaurant was revoked. It was contended that there had been a breach of article 1 of Protocol No 1 of the European Convention on Human Rights which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in

> the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

21. At para 53 of its judgment, the ECtHR rejected the argument that a licence to serve beverages could not be considered a "possession" within the meaning of article 1 of the Protocol. They held that "the economic interests connected with the running" of the restaurant were "possessions" and that the withdrawal of the licence had adverse effects on the goodwill and value of the restaurant. Such a withdrawal constituted an interference with the applicant's "peaceful enjoyment of [its] possessions".

22. Warner JA said at para 62 that a critical factor in that decision was that the withdrawal of the licence directly affected the company's business: "the operation of the business was not possible without the licence. That is not the present case. The [appellants] ply their vehicles for hire, using the Priority Bus route and facilities provided by the PTSC". At para 65, she said: "I have gathered from the authorities…that the interference complained of must be substantial to amount to a deprivation. If therefore a claimant can still put his 'property' to use, then the challenge will not succeed." She concluded that the fact that the members of the Association were subject to the management and control of the PTSC and had to pay a use fee was not a sufficient interference with their property to amount to a breach of their section 4(a) rights.

23. The Board does not agree with this conclusion. In order to prove an infringement of the right to enjoyment of property, it is not necessary to show in a business context that the infringement makes the operation of the business impossible. That was not the effect of the *Traktörer* decision. The infringement must, however, reach a certain level of significance. The regulation cases such as *Traktörer* should be applied with some care. In many of the cases relied on by the Court of Appeal, the principle that was being applied was not that a regulatory restriction could not of itself involve the taking of property. Rather it was that, as Lord Hoffmann put it in *Grape Bay Ltd v Attorney General* (1999) 57 WIR 62, at p72:

> "It is well settled that restrictions on the use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of that property for which compensation should be paid."

24. Indeed, in *Traktörer* the ECtHR said at para 55 that the withdrawal of the licence to serve alcohol "constituted a measure of control of the use of property, which falls to be considered under the second paragraph of article 1 of the Protocol". The court then considered the lawfulness and purpose of the interference. It concluded that the withdrawal of the licence was done in the public interest in furtherance of the social policy of controlling the sale of alcohol.

25. It was not necessary for the appellants in the present case to show that the effect of what the PTSC did pursuant to the 1997 Regulations was to deprive them of their businesses altogether. There is no warrant for interpreting section 4(a) of the Constitution in this way, any more than article 1 of Protocol No 1 of the European Convention on Human Rights is to be so construed. The interference with their businesses was substantial. They had previously managed and controlled their own affairs. Now they were subjected to the control and management of their competitor, who, pursuant to the authority conferred by the 1997 Regulations, charged them a fee for every exit journey and decided whether they were "fit and proper" persons to be granted a permit to use the City Gate facility at all. Prima facie, therefore, there was an infringement of the members' section 4(a) rights. In these circumstances, it was for the government to justify the interference as being in the public interest. If they failed to do so, the breach was established.

26. This brings the Board to what was the real focus of the argument in relation to the section 4(a) issue before us, namely whether the appellants were deprived of their right to enjoyment of property "by due process of law".

"Except by due process of law": substantive legitimate expectation

27. The appellants' case in summary is as follows. The representations were clear and unequivocal and gave rise to legitimate expectations of a substantive benefit. They were made to a defined group of people, namely the members of the Association, with the aim of persuading them to agree to a move from Broadway to City Gate. The members of the Association relied on the representations and moved. By making the 1997 Regulations and authorising the PTSC to manage and control the members of the Association, the government acted in breach of the representations. This was so unfair as to amount to an abuse of power and was, therefore, unlawful.

28. In a case where the legitimate expectation is based on a promise or representation, a useful summary of the relevant principles was given by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] AC 453, at para 60:

> "It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131."

29. Warner JA considered that the representations made by the minister in this case were not sufficiently clear. At para 39 of her judgment, she said:

> "In applying the law to the facts of this case in my opinion, the first point of reference must be 'the representation'. On the appellants' case (paragraph 7) there was no clear promise not to charge a user fee or transfer '*management'* to the Maxi-Taxi Association, and as Mr Maharaj [counsel for the appellants] seems to have accepted, the promise advanced was that the owner/operators *'would not be under the control and/or management'* of the PTSC. The [appellants'] argument becomes untenable if one were to ask, what does management involve? Or, what lies within the scope of the promise or representation?"

30. As regards whether the representations were "clear, unambiguous and devoid of relevant qualification", the Board refers to what Dyson LJ said when giving the judgment of the Court of Appeal in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397, at para 56: the question is how on a fair reading of the promise it would have been reasonably understood by those to whom it was made. The words "management" and "control" are ordinary English words whose meaning is well understood. The members of the Association had been controlling and managing their own affairs. They knew that they were being asked to move to a facility which was owned by PTSC. In that context, they would reasonably have understood the representations as reassuring them that they would be able to continue to control and manage their own affairs if they moved. Managing their own affairs would include not having to satisfy anyone else (still less a rival) that they were fit and proper persons who required a permit for the use of the facilities and not having to pay a fee each time they made an exit journey. The fact that there might have been some uncertainty as to precisely what management entailed does not mean that the representations were not clear and unambiguous. They were certainly devoid of any relevant qualification.

31. The finding by Warner JA that there was no clear and unambiguous representation was sufficient for her to reject the appellants' claim to a legitimate expectation. But at para 40 of her judgment she also rejected the claim on the grounds that there was nothing "unfair about the PTSC's imposition of a fee, in view of the provisions of the Public Transport Service Act 1965". As she pointed out, the PTSC was vested with the power to manage its "rail and road transportation services" (section 15 of the 1965 Act). She said that the powers of the PTSC extended no further than was expressly stated in that Act or was necessarily and properly required for "carrying into effect the purposes of incorporation, or may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorised". In fact, contrary to what Warner JA said, the power in the PTSC to impose a fee and to manage and control the City Gate facility derived from the regulations made under section 105 of the Motor Vehicles and Road Traffic Act 1934 (as amended). In any event, the fact that there was statutory power for the imposition of the fee does not answer the appellants' case.

32. Mr Peter Knox QC submits that by making the 1997 Regulations the government frustrated the appellants' legitimate expectation arising from the clear representation that, if they relocated to City Gate, they would not be under the control or management of the PTSC and that, within six months (at most), the management of the facility would be handed over to them. He says that the making of these regulations was an abuse of power to the extent that, in breach of the representations, they authorised the PTSC to make reasonable charges for any accommodation on its property (regulation 3) and authorised and required the PTSC to issue permits to the owners or operators of public service vehicles for a fee upon being satisfied that such owners or operators were fit and proper persons to use the Transit Centre (regulation 4). Mr Knox accepts that the representations were not binding on the government indefinitely, but he submits that they were binding until there was a material change of circumstances.

33. The Board broadly accepts Mr Knox's submissions. It is true that there was no express representation that, if the members of the Association moved to City Gate, the PTSC would not charge them for the use of the facility (whether a permit fee or a user fee per journey). But the charging of fees was incidental to the exercise of the PTSC's management and control of the City Gate facility and a direct consequence of the authorisation given to it by the 1997 Regulations. It was, therefore, a direct consequence of the breach of the representations which were relied on by the Association in agreeing to relocate to City Gate.

34. The more difficult question is whether the government was entitled to frustrate the legitimate expectation that had been created by its representations. In recent years, there has been considerable case law in England and Wales in relation to the circumstances in which a public authority is entitled to frustrate a substantive legitimate expectation. Some of it was referred to by Warner JA in her judgment.

The leading case is *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213. Lord Woolf MR, giving the judgment of the Court of Appeal said, at para 57:

> "Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive,* not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy. "

35. It is not in dispute that this is the test that is applicable in the present case. Indeed, it is the test which Warner JA purported to apply at para 40 of her judgment. But she did not identify any overriding public interest which justified the government's acting inconsistently with the representations. She regarded the provisions of the 1965 Act which authorised the imposition of a fee as being sufficient in themselves to demonstrate that the breach of the representations was not unfair. But the fact (which was not in dispute) that there was statutory authority for the making of the 1997 Regulations does not determine whether the making of the regulations amounted to an abuse of power.

36. The critical question in this part of the case is whether there was a sufficient public interest to override the legitimate expectation to which the representations had given rise. This raises the further question as to the burden of proof in cases of frustration of a legitimate expectation.

37. The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.

38. If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount

to an abuse of power. The Board agrees with the observation of Laws LJ in *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at para 68: "The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances." It is for the authority to prove that its failure or refusal to honour its promises *was* justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was *not* justified.

39. How an authority justifies the frustration of a promise is a separate question which is of particular significance in the present case. This is because the respondent placed no evidence before the judge or the Court of Appeal to explain why the 1997 Regulations were made. Mr Newman QC sought to place before the Board a document dated May 2005 which purported to provide some explanation, but we refused the respondent permission to adduce this evidence (which was controversial) so late in the proceedings.

40. The Court of Appeal had, however, admitted in evidence the affidavit of Roger Israel which is mentioned at para 14 above. He gives some evidence about the circumstances in which the representations were made. He also says that there was an agreement that all interested parties should be represented on a Board of Management for City Gate, including the government, the PTSC, NIPDEC and the maxi-taxi owners and operators. An Interim Board of Management was established. He says, however, that City Gate was in operation for only a matter of days before there was a change in political administration. The new minister "disregarded" the Interim Board and dealt separately with all the parties. But Mr Israel does not say why the 1997 Regulations were made despite the representations. Nor does he say that, in making the 1997 Regulations, the minister took the representations into account.

41. It follows that the respondent has provided the court with no statement of the reasons why the 1997 Regulations were made notwithstanding that their effect would be in conflict with the representations. Mr Newman submits that it is possible to infer from the mere fact that the 1997 Regulations were made that there had been a change of policy and that this must have been in response to some public interest which overrode the expectations generated by the representations. The Board rejects the proposition that the court can (still less, should) infer from the bare fact that a public body has acted in breach of a legitimate expectation that it must have done so to further some overriding public interest. So expressed, this proposition would destroy the doctrine of substantive legitimate expectation altogether, since it would always be an answer to a claim that an act was in breach of a legitimate expectation that the act must have been in furtherance of an overriding public interest.

42. It follows that, unless an authority provides evidence to explain why it has acted in breach of a representation or promise made to an applicant, it is unlikely to be able to establish any overriding public interest to defeat the applicant's legitimate expectation. Without evidence, the court is unlikely to be willing to draw an inference in favour of the authority. This is no mere technical point. The breach of a representation or promise on which an applicant has relied often, though not necessarily, to his detriment is a serious matter. Fairness, as well as the principle of good administration, demands that it needs to be justified. Often, it is only the authority that knows why it has gone back on its promise. At the very least, the authority will always be better placed than the applicant to give the reasons for its change of position. If it wishes to justify its act by reference to some overriding public interest, it must provide the material on which it relies. In particular, it must give details of the public interest so that the court can decide how to strike the balance of fairness between the interest of the applicant and the overriding interest relied on by the authority. As Schiemann LJ put it in *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607, [2002] 1 WLR 237, at para 59, where an authority decides not to give effect to a legitimate expectation, it must "articulate its reasons so that their propriety may be tested by the court".

43. There may be circumstances where it is possible to identify the relevant overriding public interest from the terms of the decision which is inconsistent with an earlier promise and the context in which it is made. In such a case, the terms of, and background to, the decision itself may provide enough material to enable the court to decide how the balance should be struck. But that is likely to be a rare case. The 1997 Regulations fall far short of providing such information for the purposes of the present case.

44. The position is different where, properly understood, a promise is only for a limited period. If it is for a specified limited period, then once that period has expired, the promise ceases to bind. The promise may also be subject to an implication that it is for no more than a reasonable period. In that event, once a reasonable period of time has elapsed, the promise ceases to bind. But it is not said by the respondent in these proceedings that the representations were for a limited period or a reasonable time which had expired. Its case is simply that, even if clear and unambiguous representations were made by the minister in 1995, there was no unfairness amounting to an abuse of power on the part of the government in making the 1997 Regulations.

45. There is a further point. In *Bibi*, Schiemann LJ said that an authority is under a duty to consider a legitimate expectation in its decision making process. He said:

> "49. Whereas in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 it was common ground that the authority had given consideration to the promises it had made, in the present cases,

> that is not so. The authority in its decision making process has simply not acknowledged that the promises were a relevant consideration in coming to a conclusion as to whether they should be honoured and if not what, if anything, should be done to assuage the disappointed expectations.
>
> . . .
>
> 51. The law requires that any legitimate expectation be properly taken into account in the decision making process. It has not been in the present case and therefore the authority has acted unlawfully."

46. The Board agrees. Where an authority is considering whether to act inconsistently with a representation or promise which it has made and which has given rise to a legitimate expectation, good administration as well as elementary fairness demands that it takes into account the fact that the proposed act will amount to a breach of the promise. Put in public law terms, the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account.

47. It was, therefore, incumbent on the government to show that it had taken into account the fact that the effect of the 1997 Regulations was to breach the earlier promises. This it has signally failed to do. It is by no means self-evident that the government would have appreciated that the 1997 Regulations were in breach of the representations.

48. It is true that these proceedings were not issued until September 2004, ie six years after the 1997 Regulations were made. There is no evidence that the Association protested about the 1997 Regulations when they were made. Their real complaint is that the 1997 Regulations placed them under the management and control of their rivals the PTSC. The specific complaint that they were required to pay $1.00 per exit journey is of less significance since the PTSC were only entitled under regulation 3(2) to make "reasonable" charges. If the charges were not reasonable, the members of the Association did not have to pay them. But the fact that the proceedings were issued six years after the 1997 Regulations was not relied on by the respondent as a ground of defence either before the judge or in the Court of Appeal. Nor was it relied on before the Board.

49. To summarise: the representations were clear, unambiguous and devoid of relevant qualification. They were made to a defined class, namely the maxi-taxi owners and operators who used routes 2 and 3. They were relied on. The critical representation was that they would not be under the control and management of the

PTSC. These bare facts are enough to give rise to a substantive legitimate expectation that the owners and operators would be permitted to operate from City Gate and would not be under the control or management of the PTSC. The government has not proved that there was an overriding public interest which justified the frustration of this legitimate expectation. For all these reasons, the appellants' case on section 4(a) of the Constitution succeeds.

Breach of section 4(d) of the Constitution

50. Since the Board would allow the appeal under section 4(a), it is not necessary to deal with the claim based on section 4(d). Nevertheless, in deference to the submissions of counsel, it will deal with the point, albeit briefly. The appellants took as their comparators the other maxi-taxi drivers of Trinidad, namely those on routes 1, 4 and 5. Their case is that they and the other owners and operators on routes 2 and 3 have been treated differently from maxi-taxi owners and operators on the other routes, because they are the only ones who are required to submit to the control of the PTSC in order to use their taxi stand and the only ones who are required to pay a fee for its use.

51. The Court of Appeal accepted that the appellants are treated differently, but identified circumstances which they said meant that the difference in treatment was lawful. Warner JA set out her conclusion at para 75 of her judgment:

> "The owners/operators of route 1, 4 and 5 do not use the City Gate facility—that is the most obvious area of difference which is reflected in the route areas traversed (see the Maxi-Taxi Act). They do not ply for hire in Port of Spain, except on weekends, public holidays or when they are chartered (see the Maxi-taxi Regulations). Their journeys do not begin or end at City Gate, nor do they use the Priority Bus Route. These are the dissimilarities in circumstances which exist. (See *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, *Shamoon v Chief constable of the Royal Ulster Constabulary* [2003] 2 All ER 26 and *Bhagwandeen v Attorney General of Trinidad and Tobago* [2004] UKPC 21.). The [appellants] do not therefore pass the 'sameness' test. There has been no denial of the equality."

52. Mr Knox submits that there is no evidence that these differences are material. In particular, he says that there is no evidence that the value of the accommodation (ie the respective taxi stands) would be affected by the factors identified by the Court of Appeal. It is tempting to say, for the reasons given by Warner JA, that the differences must have been material. But in the Board's view this not self-evidently true. The reasons for the difference in treatment should have been explained by the government

in evidence. In the absence of such evidence, the court was placed in the realms of speculation. For that reason, the Board will allow the appeal on the section 4(d) claim too.

Conclusion

53. For all these reasons, the Board will allow this appeal. Since there was no appeal by the respondent on the relief granted by the judge, his order must be restored. The Board notes, however, that the effect of the relief granted was that the members of the Association were reimbursed the entire fees that they had paid. But their claim was for compensation for breach of their constitutional rights and not a claim in restitution for the reimbursement of the fees. In assessing the compensation, the judge should have taken into account the cost that the owners and operators would have incurred if they had not been subjected to the management and control of PTSC at City Gate.

54. Submissions in relation to costs should be submitted in writing within 28 days.

LORD BROWN

55. Having the misfortune to disagree with the majority of the Board (the Board), I shall explain why as briefly as possible, seeking to avoid repeating most of the material so helpfully set out in the Board's judgment.

56. As the Board's judgment makes plain, Ibrahim J found the executive arm of the State (represented by the respondent Attorney General) to have breached sections 4(a) and 4(d) of the Constitution and in the result ordered payment by the respondent to the appellant Association of monetary compensation amounting to three quarters of all user fees paid by the Association (and those it represents) (ie the whole amount retained by the PTSC rather than paid over to the Association throughout the entire period of payment), already, we are told, some $8m (close to £1m).

57. The basic chronology of events, as the judgment makes plain, is as follows:

> (i) The Association (the term I shall use to include also the 2,000 odd maxi- taxi owners and operators on routes 2 and 3) agreed to relocate to the PTSC's site at City Gate in 1995.

(ii) The Association's facility there was initially managed by NIPDEC without charge until 1997 or 1998 (the decidedly sketchy agreed statement of facts and issues says inconsistently both that NIPDEC managed the taxi stand until 1997 and that the PTSC took over its management in about 1998).

(iii) In 1997 Regulations were made, giving the PTSC the responsibility for managing the facility and the authority "to make reasonable charges" for its use.

(iv) On 1 August 2001 the PTSC introduced the $1 user fee for each vehicular exit from the facility.

(v) On 24 August 2004 (following an initial letter of claim dated 13 April 2004) the Association issued their constitutional motion.

58. Paragraph 4 of the Board's judgment sets out the Minister's assurances as baldly listed in the agreed statements of facts. Realistically, however, these need to be considered in the context of the affidavit sworn by Roger Israel, the officer from the Ministry of Works and Transport who was closely involved with the Association's relocation and the discussions leading to it (although his involvement ended a few days after the relocation when a new government came into power). Albeit Ibrahim J refused to admit this evidence, it was admitted by the Court of Appeal and to my mind it casts helpful light upon the nature of the assurances given. In the first place Mr Israel explains that the decision to relocate the Association was "for the purpose of eradicating traffic congestion, illegal touting and other undesirable activities in the areas previously occupied by the route 2 and 3 maxi-taxis". Secondly, whilst recognising the Association's concern "that the PTSC was their competitor" and "that the location of City Gate on lands owned by the PTSC could result in the PTSC either assuming responsibility or being given responsibility for maxi-taxi owners and operators and in their opinion there was no evidence to suggest that PTSC could be efficient and would not take advantage of financial opportunities especially because of their own known fiscal difficulties", Mr Israel notes that "the maxi-taxis had already captured 90% of the travelling clientele and that PTSC and sedan taxis had less than 10% of the said clientele". Thirdly (as noted in paragraph 40 of the Board's judgment) Mr Israel records how he was to chair an Interim Board of Management to include representatives of all interested parties. He adds, however: "There was no assurance that the Board of Management would have recommended that there be a hand-over of the facilities to be managed by the maxi-taxi owners and operators. This is what the maxi-taxi owners and operators indicated that they wanted but there was no guarantee that they would have gotten their wish."

The case under section 4(a)

59. Whilst I readily accept that the imposition of user fees deprived the Association members of their right to enjoyment of property and needed, therefore, to be effected "by due process of law", on the face of it nothing could be more clearly lawful than the charging of ex-hypothesi "reasonable charges" for the facility here afforded, as authorised by Regulations properly made under the empowering legislation.

60. It is said, however, that the assurances given to the Association in 1995 gave them a substantive legitimate expectation that no such Regulations would be made and no such charges imposed. This, the Board say at paragraph 27, "was so unfair as to amount to an abuse of power". With the best will in the world I cannot agree with this conclusion.

61. A dissenting opinion in the Judicial Committee is no occasion for a detailed re-examination of the law of legitimate expectation – though I cannot but note Jack Watson's illuminating article in the December 2010 SLS Legal Studies, "Clarity and ambiguity: a new approach to the test of legitimacy in the law of legitimate expectations", vol 30 No 4, p 633 inviting (p 651) the Supreme Court to revisit the issue and suggesting that meantime it is "a patchwork of possible elements to consider" rather than an organised system of rules, and "little more than a mechanism to dispense palm-tree justice". For present purposes I am content simply to take the law as stated in the brief extracts from the judgments in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453 and *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 (see paras 28 and 34 of the Board's judgment), to look at this case in the round and to address the composite question: was the imposition of reasonable charges here so unfair as to amount to an abuse of power? (It seems to me unhelpful, certainly in the particular circumstances of this case, to divide this critical question into various sub-questions and allocate to these different burdens of proof.)

62. Were these assurances, then, such as could be regarded as "clear, unambiguous and devoid of relevant qualification" such as to commit the government to honour them on a lasting basis? Is it to be said, for example, that the Association could, had they wished, have enforced the construction of a skywalk (one of the assurances given)? Why, one wonders, was no complaint ever made about this? Why was no complaint made about the failure to hand over management of the facility to the Association, whether after three months, six months or at any other time? Why was no complaint made for seven years about the introduction of the 1997 Regulations? Why, indeed, was no complaint made even of the imposition of the user fee until nearly three years after it was introduced? None of this suggests to me that the Association regarded itself as the beneficiary of well-nigh enforceable promises, requiring a material change of circumstances rather than a mere change of policy

before the government could lawfully depart from them. And, of course, it goes further than this. As the Board notes at paragraph 32, Mr Knox QC accepts that these representations could not be regarded as binding on the government indefinitely. And to my mind, if one gives any weight at all to Mr Israel's evidence, realistically the long-term management of the facility by the Association itself was to be seen more as an aspiration than a guarantee. And if the Association was not itself to manage the facility, why should it not be managed by its owner, PTSC? One must therefore ask, given that the PTSC was providing a facility, and that inevitably this would involve them in expense, were the Association really entitled to suppose that, five years after relocation, they would remain entitled to the free use of the facility?

63. So far from it being an abuse of power to introduce reasonable charges after giving the Association five years of free use of the facility, this seems to me entirely unsurprising and properly authorised by the 1997 Regulations. Obviously the government could, and sensibly should, have put their case beyond argument by adducing direct evidence explaining why in 1997 they regarded themselves as under no continuing obligation to the Association and why they thought it right in the wider public interest to introduce the 1997 Regulations and authorise the PTSC to levy reasonable charges for the use of their facility. For my part, however, even without such direct evidence, I would hold that the nature of the 1995 assurances was not such as to preclude government two years later from giving effect to what was self-evidently by then its policy, namely to allow the PTSC to make a reasonable charge for the facility it was providing. Criticise the government as one might for its conduct of this litigation, I do not think the evidential shortcomings here sufficient to justify so unmerited a windfall for the Association at so great a cost to the long-suffering Trinidad taxpayers.

64. The whole thrust of these proceedings has been directed towards the recovery of the user fees. Had it focused instead upon the provision made by the 1997 Regulations for the PTSC to issue permits to the owners or operators for a fee upon being satisfied that they were fit and proper persons to use the facility I would have recognised rather greater force in the Association's argument.

The case under section 4(d)

65. I can indicate altogether more briefly why I find myself in respectful disagreement with the Board on this issue too. Plainly the Association was treated unequally in comparison to the maxi-taxi owners and operators on routes 1, 4 and 5 in that they, unlike the Association, were not required to pay a fee for the use of their taxi stands. The justification for this unequal treatment, however, seems to me prima facie self-evident. Only the Association enjoyed the PTSC's facility and were thus required to pay reasonable charges for its use. If the Association wished to assert that comparable facilities were provided without charge to the owners and operators on the

other three routes, to my mind it was plainly up to them to adduce evidence to this effect. This they singularly failed to do.

66. For my part I would have dismissed this appeal in its entirety.