Privy Council Appeal No 46 of 2008

Fun World Co Ltd *Appellant*

v.

The Municipal Council of Quatre Bornes *Respondents*

FROM

THE SUPREME COURT OF MAURITIUS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 16th March 2009

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Present at the hearing:-

Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Brown of Eaton-under-Heywood
Lord Mance

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[Majority Judgment delivered by Lord Mance]

1. This appeal arises from the introduction by the Local Government Act 2003 of a new procedure, requiring any person carrying on certain classified trades from a date in early August 2004 to have a municipal licence issued by the relevant municipal council. Previously, there had been a requirement to obtain a tourist enterprise licence from the Tourism Authority under the Tourism Act 2002. Subsequently, from (it appears) 1st October 2006, the Business Facilitation (Miscellaneous) Provisions Act 2006 has in turn repealed the provisions of the 2003 Act relating to municipal licences and substituted another significantly different scheme. This involves the issue in respect of specified economic activities of land use permits by a new Permits and Monitoring Committee, whose decisions are subject to a right of appeal to the

Town and Country Planning Board established under the Town and Country Planning Act 1954.

2. Under the 2003 Act, the classified trades included two of the businesses or activities which the appellant carries on in Mauritius: operating "coin-operated gaming machines" and a "gaming house holding a casino licence". According to the appellant's evidence, the appellant, having resolved to extend its operations to premises at Bobby Building, St Jean Road in the respondent Council's area from the end of September 2004, was advised by the Council that this was a transitional period, that the respondent was not yet ready to issue licences and that the appellant should obtain any licences from, and make payment therefor to, the Tourism Authority until the Council was ready. The appellant sought and obtained from the Tourism Authority in respect of its proposed operations licences dated 24th and 30th September 2004 valid in each case until 30th June 2005. The agreed statement of facts (paragraph 4) notes in this connection that necessary approvals were also obtained from various other authorities (the Commissioner of Police, the Chief of Fire Services, the Commissioner of VAT and the Ministry of Health). The appellant paid the Tourist Authority Rs 1.2 million for these licences, set about acquiring the required machines, renovated the building, engaged some 79 operating staff and on 9th April 2005 commenced its operations.

3. From 11th April 2005, the respondent, during visits by its inspectors and by police at its request and during correspondence, sought first to verify and then to challenge the appellant's right to conduct its operations in Quatre Bornes. By letter dated 13th April 2005 the respondent requested sight of inter alia any development permit held by the appellant as well as "the trade licences issued by the Tourism Authority" and by letter dated 25th April 2005 it challenged the appellant's right to conduct its operations without a development permit. On 13th May 2005 it sought an injunction to restrain such operations, now also alleging that any licences issued by the Tourism Authority were invalid after the legislative changes of early August 2004. An interim injunction was granted ex parte by P Lam Shang Leen J in chambers on 13th May, but was discharged by the same judge, sitting again in chambers, on 20th May 2005. The judge rejected the need for any further development permit, since the building owner, Bobby Holdings Ltd, already possessed one, but accepted that, since the legislative changes, any municipal licence needed to be obtained from the respondent rather than the Tourism Authority. He stated that, until such had been obtained, the appellant was not entitled to conduct its operations.

4. The appellant applied for municipal licences but was informed by the respondent by letter dated 24th June 2005 that its application

"has not been favourably considered by the Permits and [L]icences Committee at its meeting of 17th June, 2005 in view of

(1) the Municipal Council's policy decision adopted on 10th March 2005 of not allowing the running of Gaming houses and Places of Entertainment within the township because,

(a) Such activities would have a negative effect on the public in general and more particularly on the youth and jeopardize their future.

(b) A vast majority of the inhabitants are against such activities.

(c) The town is predominantly a residential one.

(2) your failure to obtain a permit under section 10 of the Building Act."

5. The appellant on 20th July 2005 issued proceedings

"for a summons to issue calling upon the Respondents to appear before the Honourable Judge in Chambers …. to show cause why:-

(a) the Applicant's application for the licences to operate and run [its operations] should not be granted,

(b) an Order should not be made setting aside the decision of the Respondent dated 24th June 2005 rejecting the Applicant's application …..; and

(c) for such other order or orders that the Honourable Judge in Chambers may deem fit and reasonable to make in the circumstances."

The matter came again before P Lam Shang Leen J, sitting in chambers, on 29th July 2005. Counsel for the respondent abandoned any point based on the Building Act, said that he "could not be of any help" on the "policy decision" referred to in the Council's letter dated 24th June 2005 and limited his positive arguments to the proposition that "the Judge in Chambers has no jurisdiction to entertain the application". The judge looked at the matter more broadly, concluded that he had jurisdiction and determined that, in the absence of any valid objection, he should "order that the respondent issue the relevant licences to the applicant, subject to conditions as provided by section 107 of the Act, after the payment of the appropriate fees". Such licences were issued, without prejudice to the Council's right to cancel them in the event of a successful appeal to the Supreme Court, for a period or periods covering such an appeal.

6. On the Council's appeal, the Supreme Court (K P Matadeen and A F Chui Yew Cheong JJ) concluded on 25th January 2007 that the Judge in Chambers did not have jurisdiction over the application before him, which was in its view "a disguised form of an application for judicial review" which should have been made to the Supreme Court. On that ground alone it allowed the appeal, quashing the judge's order. Immediate applications were made for

a stay and for leave to appeal to the Privy Council, but these were not determined until 19th May 2008 when both were refused. In the meantime however, the current licences were not revoked. On the contrary, fresh licences (or permits) were issued for at least one and probably two periods currently expiring, the Board understands, in June 2009. There was some discussion about this during the hearing before the Supreme Court on 6th May 2008 of the appellant's application for a stay and for leave. However, neither the documents nor their terms were produced then or to the Board. In view of the commencement date of the 2006 Act, it seems likely that the new documents must have taken the form of land use permits under the 2006 Act. (The appellant's operations would seem to have involved either commercial or, if not, "*sui generis*" economic activities within paragraph 1 or 4 of the Eleventh Schedule, and to have required to be licensed accordingly.) On 23rd June 2008 the Board granted leave to appeal and a stay of the Supreme Court's order, and the appellant's operations have continued pending the present judgment.

Statutory provisions

7. Against that factual background, the Board turns to the relevant statutory provisions. The obligation to obtain a municipal licence, on pain of committing an offence punishable by fine, derives from s.103 of the 2003 Act. S.97 requires every local authority to establish a Permits and Licences Committee, consisting of its Chief Executive or his representative and four heads of the relevant departments of the local authority designated by the Chief Executive. S.98(2) provides that this Committee "shall act as a one-stop shop for the processing of the applications for permits and licences". S.98 continues:

> "**98. Powers and functions of Permits and Licences Committee**
>
> ……
>
> (3) The Committee shall disseminate clear and transparent guidelines for the application, processing and issue of permits and licences.
>
> (4) The guidelines under subsection (3) shall be in terms of the requirements of the law, the procedures to be adopted and shall be in accordance with–
>
> (a) the guiding principles and plans for land development and planning laid down and published by the Ministry responsible for the subject of lands;
>
> (b) the guidelines published–
>
> (i) …..
>
> (ii) for the purposes of development permits under the Town and Country Planning Act and building permits under the Building Act;

(iii) by Police, Fire Services, Sanitary Authority and any other relevant Ministry and Government Department in respect of the necessary clearances and authorisations relating to the permits referred to in subparagraph (ii); and

(c) the guidelines published by the Council of the local authority relating to municipal licences, permits or authorisations under this Act or any regulations made thereunder.

(5) Subject to section 105, the Committee shall–

(a) examine, process and approve applications for permits and licences in accordance with the guidelines referred to in subsections (3) and (4); and

(b) issue under the authority of the Chief Executive–

(i) development permits under the Town and Country Planning Act;

(ii) permits under the Building Act; and

(iii) municipal licences and other permits or authoritisations under this Act or any regulations made thereunder."

8. S.104(1) and (2) provides that every application for a permit (e.g. under the Building Act or a development permit under the Town and Country Planning Act) or licence shall be in such form as may be approved by the Council and shall, "together with such information, particulars and documents as may be specified in the application form" be addressed to the Chief Executive "who shall refer the applications to the Permits and Licences Committee". S.105 provides:

"**105. Examination of applications for permits and licences by committee**

…….

(2) The Permits and Licences Committee shall examine the applications under section 100 or 104 to verify whether they comply with section 98(4).

(3) Where the Committee considers that an application complying with section 98(4) needs to be referred to the Police, Fire Services, Sanitary Authority or any other relevant Ministry or Government Department for its views, it shall do so within 2 weeks of the effective date of the receipt of the application.

(4) Where the Committee considers that an application already submitted to the Council under subsection (1) needs not to be referred to the Police, Fire Services, Sanitary Authority or any other Ministry or Government Department under subsection (3), it shall grant the licence or permit immediately, as provided in section 98(5).

(5) Where an application under section 100 or 104 does not comply with section 98(4), the Committee shall, within a delay of not more than 3 weeks of the receipt of the application, notify the applicant in writing of the reasons therefor.

(6) Unless the Chief Executive receives a certificate of objection from the Police, Fire Services, Sanitary Authority, or any other relevant Ministry or Government Department within a period not exceeding 4 weeks of the date the matter is referred to any of them under subsection (3), the Chief Executive shall, without having to refer the matter again to the Council, grant the licence or permit applied for.

(7) The Chief Executive shall grant the licence or permit subject to such terms and conditions as it considers fit in the interests of the environment, public health, public order or public safety.

(8) Where the Committee refuses to grant a development permit under the Town and Country Planning Act or a building permit under the Building Act, the Committee shall, within 6 weeks of the effective date of receipt of the application, give notice in writing to the applicant setting out the reasons therefor.

(9) Where, within the period specified in subsection (6), the Police, Fire Services, Sanitary Authority or other relevant Ministry or Government Department objects to the grant of a licence or permit, the Chief Executive shall, not later than 5 days after receiving the objection, communicate same, by registered post, to the applicant."

S.107 provides:

"**107. Forms and conditions of licence**

(1) A licence shall be in such form as may be approved by the relevant council.

(2) A licence shall be issued subject to such conditions as the local authority may decide and shall be valid as from the date of issue up to the end of the financial year."

9. S.106 gives the Judge in Chambers jurisdiction in specified cases:

"**106. Applications to Judge in Chambers**

(1) Any applicant for a municipal licence may, within 30 days of the date on which the objection is posted to him under section 105(9), apply to the Judge in Chambers for a summons calling upon the Police, Fires Services, Sanitary Authority or other relevant Ministry or Government Department, as the case may be, to show cause why his application should not be granted.

(2) Where, pursuant to section 105(6), a licence or permit is granted without a certificate of no-objection, and the Police, Fires Services,

> Sanitary Authority or other relevant Ministry or Government Department considers that public health, public order or public safety may be jeopardised if the licence is allowed to remain in force, it may apply to the Judge in Chambers within a reasonable time for a summons calling on the holder of the licence or permit to show cause why his licence or permit should not be revoked.
>
> (3) Any applicant for a development permit under the Town and Country Planning Act or a building permit under the Building Act may, within 30 days of the date on which the notice of refusal under section 105(8) is given, apply to the Judge in Chambers for a summons calling upon the local authority to show cause why his application should not be granted.
>
> (4) An application to the Judge in Chambers under subsection (1), (2) or (3) shall be made in the presence of the local authority, and the decision of the Judge in Chambers shall be final and conclusive.
>
> (5) The Judge may grant any application on such terms and conditions as he may deem fit or reject it."

Analysis

10. The appellant, in the affidavit sworn in support of its present proceedings on 20th July 2005, stated that it was applying "under the provisions of s.106(3) of the [2003] Act and the powers of the Judge in Chambers under the Courts Act [1945]". Since its complaint was not about a refusal to issue either a development or a building permit, s.106(3) was irrelevant. S.106(1) and (2) are equally inapplicable, dealing as they both do with specific situations in which the Committee had referred an application to the police, fire services or other authority mentioned in s.105(3) and had either received an objection which the applicant wished to challenge or had not received any answer and had granted a licence which the police, fire services or other authority later wished to see revoked. Here, the Committee never got to the stage of referring the appellant's application to the police, fire services or any other authority. Since the Committee decided to refuse any licences outright on the basis of its supposed policy decision of 10th March 2005, there is no basis for thinking that it ever addressed its mind to the question whether the approvals given at least six months earlier by various other authorities in the context of the obtaining of the Tourism Authority licences (see paragraph 2 above), could or should influence the Committee under s.105(4) of the 2003 Act not to refer the application to the authorities listed in that subsection.

11. Instead, the Committee simply refused the application on the basis of a suggested Council "policy decision adopted on 10th March 2005". The difficulty about that refusal is that the combination of ss.98(2) to (5) and

105(2) shows that the Committee did not enjoy an open discretion to grant or refuse applications for licences as it might think fit when considering them. On the contrary, its function under ss.98(5)(a) was, subject to s.105, to examine, process and approve such applications "in accordance with the guidelines referred to in s.98(3) and (4)" and under s.105(2) to examine them "to verify whether they comply with s.98(4)". In the Board's opinion, P Lam Shang Leen J was correct to conclude that, if an application for a licence did so comply, then, unless the Committee considered that it needed to be referred to the police, fire services or other authority under s.105(3), the Committee was bound under the combination of s.105(2) and (4) to grant the licence immediately, subject only to such conditions as might be decided and apply under s.107(2). A further first instance authority to like effect in relation to a development permit is *Yaskika Conservaria Ltd. v. The Municipal Authority of Quatre Bornes* 2005 SCJ 282 (Balgobin J).

12. P Lam Shang Leen J's order that the Council should issue the relevant licences to the applicant, subject to conditions as provided by section 107 of the Act and after the payment of the appropriate fees, was based on an assumption that relevant guidelines existed and must have been complied with. He said:

> " In the case in hand, I have not been told if the respondent has an approved application form and most of all, if there is one, what it contains. I have also not been told whether it has disseminated its guidelines. It is not assuming too much to infer that the application form must, at least, be in compliance with the guidelines and which it is for the respondent, in the exercise of its statutory duty, to make them known to the public at large, the more so that it is for the respondent "to disseminate clear and transparent guidelines for the application, processing and issue of permits and licences". Those guidelines must necessarily be as provided for under section 98(4) of the Act. Consequently, it is not open to the respondent to put forward as guidelines what is its policy in the granting of permits and licences. The reasons given by the respondent to refuse the applications are not compelling and anyway, it was not for the respondent to come up with any objections which must be left to the Police, Fire Services, Sanitary Authority or other relevant Ministry or Government Department…
>
> It is clear from the above that when there is compliance with the guidelines and when there is no objection from any of the relevant authorities the local authority has no alternative but to grant the licences or permits applied for. It is not open to the local authority to put in an objection."

13. Had the matter stopped there, and leaving aside the issue of jurisdiction, the Board would have seen nothing wrong with P Lam Shang Leen's reasoning or the resulting order. On appeal to the Supreme Court however, a very different factual position emerged. The appellant through counsel, Sir Hamid Moollan QC, made clear without objection (and quite possibly to avoid misleading the court on a factual point) that no guidelines whatever had been issued, still less published, by the Committee under the 2003 Act, at least at the relevant dates in 2005. The conclusion urged on behalf of the appellant was that, since (a) the Council could properly refuse a licence only through and on the basis of guidelines, it followed that (b), in the absence of guidelines, the Council was bound to grant such a licence.

14. In response, Mr Ho Chan Fong, appearing then for the Council, concentrated on the issue of jurisdiction, arguing that the proper course for any challenge would have been judicial review rather than an application to the Judge in Chambers and adding only a brief submission (which the Board has already rejected) that the local authority possessed a general discretion whether to grant or refuse a municipal licence. Before the Board, Mr Geoffrey Cox QC, now representing the Council, took a different line. He submitted that it was arguable that the Council's suggested "policy decision adopted on 10th March 2005" could constitute a guideline and that further promulgation was not fatal to reliance upon it by the Committee in refusing licences. Not only was this submission not canvassed below, but it runs contrary to s.98(3) and (4) of the 2003 Act, which require the Committee to disseminate its own "(3) clear and transparent guidelines …. (4) ….. in accordance with ….. (c) the guidelines published by the Council of the local authority relating to municipal licences". Mr James Guthrie QC for the appellant presented the appeal to the Board on the same basis as Sir Hamid Moollan, accepting that there were no guidelines (unless, which he denied, the policy decision of 10th March 2005 could constitute such), accepting that if guidelines had been issued then judicial review would have been the route by which they might have been challenged, but submitting (in accordance with Sir Hamid's proposition (b)) that, in the absence of guidelines, the Council had a duty to issue the licences capable of enforcement summarily by the Judge in Chambers.

15. The Board has no hesitation in rejecting Mr Cox's new submission even if the Council's policy decision (which has never been produced) could have sufficed as Council guidelines under s.98(4(c), it was never, so far as appears, published, and, even if it was, there is no suggestion that the Committee ever formulated or published its own guidelines in accordance therewith under s.98(3) and (4). Taking the appellant's propositions advanced by Sir Hamid Moollan QC before the Supreme Court: proposition (a) is correct, but

proposition (b) does not follow. Proposition (b) overlooks the fact that the obligations imposed on the Council to draw up guidelines and to examine applications to verify compliance therewith, were imposed, not in the Council's own interests, but because the Council was to be guardian of the public's general interest in relation to such applications. To hold that the Council, if it failed to perform its obligation to draw up guidelines, became obliged to grant any municipal licence for which any application was made (subject only to the procedure for inviting objections from the police, fire service or other authority) would be to overlook or sacrifice the public interest, because of its guardian's obvious default. This point arises squarely on the scheme and wording of the legislation, is considered in the authorities referred to in paragraph 16 below put before the Board by the parties and was canvassed with counsel during oral submissions by and before the Board.

16. The preferable analysis in the Board's view is that taken at first instance in *Microgames Co. Ltd. v. The Municipal Council of Curepipe* 2006 SCJ 49. This too was a case where the local authority refused a municipal licence for reasons not based on any guidelines, no such guidelines having been formulated, adopted or published. S B Domah J said that "the local authority, by not following the statutory procedure, is foiling the intention of the legislator and defeating the provisions of the very law which it has been delegated by Parliament to administer". He found in this light that the Council's decision to refuse a licence was flawed and could not stand, but he went on

> "As regards the applicant, I take the view that he may not invoke the illegality of the Respondent [municipal authority] to obtain the licence applied for. Inasmuch as the decision to decline the licence has been taken without the statutory procedure having been followed, it is my view that there has been no decision. The authorities, therefore, should take a fresh decision in the matter after formulating, disseminating and publishing the appropriate guidelines as per the requirement of the law".

A similar view was taken by K P Matadeen J in *Société Apsara Court v. The Municipal Council of Quatre Bornes* 2006 SCJ 78, where, without any guidelines having been formulated, the Council had refused an application for a development permit and the applicant for the grant of such a permit under s.106(3). K P Matadeen J said that:

> "In the absence of such guidelines, I fail to understand how a Judge sitting in Chambers can exercise the jurisdiction that the legislator has thrust upon him, the more so as his decision shall be virtue of section 106(4) be final and conclusive. I shall refrain from commenting on how

> the respondent itself could have taken its decision in the absence of any guidelines.
>
> The matter is accordingly remitted to the respondent for a reconsideration of the applicant's application for a development permit."

17. Still leaving aside the issue of jurisdiction, the Board considers that, had the actual factual position regarding guidelines been put before and known to P Lam Shang Leen J, he would and certainly should have taken a similar course to that taken by S B Domah J in *Microgames Co. Ltd. v. The Municipal Council of Curepipe*. The likely consequence would of course have been that, due to the Council's default, the question whether municipal licences should be issued would have been further deferred; further, even if licences had been in due course issued, the appellant could, through no fault of its own, then have incurred loss if it had had in the meantime to halt its operations in Quatre Bornes. It may be that it would have been entitled to constitutional or other compensation in respect of any such loss. It may also be that no injunction would in these circumstances have been granted to prevent such operations, and it is possible that any attempt to fine the appellant might have been an abuse. Be all that as it may, much water has passed under the bridge and many chips no doubt across the table since then. There could be no sense now in making, even if this were possible, an order that the Council should formulate or disseminate guidelines or consider the issue of municipal licences in respect of a past period under a statute since superseded.

18. Up until now, the appellant has had and it continues to have valid licences or permits for its operations, granted presumably as the Board has noted under the new 2006 Act. No court order required their issue. The Council in considering whether to grant them under the 2006 Act was required to "have regard" to guidelines issued not by the Council, but by other authorities under the Building Act, the Town and Country Planning Act and the Planning and Development Act. The Council must have been satisfied that such guidelines gave rise to no impediment to the issue of licences to the appellant. Mr Cox QC was not minded to quarrel with an indication by the Board that it could be thought irrational to revoke the present licences (or permits) before their expiry in June 2009, when a new application will anyway be required. On the admittedly limited information available to the Board, the Board finds it hard to see any basis on which the Council could now, whatever the outcome of this appeal, legitimately or properly revoke the current licences or permits before their natural expiry.

Jurisdiction

19. The Board turns to the question of jurisdiction. The Board has already indicated that one basis on which proceedings were initially issued before the Judge in Chambers - s.106 of the 2003 Act - cannot be sustained. The other basis was the Courts Act 1945. S.71 of the Courts Act enables a Judge in Chambers to deal with applications in relation to certain specified matters (including "applications for affirmative declaration". The Supreme Court held that s.71 was irrelevant, and Mr James Guthrie QC for the appellant expressly abandoned any contrary suggestion in his oral submissions before the Board. Ss. 73 and 74 provide as follows:

> "**73. Power to grant an injunction**
>
> A Judge may, whether in term time or in vacation, grant an injunction subject to a motion to the Court to set aside the injunction, and the Court may then set aside or modify it.
>
> **74. Rule or summons to show cause**
>
> Where a party seeks to obtain a rule or summons to show cause, he shall apply to the Master and Registrar who may issue the rule or summons and make it returnable before the Judge in Chambers."

Before the Supreme Court reliance was also placed on the *référé* powers of the Judge in Chambers under articles 806 and 809 of the Code de Procedure Civile, which read:

> "806. Dans tous les cas d'urgence, ou lorsqu'il s'agira de statuer provisoirement sur les difficultés relatives à l'exécution d'un titre exécutoire ou d'un jugement, il sera procédé ainsi qu'il va être réglé ci-après.
>
> 809. Les ordonnances sur référés ne feront aucun prejudice au principal; elles seront exécutoires par provision, sans caution, si le juge n'a pas ordonné qu'il en serait fourni une."

Mr Guthrie did not before the Board pursue any point under s.73, although it will be necessary to return to this section. He contended that the Judge in Chambers had jurisdiction either under s.74 or under the *référé* procedure.

20. In relation to these submissions, the Board considers pertinent the observation made by Mr Ho Chan Fong before the Supreme Court, that the appropriateness of the procedure adopted is linked with the arguments about the merits. S.74 appears to the Board to be a procedure designed to enable a summary final resolution of certain problems the answer to which can be clearly established without any more formal or extensive process. Mr Guthrie himself did not suggest that s.74 could be appropriate in relation to, or could at all events lead to any determination of, issues disputed on arguable grounds. So, in the present case and in view of the Board's conclusions as to the

position under the 2003 Act, the most that could conceivably have been sought under s.74 would have been an order setting aside the Council's refusal and requiring it to go through the process of formulating and publishing guidelines and of reconsidering the appellant's application in their light. No order could have been made requiring the Council to issue municipal licences without going through this process.

21. The parallel existence of both s.73 and, where it applies, the *référé* procedure, tends to confirm that s.74 only applies in a limited class of situations. S.73 and the *référé* procedure cater in different ways for situations where it is not possible for the Judge in Chambers to resolve a matter finally, although in the case of the *référé* procedure the answer must already be clear. The power to grant injunctive relief under s.73 is "a form of remedy imported from English procedural law": *Rameshwarnath Temple Association v. Mauritius Sanatan Dharma Temples Foundation* 1986 MR 100; 1986 SCJ 173, per Glover SPJ. Its exercise "depends on what is sometimes called the balance of convenience but is more accurately an assessment of whether granting or withholding the injunction at that stage is more likely in the end to produce a just result": *Gujadhur v. Gujadhur* [2007] UKPC 54, paragraph 16. The power is not apt for interlocutory use to grant relief of a substantive nature that could not be obtained if the proceedings went further. Indeed, the Board was inclined to think in *Gujadhur v. Gujadhur* that it would never be right to grant even a mandatory injunction unless there are or will be principal proceedings in existence. In the present case, assuming the relief obtainable at trial in the proceedings to have been restricted to an order setting aside the refusal of licences and requiring the Council to formulate and publish guidelines and reconsider the applications in their light, there could have been no basis for an interlocutory injunction requiring the issue of licences pending such reconsideration. The Board has already noted, and it is understandable in these circumstances, that Mr Guthrie did not suggest the contrary or rely on s.73 at all.

22. The *référé* procedure is designed to lead to speedy relief "in matters requiring celerity so as to implement or protect a clear legal right to the exercise of which there is no serious or bona fide defence": *Ragavoodoo v. Appaya and Registrar of Associations* 1985 MR 18. In *Gujadhur v. Gujadhur* the Board compared it to English summary judgment procedure, but with the "great difference" that an order under the *référé* procedure is provisional in the sense that it can be displaced by an order in the principal proceedings (paragraph 12). Further, the "*référé* procedure …. is an entirely freestanding *instance* …. in which no order is made unless the judge considers that there is no serious and bona fide defence. It does not need the support of a principal action although either party is at liberty to commence one". Again, however,

assuming the relief obtainable at trial in the present proceedings to have been restricted to an order setting aside the refusal of licences and requiring the Council to formulate and publish guidelines and reconsider the applications in their light, there could have been no basis for a *référé* order requiring the issue of licences pending such reconsideration.

23. Repeating submissions made by the Council below, Mr Cox submitted that neither s.74 nor the *référé* procedure was here an appropriate basis for any application at all to the Judge in Chambers, so that not even an order setting aside the refusal of licences and requiring the Council to formulate and publish guidelines and reconsider the application in their light could have been appropriate. The case, in his submission, involved administrative law issues which could and should have been addressed by an application for judicial review. The procedure under the former RSC O.53 (now CPR Rule 54) of English law has been imported by judicial initiative into the law of Mauritius: see e.g. *Monty v. Public Service Commission and Parmesseur* 1981 MR 244; 1981 SCJ 210, where it was said that "in the silence of our own enactments on prerogative orders, this Court will follow the English practice governing applications for judicial review". The accepted procedure for judicial review in Mauritius is by application to a two- or three-judge constitution of the Supreme Court. The fact that this would involve considerable delay (two years according to the appellant, one according to Mr Cox) was, in Mr Cox's submission, immaterial. It would, he also submitted, be a radical and unprecedented step to extend the *référé* procedure to the area of public law, or at least to do so in any form which could assist the appellant in this case.

24. The Board has several observations on these submissions. First, there is a distinction between jurisdiction and procedural propriety. A Judge in Chambers is, and sits as, a judge of the Supreme Court of Mauritius, as do the judges of the Supreme Court when sitting on an appeal. The titles to the proceedings before P Lam Shang Leen J and to the appeals in this case show as much. S.15 of the Courts Act provides that "The Supreme Court …. shall have all the powers and judicial jurisdiction necessary to administer the laws of Mauritius". On the face of it, P Lam Shang Leen J had jurisdiction to exercise all such powers and judicial jurisdiction, unless that jurisdiction was cut down by statute. See also the remarks of the Board, and the citation by the Board from *Re Shilena Hosiery Co. Ltd*. [1980] Ch 219, 224, in *Woventex Ltd. v Jacques Isaac Benichou* [2007] UKPC 32. Under the English CPR 54.2, the judicial review procedure "must be used" for claims to a mandatory or quashing order. But there is nothing equivalent in the law of Mauritius. It appears to be no more than a settled practice that judicial review applications go before a two- or three-judge court. (In so far as that practice may originally have derived from English procedure, it is to be noted that it only mirrors the

English practice up to 1980. Since then, judicial review applications have, in the interests of speed and efficiency, normally been determined by a single judge of the English Administrative Court.) The situation in Mauritius falls within the second sense in which the word "jurisdiction" is used (i.e. as meaning "practice" rather than "power") in the passage from the judgment of Pickford LJ in G*uaranty Trust Company of New York v. Hannay & Co.* [1915] 2 KB 536 which Lord Scott of Foscote has identified and quoted in paragraph 55 of his judgment on this appeal.

25. Secondly, once the order made by the Judge in Chambers was being considered on appeal, the matter was before a two-judge court which unquestionably had power, even under the settled practice of Mauritius, to consider a judicial review application, and, if that was the more appropriate course, the Supreme Court hearing the appeal could have directed that the matter proceed accordingly and could have determined those substantive issues in dispute between the parties which did not require to go back to the Council for further action and consideration.

26. Thirdly, the distinction between public and private law issues under English RSC Order 53 was never rigid, as is made clear by Lord Diplock in *O'Reilly v. Mackman* [1983] 2 AC 237, p.284H in passages identified and quoted by Lord Scott in paragraph 56 of his judgment on this appeal. The bringing of an ordinary action for a grant which it was claimed that a council ought to have paid for repair to make premises habitable was thus permitted in *Trustees of the Dennis Rye Pension Fund v. Sheffield City Council* [1998] 1 WLR 840, where Lord Woolf MR said that whether a case fell within the exceptions to Lord Diplock's general rule involved "not only considering the technical questions of the distinctions between public and private rights and bodies but also looking at the practical consequences of the choice of procedure whch has been made", and that "If the choice has no significant disadvantages for the parties, the public or the court, then it should not normally be regarded as constituting an abuse" (p.849C-D).

27. Fourthly, the Board does not on this appeal need to seek further to define the scope of the *référé* procedure or its role, if any, in the public law field. When the point does arise squarely for decision, it would be material to look at the French position, both before and after the reforms in the administrative law field introduced, the Board understands, by law of 30 June 2000, supplemented by decree of 22 November 2000. The evident flexibility of Mauritian law may also be relevant. Glover CJ and Lallah SPJ noted in *Director Public Prosecutors v. Mootoocarpen* 1988 MR 195; 1988 SCJ 502 that the case law of Mauritius

> "is replete with instances where this Court, and by extension the Judge in Chambers, have exercised powers and made orders in the field of equity (particularly injunctions), in the much wider area of administrative law which is not, in this country, broadly regulated by any statute, and in order to punish people for contempt, to name only those instances. …..
> It is quite clear that if a treatise were to be written on Mauritian law, the sources of our law would not be limited to statute but would have to include case-law. Nowhere, for example, is it written that a public body acting in the exercise of its functions to determine the rights of citizens can be sanctioned by this Court for error on the face of the record or breach of the rules of natural justice. Surely, however, no one would contest this Court's right to come to the citizen's rescue in that area."

28. The approach taken by the Judge in Chambers in *Ragavoodoo v. Appaya and Registrar of Associations* 1985 MR 18 is also of interest. There, officers of a newly elected management committee of an association applied to the Judge in Chambers for an order (a) setting aside instructions given by the Registrar to hold another further election, (b) prohibiting the members of the old management committee from purporting to hold such an election and (c) directing them to hand over all the books, documents and funds of the association. The Judge came to the conclusion that the Registrar had no statutory power to direct a new election, that the members of the old committee had no mandate, having been voted out of office and that the third head of relief should accordingly be granted. In a passage already partly quoted, he made it clear that this was on a *référé* basis, saying:

> "Far too often there is confusion between the jurisdiction of the Judge in Chambers to grant interlocutory relief and his residual jurisdiction to grant relief in matters requiring celerity so as to implement or protect a clear legal right to the exercise of which there is no serious or bona fide defence. …. It is the latter kind of jurisdiction that the Judge in Chambers, as I understand it, is being called upon to exercise. It is the prayer in paragraph (3) that is relevant for this purpose and the matter raised in paragraph (1) is only relevant for the purpose of deciding the question raised under paragraph (3)."

The *référé* procedure was there being used against private individuals, but only after forming clear conclusions about the illegitimacy and invalidity of the conduct of a public authority (the Registrar). The decision indicates that the *référé* procedure may be used to consider public law issues. It may be at least open to consideration in another case whether the permissibility of this

depends upon whether or not the ultimate relief sought happens to be against a public authority, but the Board expresses no view whatever on that in this case.

Conclusion

29. In these circumstances the Board considers, first, that the Supreme Court was wrong to regard P Lam Shang Leen J sitting as Judge in Chambers as having exceeded his jurisdiction. At the most he exercised his jurisdiction in circumstances which were procedurally irregular and/or more suitable for judicial review. Secondly, however, the Board inclines to the view that s.74 provided a procedural basis for the Judge in Chambers (on the facts as they appeared before P Lam Shang Leen J) to set aside the refusal of municipal licences and to order their issue or (on the facts as they now appear from Sir Hamid Moollan's explanation to the Supreme Court) to set aside the refusal of such licences and to require the Council to formulate and publish guidelines and then to reconsider the appellant's application for such licences. Thirdly, whatever view may be taken on the first and second points, once the matter came on appeal before two judges of the Supreme Court, they undoubtedly had power, if necessary, to treat it as an application for judicial review and to make the like order on that basis, and, to the extent that the continued operations of the present appellant depended upon it, this was a course that should in the circumstances have been taken. Fourthly, no outright order for the issue of municipal licences was appropriate, once it was clear (as it was not before the Judge in Chambers) that no guidelines had ever been formulated or published by the Council's Permits and Licences Committee under s.98(3) and (4) of the 2003 Act. Fifthly, it follows that, on one or the other basis, the Board considers that the Supreme Court was wrong to have allowed the appeal in so far as it involved setting aside the Council's decision dated 24th June 2005 to refuse municipal licences, but that it was right, in the light of the information put before it that no guidelines had ever been formulated or published, to set aside the Judge in Chambers' order dated 29th July 2005 that the Council grant such licences. The appellant's appeal against the Supreme Court's decision dated 27th January 2007 thus succeeds in part. Sixthly, however, there could be no sense now in making, even if this were possible, an order that the Council should formulate or disseminate guidelines or consider the issue of municipal licences in respect of a past period under a statute since superseded.

30. Seventhly, in relation to the appellant's present operations, and for reasons which the Board has already identified, the outcome of the present appeal appears to be history. The appellant has been permitted or able to

continue its operations. The old licences have expired, and the legislative provisions in issue in 2005 have been repealed since, it appears, 1st October 2006. Fresh licences or permits have been issued, as the Board presumes, under the new and significantly different legislation, without any court order having required their issue; and, as the Board has also already indicated, the Board finds it hard to see any basis on which the Council could now, whatever the outcome of this appeal, legitimately or properly revoke the current licences or permits before their natural expiry in June 2009, when a new application will anyway be required.

31. The Appellant's appeal thus succeeds in part to the extent indicated in paragraph 29. The parties will have 28 days within which to make written submissions as to costs.

Dissenting Judgment by Lord Scott of Foscote

Introduction

32. Fun World Co. Ltd, the appellant, operates a number of businesses providing leisure activities in Mauritius. Some of these include gaming operations. On 16 January 2004 Fun World obtained from the Gaming Control Board of Mauritius a gaming house licence and a letter of intent approving the installation and operation of sixty coin-operated gaming machines in a building in St Jean Road, Quatre Bornes. Necessary approvals were obtained also from the Commissioner of Police, the Chief of Fire Services, the Commissioner of Value Added Tax and the Ministry of Health. And on 30 September 2004 Fun World obtained licences for its Quatre Bornes operations from Mauritius' Tourism Authority. Fun World then commenced its gaming house business at the St Jean Road building.

33. Unfortunately, however, Fun World had overlooked the need to obtain a municipal licence from the respondent, the Municipal Council of Quatre Bornes, as required by section 103 of the Local Government Act 2003

> "103(1) without prejudice to the provisions of any enactment providing for the licensing of any particular trade, business, profession or calling, no person shall carry out, by himself or through an agent, any classified trade within the administrative area of a local authority unless –
>
> (a) he is the holder of a municipal licence issued under this Act authorising him to do so; and
>
> (b) he has paid the licence fees prescribed by the municipal council for the relevant licence.

(2) …….

(3) The licences under this section and the fees prescribed by the Council under subsection (4) shall be in addition to, and not in derogation from, any licence and fees prescribed in any other enactment.

(4) A Council may, by regulations, provide for the payment of –

(a) fees, dues or other charges in respect of the activities specified in Part 1 of the Eighth Schedule …. ;

(b) …….

(5) …..

(6) Any person who fails –

(a) to take out any licence or permit which he is required to take out; or

(b) to pay any fees, due or charges which he is required to pay, under regulations made pursuant to this section shall commit an offence ….."

Under Part 1 of the Eighth Schedule to the Act, coin-operated gaming machines and gaming houses holding casino licences are among the "classified trades" specified for the purposes of section 103.

34. A consequence of Fun World's failure to have applied for and obtained from the Council a section 103 licence, and, presumably, their consequential failure to have paid the Council the required fees, was that on 13 May 2005 the Council applied for an injunction restraining Fun World from continuing its St Jean Road, Quatre Bornes, operations. Two grounds were relied on; first, that Fun World had not obtained a development permit authorising the use they were making of the St Jean Road building and, secondly, that Fun World had not obtained a section 103 licence.

35. The Council's application for an injunction was heard by the Judge in Chambers, P.Lam Shang Leen J, on 20 May 2005. He dismissed the first ground, holding that a development permit was unnecessary, but accepted the second ground. The requisite section 103 licence had to be issued by the Council, not the Tourism Authority, and until issued, held the judge, Fun World was not entitled to operate its St Jean Road gaming house. So Fun World agreed to make the necessary application to the Council. The judge made no order as to costs.

36. On 10 June 2005 (according to para. 9.8 of the Respondent's Case), Fun World applied to the Council for a section 103 licence. But the application was refused by the Council's Permits and Licences Committee ("the Committee") at its meeting on 17 June 2005. The refusal was communicated to Fun World by a letter from the Council dated 24 June 2005. The letter said this :

> "I regret to inform you that your application has not been favourably considered by the Permits and Licences Committee at its meeting of 17 June 2005 in view of:
>
> 1. The Municipal Council's policy decision adopted on 10th March 2005 of not allowing the running of Gaming houses and Places of Entertainment within the township because,
>
> (a) Such activities would have negative effect on the public in general and more particularly on the youth and jeopardise their future,
>
> (b) A vast majority of the inhabitants are against such activities.
>
> (c) The town is predominantly a residential one.
>
> 2. Your failure to obtain a permit under Section 10 of the Building Act"

37. Fun World then, on 20 July 2005, commenced proceedings against the Council. I will have to refer in more detail later to the form of the proceedings, the grounds on which relief was sought and the manner in which the proceedings were dealt with, first by the Judge in Chambers, P.Lam Shang Leen J, and then on appeal, but it is convenient at this point to describe in summary terms what happened. Fun World contended that under the relevant provisions of the 2003 Act the Council were obliged to grant Fun World the licence it had applied for. The Council expressly abandoned its objection based on the Building Act and did not pursue before the judge its policy objection expressed in paragraph 1 of the 24 June 2005 letter. Instead the Council took a jurisdiction point. The Judge in Chambers, it was argued, had no jurisdiction to order the Council to issue Fun World the licence it had applied for. The judge disagreed, held he did have the necessary jurisdiction, and by an order of 29 July 2005 directed the Council forthwith to issue the licence to Fun World "subject to conditions as provided by section 107, after payment of the appropriate fees".

38. The Council appealed. They did issue Fun World with the licence but did so subject to their appeal. Pending the hearing of the appeal, therefore,

Fun World commenced, or perhaps re-commenced, their gaming operations at the St Jean Road building.

39. The Council's appeal, heard on 13 November 2006, succeeded. The only point argued was the jurisdiction point and the Court (K.P.Matadeen J and A.F.Chui Yew Cheong J), in a judgment delivered on 25 January 2007, expressed the view that the Judge in Chambers

> "… did not have jurisdiction to entertain the application before him, an application which … was a disguised form of an application for a judicial review which should be made not to the Judge in Chambers but to the Supreme Court."

40. An application by Fun World for leave to appeal to the Privy Council was made to the Supreme Court on 12 February 2007 but in a judgment dated 19 May 2008 the Court (A.F.Chui Yew Cheong J and S.B.Domah J) refused leave and, in addition, ordered Fun World forthwith to "cease operating its coin-operated machines and its gaming house" at the St Jean Road building. However, on 23 June 2008 the Privy Council granted Fun World special leave to appeal and ordered the Council, pending the outcome of the appeal, to allow Fun World to continue to operate its gaming activities.

The Local Government Act 2003

41. The essential submission of Fun World is that the provisions of the 2003 Act, in the circumstances relevant to this case, placed the Council under a statutory obligation to issue Fun World with the licence applied for. The Council do not accept that that statutory obligation had arisen but contend that, even if it had, the Judge in Chambers had no jurisdiction to enforce it. These submissions require, as a start, a careful look at the statutory provisions.

42. Section 97 of the Act requires every Council to have a "Permits and Licences Committee", one of the functions of which is to deal with applications for, *inter alia*, licences under section 103. Section 98 prescribes the manner in which the Committee must deal with these applications.

> "98(1) …
>
> (2) The Permits and Licences Committee shall act as a one-stop service for the processing of the applications for permits and licences.
>
> (3) The Committee shall disseminate clear and transparent guidelines for the application, processing and issue of permits and licences.

(4) The guidelines under subsection (3) shall be in terms of the requirements of the law, the procedures to be adopted and shall be in accordance with –

(a) the guiding principles and plans for land development and planning laid down and published by the Ministry responsible for the subject of lands;

(b) …..; and

(c) the guidelines published by the Council of the local authority relating to municipal licences, permits or authorisations under this Act or any regulations made thereunder.

(5) Subject to section 105, the Committee shall -

(a) examine, process and approve applications for permits and licences in accordance with the guidelines referred to in subsections (3) and (4) and

(b) issue under the authority of the Chief Executive –

(i) …….. ;

(ii) …… ;

(iii) municipal licences and other permits or authorisations under this Act or any regulations made thereunder."

43. There are two particular points worth noticing in section 98. First, there is the express indication in subsection (2) that the Committee is to act as a "one-stop service" for dealing with licence applications. It is the Committee, not the Council, that is to "examine, process and issue" licences (subsection (5)). Second, there are the two sets of "guidelines". The Committee is to "disseminate" guidelines for the "application, processing and issue" of licences (subsection (3)). These subsection (3) guidelines must be in accordance with any "guiding principles and plans laid down and published" by the Ministry, and in accordance also with "the guidelines published by the Council relating to municipal licences …" (subsection (4)). The Council may, therefore, influence the Committee's decisions by publishing its own guidelines in accordance with which the Committee must "examine, process and approve" an application for a municipal licence (subsection (5)). It seems to the Board clear from subsections (3), (4) and (5) that the Committee's subsection (3) guidelines and the Council's subsection (4) guidelines will necessarily have to be in documentary form and to be brought to public attention by some form of

dissemination or publication. It is difficult to see how otherwise the Committee could be said to have disseminated "clear and transparent" guidelines or how otherwise the Council's guidelines could be said to have been published.

44. Section 104(1) of the Act requires applications for licences to be

> "… made in writing in such form as may be approved by the relevant Council"

and section 104(2) requires them to be addressed to the Council's Chief Executive and to be referred by him to the Permits and Licences Committee. Section 105 sets out how the Committee must deal with the applications -

> "105(1) The Chief Executive shall, at every meeting of the Council, submit to the Council a list of all applications received under Section …. 104 since the last meeting.
>
> (2) The Permits and Licences Committee shall examine the applications under section … 104 to verify whether they comply with section 98(4).
>
> (3) Where the Committee considers that an application complying with section 98(4) needs to be referred to the Police, Fire Services, Sanitary Authority or any other relevant Ministry or Government Department for its views, it shall do so within 2 weeks of the effective date of the receipt of the application.
>
> (4) Where the Committee considers that an application already submitted to the Council under subsection (1) needs not to be referred to the Police, Fire Services, Sanitary Authority, or any other Ministry or Government Department under subsection (3), it shall grant the licence or permit immediately, as provided in section 98(3).
>
> (5) Where an application under section … 104 does not comply within section 98(4), the Committee shall, with a delay of not more than 3 weeks of the receipt of the application, notify the applicant of the reasons therefor.
>
> (6) Unless the Chief Executive receives a certificate of objection from the Police, Fire Services, Sanitary Authority, or any other relevant Ministry or Government Department within a period not exceeding 4 weeks of the date the matter is referred to any of them under subsection (3), the Chief Executive shall, without having to refer the matter again to the Council, grant the licence or permit applied for.

(7) The Chief Executive shall grant the licence or permit subject to such terms or conditions as it considers fit in the interests of the environment, public health, public order or public safety.

(8) ……

(9) Where, within the period specified in subsection (6), the Police, Fire Services, Sanitary Authority or other relevant Ministry or Government Department objects to the grant of a licence or permit, the Chief Executive shall, not later than 5 days after receiving the objection, communicate same, by registered post, to the applicant.

(10) …..

45. It must be assumed that the Committee, pursuant to section 105(2), examined Fun World's section 103 application to verify whether it complied with section 98(4), that is to say, whether the application complied with section 98(3) guidelines that had been disseminated by the Committee and that had been in accordance with section 98(4)(c) guidelines relating to municipal licences that had been published by the Council. There is no indication in the Council's refusal letter of 24 June 2005 that the application did not so comply. There is no suggestion that section 98(3) guidelines incorporating the Council's policy apparently adopted at a Council meeting of 10 March 2005 had been disseminated by the Committee. Nor is there any suggestion that that policy had been "published" by the Council so as to constitute section 98(4)(c) guidelines. No such document or documents have been produced by the Council and relied on in this litigation.

46. *Microgames Co. v The Municipal Council of CPE* (2006) SCJ 49 is illustrative of the need for section 98 guidelines to be disseminated or published (as the case may be) and to conform to the general understanding of what constitutes guidelines. Microgames had made an application for a section 103 municipal licence. A copy of so-called "guidelines" had been annexed to the application form prescribed by the respondent council (see s.104(1)). The Permit and Licences Committee of the Council had rejected the application and Microgames had commenced proceedings for an order requiring the Council to issue the licence. The judge, S.B.Domah J, held that the annexed "guidelines" did not constitute section 98(3) or (4) guidelines. He said (at p.3) this :

> "First, the 'Guidelines' were not published in the Government Gazette even if they were approved by the Council. Second, the 'Guidelines' were annexed to the Application Form. Third the

> PLC did not consider whether the applicant complied with the 'Guidelines' … given that the applicant had already obtained all relevant clearances from the competent authorities. I have used the term 'Guidelines' between inverted commas advisedly on account of the fact that when the content of the document stated to be 'Guidelines' is examined, one easily sees that it contains anything but guidelines. They are general information passed on to applicants. Though given under the rubric, the document is anything but a set of 'Guidelines'.

And at p.4 the judge repeated his conclusion :

> "The Guidelines were no guidelines at all. They had not been published."

47. I am in respectful agreement with S.B.Domah J's conclusion. Nonetheless, the judge did not proceed to grant Microgames' application. He held that the failure of the respondent Council and its Committee to comply with the requirements of the 2003 Act regarding the formulation, approval, dissemination and publication of section 98 guidelines meant that their refusal of Microgames' application was null and void. There had been, he said, no decision on the application and (at p.7) that :

> "The authorities, therefore, should take a fresh decision in the matter after formulating, disseminating and publishing the appropriate guidelines as per the requirement of the law".

48. Whether the result in the *Microgames* case was justified by the premise that the refusal of Microgames' application was null and void is, in my respectful opinion, doubtful. However the important question for present purposes is whether Fun World's application complied with section 98(4). The conclusion that Fun World's section 103 application did so comply appears to me to be the only conclusion open on the evidence. It is apparent that the Committee did not consider that the application needed to be referred to any of the authorities mentioned in section 105(3). This is not surprising since it is agreed by the Council that, prior to the application having been made, "necessary approvals" had been obtained by Fun World from the relevant authorities (see para.4 of the Agreed Statement of Facts). Accordingly, there seems no answer to Fun World's submission that the Committee were under a statutory duty, imposed by section 105(4) to "… grant the licence … immediately, as provided in section 98(5)". Before the Board, however, Mr Cox QC has contended on behalf of the Council that, notwithstanding the

peremptory language of section 105, the Council retained a discretion to refuse the licence application. I will return to this contention later.

49. Section 106 of the Act contains a very limited provision for appeals. The section provides only for appeals against objections lodged by any of the authorities mentioned in section 105(3) (see s.105(9)). It provides also, in subsection (2), for applications to be made to the Judge in Chambers by any of the authorities who, in the circumstances referred to in the subsection, consider that a licence that has been granted should be revoked (see s.106(2)). Nothing, for present purposes, turns on subsection (2).

> "106(1) Any applicant for a municipal licence may, within 30 days of the date on which the objection is posted to him under section 105(9), apply to the Judge in Chambers for a Summons calling upon the Police, Fires Services, Sanitary Authority or other relevant Ministry or Government Department, as the case may be, to show cause why his application should not be granted.
>
> (2) ….
>
> (3) …..
>
> (4) An application to the Judge in Chambers under subsection (1) …. shall be made in the presence of the local authority and the decision of the Judge in Chambers shall be final and conclusive."

50. It is necessary to refer also to section 107, mentioned in the order made by the Judge in Chambers. Section 107(2) says that

> "A licence shall be issued subject to such conditions as the local authority may decide and shall be valid as from the date of issue up to the end of the financial year."

It is apparent, therefore, that the statutory obligation imposed by section 105(4) or (6) does not prevent a local authority from issuing a licence subject to such reasonable conditions as, in its discretion, it decides to impose. In the present case, since the Council refused to issue the licence, this stage was never reached.

Fun World's application to the Judge in Chambers

51. Fun World's Praecipe of 20 July 2005 did not identify the procedural basis on which relief was being sought. It asked for a summons to issue calling upon the Council to appear before a Judge in Chambers to show cause why Fun World's licence application should not be granted and why an order should not be made setting aside the Council's refusal of the application. The

affidavit in support, however, did identify the procedural basis of the application. It said, in paragraph 8, that -

> "The application is being made under the provisions of section 106(3) of the Local Government Act and the powers of the Judge in Chambers under the Courts Act".

The reference to subsection (3), which relates to applications for development permits or building permits, was a slip but both the Judge in Chambers and the judges who heard Fun World's appeal considered whether any of the section 106 subsections authorised Fun World's application. The appellate judges' conclusion that none of the subsections authorised Fun World's application to the Judge in Chambers was, in my respectful opinion, plainly right. Their reasoning was unanswerable.

> "The application before the Judge in Chambers clearly did not come under any of the three situations referred to in subsections (1), (2) and (3) …. It was not a case where there was an objection by the Police, the Fire Services, the Sanitary Authority or any other relevant Ministry or Government Department (subsection (1)). Nor was it a case where one of these bodies had not objected in good time but considered that the licence should not have been granted (subsection (2)). And finally, the application before the Judge did not relate to an application for a building permit or a development permit (subsection (3)). In the circumstances we hold that [Fun World] could never have grounded [its] application to the Judge in Chambers for a summons to show cause under section 106 of the Act"

I agree.

52. The question, therefore, is whether the power of the Judge in Chambers to make the order or orders sought can be found elsewhere. The Courts Act is relied on by Fun World but, before turning to the relevant sections, it seems to me convenient to examine whether the issue in this case is truly one of jurisdiction or whether it would be more accurately described as an issue of procedural propriety.

Jurisdiction

53. Under the court system of Mauritius a Judge in Chambers sits as a judge of the Supreme Court of Mauritius. If there is an appeal, the appellate judges sit as appellate judges of the Supreme Court of Mauritius. The title to the proceedings before P.Lam Shang Leen J (p.85 of the Record) and the appellate judges, K.P.Matadeen J and A.F.Chui Yew Cheong J (p.142 of the Record), or,

for that matter, A.F.Chui Yew Cheong J and S.B.Domah J (p.197 of the Record) show that on each occasion the judges were sitting as judges of the Supreme Court of Mauritius.

54. Section 15 of the Courts Act says that -

> "The Supreme Court … shall have all the powers and judicial jurisdiction necessary to administer the laws of Mauritius".

So there can be no question but that there is jurisdiction in the Supreme Court of Mauritius to make a mandatory order ordering a person subject to an obligation imposed by statute to carry out that obligation. The question whether the correct procedure in order to invoke that jurisdiction has been used depends both on Rules of Court and on rules of practice. The former have statutory authority and can, if appropriately worded, cut down the power of a judge in particular circumstances to exercise a particular jurisdiction. For example, Order 54.2 of the Civil Procedure Rules 1998, applicable to litigation in England and Wales, states that –

> "The judicial review procedure *must be used* in a claim for judicial review where the claimant is seeking –
>
> (a) a mandatory order
>
> (b) a quashing order
>
> (c) ….. (emphasis added).

A judge sitting in Chambers in the Queen's Bench Division of the High Court could not, therefore, entertain an application for a mandatory order such as is sought by Fun World in the present case. But Mauritius has no such Rule of Court.

55. The distinction between jurisdiction in the strict sense and procedural propriety has been made in a number of cases. In *Guaranty Trust Company of New York v Hannay & Co.* [1915] 2 KB 536 Pickford LJ commented at 563

> "The word 'jurisdiction' and the expression 'the Court has no jurisdiction' are used in two different senses which I think often leads to confusion. The first and, in my opinion, the only really correct sense of the expression that the Court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form and by whom it is raised. But there is another sense in which it is often used, i.e., that although the Court has power to decide the question it will

> not according to its settled practice do so except in a certain way and under certain circumstances."

The same distinction was drawn by Diplock LJ (as he then was) in *Garthwaite v Garthwaite* [1964] P 356 at 387. It was drawn also in *Edge v Pensions Ombudsman* both at first instance [1998] Ch 512 at 519 and in the Court of Appeal [2000] Ch 602 at 643 (see also *Tehrani v Home Secretary* [2007] 1 AC 521 at 543). And in the great case of *O'Reilly v Mackman* [1983] 2 AC 237, which one of their Lordships will remember with particular pleasure, Lord Diplock said at 274 –

> "So no question arises as to the 'jurisdiction' of the High Court to grant to each of the appellants relief by way of a declaration in the terms sought, if they succeeded in establishing the facts alleged in their respective statements of claim or originating summons and the court considered a declaration to be an appropriate remedy. All that is at issue in the instant appeal is the procedure by which such relief ought to be sought."

So, too, here. The issue is not one of jurisdiction; it is one of procedural propriety. Was it proper, on the facts of the present case, facts not in dispute, for Fun World to seek a mandatory order, compelling the Council to perform its statutory duty, by applying to the Judge in Chambers rather than by employing judicial review procedure?

56. Before leaving *O'Reilly v Mackman*, in which the House of Lords upheld the Court of Appeal in holding that the respective appellants ought to have employed judicial review procedure rather than ordinary writ action or originating summons procedure, it is worth noticing that the requirement that judicial review procedure be employed was expressed as a "general rule" rather than as an invariable one. Lord Diplock commented, at 284, that

> "Order 53 does not expressly provide that procedure by application for judicial review shall be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law; nor does section 31 of the Supreme Court Act 1981"

and, at 285, expressed the view that –

> "… it would …. as a *general rule* be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of the authorities." (emphasis added)

In expressing this view Lord Diplock was adopting the opening submission of counsel for the respondents, all of which were public authorities, at 272

> "The respondents do not contend that in no case is it permissible for a person aggrieved to proceed by writ or originating summons …"

57. It is necessary at this point to deal with Mr Cox's submission that, notwithstanding the peremptory language of section 105(4) and (6), a local authority to which an application for a section 103 municipal licence has been addressed retains a general discretion whether or not to grant the licence. In support of his submission Mr Cox referred to *Issa Kurrimbakus v Municipal Council of Vacoas Phoenix* (2006) SCJ 195. The applicant in that case had applied for a development permit pursuant to section 103 of the 2003 Act. The respondent council had called a public meeting to hear what members of the public thought about the application. The applicant applied to the Judge in Chambers for an injunction to restrain the council from convening the meeting and for a summons to be issued requiring the council to show cause why the development permit should not be issued. The judge asked the applicant whether there was a section 98(3) guideline relevant to his application for the permit. The judgment records that the applicant was unable to answer. But it appears that the applicant had published notice of his application in the local press and the judge inferred that this must have been done pursuant to some requirement imposed by the council. The judge concluded that

> "In the absence of the details of the guidelines, it would be difficult for me to know whether the respondent had failed to comply with the Act which had made the local authority a one-stop service for the processing of the applications for permits and licences."

It seems to me fair to infer from the terms of the judge's judgment that he thought it would have been open to the council to publish section 98 guidelines that would allow account to be taken by the council's Permits and Licences

Committee of objections to the grant of the permit expressed by members of the public. Whether guidelines of that sort would be capable of being section 98 guidelines may be open to question but the case does not address, and did not need to address, the question of law that arises in the present case, namely, whether in the absence of any relevant published guidelines a local authority has a residuary discretion to refuse a licence application on general policy grounds.

58. There is one respect, however, in which the *Kurrimbakus* case is of assistance to Fun World. The applicant had applied to the Judge in Chambers for relief that included the making of a mandatory order. Nowhere in the judgment of the judge, P.Lam Shang Leen J, is any criticism to be found of this procedure. It is consistent with the judge's remark cited above that, had he been able to conclude that the council had indeed failed to comply with the Act, he would have granted the application for the mandatory order.

59. Mr Cox supported his submission by referring also to the general duty of a local authority under section 40 of the 2003 Act

> "… to promote the social, economic, environmental and cultural well-being of the local community; improve the overall quality of life of people of the local community …"

and under section 4(1) of the Local Government Act 1989 to

> "… administer the town in respect of which it is set up."

These formulations of the general duty of a municipal council in Mauritius can be no answer to the peremptory language of section 105(4) or (6). The maxim *generalibus specialia derogant*, or the converse, *generalia specialibus non derogant,* is applicable. The maxim, as Lord Cooke of Thorndon put in *Effort Shipping Co.Ltd v Linden Management SA* [1998] AC 605 at 627, represents "simple commonsense and ordinary usage [of language]." The language of section 105(4) is clear. In the circumstances referred to in the subsection, circumstances that in my opinion are shown to have existed in this case (see paras.14 to 17 above), the council were under the statutory duty imposed by section 195(4): "… the Council shall grant the licence … immediately." It is on that basis that, in my opinion, the procedural propriety of Fun World's application to the Judge in Chambers must be judged.

The procedural propriety of Fun World's application to the Judge in Chambers

60. Mr Cox submits that Fun World's application ought to have been made in accordance with judicial review procedure. We were told that judicial review procedure in Mauritius had been modelled on that prescribed for judicial review in this jurisdiction by the former Order 53 of the Rules of the Supreme Court (now replaced by Part 54 of the Civil Procedure Rules). In *Monty v Public Service Commission and Another* [1981] SCJ 210 Moollan SPJ and Glover J said (page 2 of 5) that –

> "As explained in *C.E.B. v Forget & Anon* [1974] MR 299 and *Transport Employees Union v Permanent Arbitration Tribunal* [1977] MR 831, in the silence of our own enactments on prorogative orders, this Court will follow the English practice governing applications for judicial review."

The judges then referred to Order 53 of the Rules of the Supreme Court in England. Mr Cox referred also to *Le Petit Morne Ltee v The Town and Country Planning Board* (1998) SCJ 141 and to *Hazareesingh v The Town Clerk, Municipal Council of Beau Basin/Rose Hill* (1996) SCJ 142 as further examples of the adoption in Mauritius of Order 53 judicial review procedure for the purposes of applications for mandatory orders. These cases do indeed evidence that adoption but they do not demonstrate that the use of that procedure is an invariable, as opposed to a general, requirement.

61. The use of judicial review procedure has become, in this jurisdiction, an invariable requirement. Part 54.2 of the CPR, which came into effect on 2 October 2000, says that the judicial review procedure "must be used" where the claimant is seeking a mandatory order. Mauritius has no such rule. Its adoption of Order 53 procedure appears to be based simply on practice. The practice, moreover, is not identical to that in this jurisdiction. We were told by counsel that the application for leave had to be made to two Supreme Court judges and that, if leave were granted, the substantive hearing would have to be before another two Supreme Court judges. Mr Guthrie QC, counsel for Fun World, told us, on instructions, that a judicial review application in Mauritius would take up to two years before a judgment on the substantive hearing could be obtained. Mr Cox, also on instructions, gave us an estimate of at least a year. In a case where the facts are not in dispute and it is clear that a public authority is under a statutory obligation that it has failed to discharge, and particularly where the continuance of the failure prevents the victim of the failure from pursuing some lawful trade or calling, the prospect of a delay of between one and two years before a mandatory order requiring the local

authority to discharge its statutory obligation can be obtained, seems to me tantamount to a denial of justice to the victim. It is, to my mind, unacceptable that such a denial should be brought about by an insistence on the observance of what is no more than a rule of practice. In *re Coles and Ravenshear Arbitration* [1907] 1 KB 1 at 4 Collins MR said this:

> "I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress and the court ought not to be so far bound and tied by rules which are, after all, only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."

These remarks need, in my opinion, to be borne in mind in the present case.

62. Moreover, it is not as though the rule of practice, requiring applications for a mandatory order that a public law duty be performed to be pursued by way of judicial review procedure, were uniformly insisted upon. In *Mandiv and Sabha v The Mauritius Sanathan Dharma Temples Foundation* (2008) SCJ 286 the applicants alleged that the respondent was unlawfully withholding from them grants from the State to which they were entitled. Their claim was, therefore, a claim under public law. Nonetheless the application was made pursuant to section 74 of the Courts Act and pursuant to article 806 of the Code de Procédure Civile. Judicial review procedure was not employed. The judge, S. Peero J, held that the applicants were entitled to the grants, that no reason at all had been given to justify the respondents' decision to withhold them and then said this –

> "That is enough, in my view, to entitle the applicants to seek the jurisdiction of the Judge in Chambers in the circumstances as a matter of urgency to prevent the respondent from adversely affecting the applicants' financial situation …"

There was not a word of criticism about the applicants' failure to employ judicial procedure which, if it had been employed, would have resulted in them being kept out of their money for at least a year.

63. In *Ragavoodoo v Appaya and Registrar of Associations* [1985] MCR 18 relief sought from the Judge in Chambers included both a quashing order directed to the second respondent, a public authority, and a mandatory order consequential upon the grant of the quashing order. The judge commented that -

> "Far too often there is a confusion between the jurisdiction of the Judge in Chambers to grant interlocutory relief and his residual jurisdiction to grant relief in matters requiring celerity so as to implement or protect a clear legal right to the exercise of which there is no serious or bona fide defence".

The public authority, the Registrar of Associations, conceded that the instructions it had given, and against which the quashing order had been sought, were *ultra vires* and the Judge in Chambers granted the mandatory order. And in *DPP v Mootoocarpen and Others* (1988) SCJ 502 Glover CJ commented that -

> "Our case law is replete with instances where this Court, and by extension the Judge in Chambers, have exercised powers and made orders in the field of equity …, in the much wider area of administrative law which is not, in this country, broadly regulated by any statute, and in order to punish people for contempt, to name only those instances. (See the Mauritius Digest VO 'Supreme Court Jurisdiction')."

The Courts Act

64. In the affidavit of M. Chabaud, sworn and filed in support of Fun World's *praecipe*, it was stated that the application was made pursuant to section 106(3) of the 2003 Act (a broken reed for reasons already explained) and under the Courts Act. In his printed Case Mr Guthrie QC relied on sections 71 and 74 of the Courts Act. In his oral submissions Mr Guthrie abandoned his reliance on section 71 but prayed in aid also article 806 of the Code Civile. Section 74 of the Courts Act says, simply, that

> "Where a party seeks to obtain a rule or summons to show cause, he shall apply to the Master and Registrar who may issue the rule or summons and make it returnable before the Judge in Chambers."

65. The section does not identify the type of case in which section 74 procedure can be used. If the present case were one in which issues of fact needed to be decided, with the possibility of cross-examination of witnesses and of the need for discovery of documents, it is easy to see that the section 74 procedure might be inappropriate. So, too, it might be inappropriate if the case were one that required pleadings in order to identify the issues and to disclose the cases of the respective parties. The present case falls into neither of those categories.

66. P Lam Shang Leen J took the view that Fun World could rely on the statutory authority of section 106 as justification for making its application to the Judge in Chambers. In this, in my respectful opinion, he was mistaken, but his instinct that the Judge in Chambers procedure was, in the circumstances disclosed by M. Chabaud's affidavit, appropriate for the application being made was, in my opinion, a sound one. The procedure complied with the spirit of sections 96 to 107 of the 2003 Act and the evident intention of the legislature that disputes arising from objections to the grant of a licence where all other statutory requirements had been satisfied should be able to be speedily resolved by a summary procedure. I can see no good reason why Fun World's complaint that the Council was under a mandatory statutory obligation to grant the licence but was refusing to do so should not have been dealt with by the same summary procedure as had been devised by the legislature for dealing with disputes about objections that had been raised by one or other of the specified authorities, or, indeed, with refusals of applications for development permits or building permits (see s.106(3) and *Yashika Conservaria Ltd v Municipal Council of Quatre Bornes* (2005) SCJ 282).

67. In granting the relief P Lam Shang Leen J was exercising a jurisdiction that the Supreme Court undoubtedly has (see s.15 of the Courts Act). There is no statutory provision, or rule with statutory force, forbidding the obtaining of a mandatory order by summary process under section 74. The need to protect public authorities from misconceived claims under public law, for which purpose the leave requirement in judicial review procedure was introduced, has no weight whatever in a case where no facts are in dispute, where the legal obligation sought to be enforced is clearly owing and where the public authority has no reasonably arguable defence. It is significant, to my mind, that both before the Judge in Chambers and on appeal the Council's resistance to the order sought was based on the proposition that the Judge in Chambers had no jurisdiction to grant it. No defence on the merits was offered. Before the Board the Council, for the first time, has through Mr Cox attempted a defence on the merits. It is said that the Council's policy decision of 10 March 2005 constituted, although never published nor disseminated, a section 98 guideline. The Council, it is said, had a residuary discretion, pursuant to its section 40 duty, to refuse applications inconsistent with or inimical to its policy. Mr Cox's submissions to that effect were, so far as a defence on the merits is concerned, attempts to make bricks without straw. The plain fact is that the Council has no defence on the merits and, before the Board, as before the lower courts, the only real issue is the procedural one.

Article 806

68. Article 806 of the Civil Code provides, as I understand it, a supplemental power for a judge to make a provisional order where urgency requires that relief be granted. It may be that the order made by P Lam Shang Leen J could be upheld under article 806 independently of any other procedural authority. I am not clear, however, that I fully understand the scope of a judge's powers under article 806 and prefer to base my conclusion on section 74 of the Courts Act.

Conclusion

69. In my opinion, in the circumstances of this case, there was no impropriety in the procedure adopted by Fun World.

Addendum

70. Since preparing this judgment I have had the opportunity of reading the judgment prepared by Lord Mance, and concurred in by a majority of the Board, in which Lord Mance expresses the conclusion that, first, the Council had had no legal obligation under section 105 to grant the licences that Fun World had applied for and, consequently, that the Judge in Chambers had been wrong to have ordered the Council to do so and that the appellate judges had been right to have allowed the appeal. I respectfully dissent from that conclusion.

71. My opinion that the Council had come under a legal obligation to grant Fun World the licences is based on section 105(4) of the Act which applies where "… the Committee considers that an application already submitted to the Council under subsection (1) …" does not need to be referred to any of the authorities mentioned in the subsection. Fun World's licence application had certainly been submitted to the Council and had been considered by the Committee. Lord Mance says that "the Committee never got to the stage of referring Fun World's application …" to the relevant authorities (para.10 of his judgment). The relevance of this comment is, presumably, that the statutory obligation of the Council under section 105(4) would, therefore, not yet have arisen. But it has never been suggested on behalf of the Council that that stage had not been reached. Paragraph 4 of the Agreed Statement of Facts, prepared for the purposes of the appeal to the Board, records that "the necessary approvals" from the relevant authorities had been obtained by Fun World. It is surely safe to assume that the Committee considered that any further reference to these authorities would be otiose. It is not in the least surprising that the contention, unsupported by any evidence, that the section

105(4) stage had not been reached is a point that was never raised by the Council.

72. Lord Mance's conclusion that the Council had not come under a legal obligation to grant Fun World the licences it had applied for appears to have been primarily based on the proposition that no guidelines had been disseminated by the Committee (s.98(3) of the Act) or published by the Council (section 98(4)(a) of the Act) and that, in the absence of any such guidelines, the Council could not have come under any legal obligation under section 105(4) (see para.15 of Lord Mance's judgment).

73. This was another point never raised or relied on by the Council at any stage of the litigation. The evidential basis on which the point rests appears to consist, first, of remarks said to have been made by Sir Hamid Moollan QC, Fun World's counsel, on the hearing of the appeal from the Judge in Chambers, and, second, on remarks made by Mr Guthrie QC, when opening Fun World's appeal to the Board. But neither before the Supreme Court appellate judges nor before the Board had any argument been raised on behalf of the Council to the effect that the absence of any section 98 guidelines required the refusal of Fun World's application.

74. The Council's refusal letter of 24 June 2005 shows that Fun World's application had been accepted as procedurally in order, had been considered on its merits by the Committee at its meeting on 17 June 2005 but had been refused on grounds that, it must now be accepted, did not justify the refusal. The only real issue, first before the Judge in Chambers and subsequently on the hearing of the appeal, was the procedural issue of jurisdiction with which I have already dealt. There was no issue regarding the existence or non-existence of section 98 guidelines and the context in which Sir Hamid Moollan referred to them is entirely unclear. On the appeal to the Board it was contended, as a supplement to the jurisdiction issue, that the Council's policy decision, referred to in its 24 June 2005 refusal letter, provided a basis on which the Council was entitled to refuse the licence application. This was the context in which Mr Guthrie QC made his remarks about the absence of any guidelines. Whether he intended to say any more than that the policy decision had not been elevated to the status of a section 98 guideline seems to me unclear, for the presence or absence of guidelines in general had never been an issue. At no stage in the litigation had it been submitted on behalf of the Council that Fun World's claim to be entitled under section 105 to a grant of the licences had to fail because the Council and the Committee had failed to promulgate any section 98 guidelines. The point emerges for the first time in Lord Mance's judgment.

75. If Lord Mance's view (shared by the majority) that the failure of the Council and Committee to promulgate any section 98 guidelines justified the refusal of the licence application were correct, it would lead to a remarkable state of affairs. A Council and its Committee, by failing to discharge their statutory function of promulgating section 98 guidelines, would be able to grant licence applications of which they approved but to refuse any others on any policy basis or for any reason, secure in the knowledge that only by the successful pursuit of judicial review proceedings for a mandatory order requiring the Council and the Committee to produce section 98 guidelines – a process apt to take between one and two years – could an applicant for a licence put itself in a position to obtain relief against an unjustified refusal of its application. This is, presumably, the view of the majority as to the position that pertained in this case.

76. It seems to me grossly unfair, and, with respect, unacceptable, for the Board to come to a conclusion adverse to Fun World on the basis of a proposition unsupported by any clear evidence, contradicted by the Agreed Statement of Facts and never advanced at any stage in the litigation by the Council or by any of the advocates who appeared on its behalf. In these circumstances I regret that I am unable to join the majority in concluding that the appellate judges were right to have allowed the appeal against the order made by the Judge in Chambers.

77. For the historical reasons explained by Lord Mance, the order made by the Judge in Chambers would, had it remained in force, have become spent long since and the question of restoring it does not now arise. I would, therefore, simply allow Fun World's appeal with costs.