COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

PUBLIC LAW DIVISION

2018/PUB/jrv/0014

IN THE MATTER OF an application by NAVETTE BROADCASTING & ENTERTAINMENT COMPANY LTD. for leave to apply for Judicial Review.

AND

IN THE MATTER OF (1) The decision ("The Decision") of the Utilities Regulation and Competition Authority (URCA) by letter dated 15 June 2017 whereby URCA pursuant to Section 27(1)(a) of the Communications Act purported to vary the Applicants license with immediate effect from the Commencement Date of the license ("the 15 June 2017 Decision") (2) The Decision by URCA, with the assistance of the Royal Bahamas Police Force, on or about the 9th day April AD 2018, pursuant to s.16(1) and 33 of the Communications Act, to enter upon the Applicant's property to remove without notice or reasonable or lawful basis the following property of the Applicant; (i) Black Dell CPU, (ii) Silver FM Transmitter (iii) White and green Reciever, and (iv) Demixer; (3) The Decision of Paramount Systems Ltd. to accept issuance, by URCA of the Applicant's license pursuant to and in accordance with the Decision complained of herein.

AND

IN THE MATTER OF an The Communications Act (the Act)

AND

IN THE MATTER of the Constitution of The Commonwealth of The Bahamas (the Constitution)

BETWEEN

AND

NAVETTE BROADCASTING & ENTERTAINMENT COMPANY LTD.

Intended Applicant

AND

THE UTILITIES REGULATION AND COMPETITION AUTHORITY

Intended 1 Respondent

AND

PARAMOUNT SYSTEMS LTD.

Intended 2nd Respondent

Before Hon. Justice Ian R. Winder

Appearances: Khalil Parker with Robertha Quant for the Applicant

Dianne Stewart with Ashley Sands and Sean Moree (11 September 2018) for URCA

Alfred Sears QC with Charles Mackay and Valentino Hamilton for Paramount Systems Ltd.

1 May 2018, 13 June 2018, 11 September 2018

RULING

WINDER J

This the application of Navette Broadcasting & Entertainment Company Ltd. (Navette) for judicial review which was heard inter partes,

1. The application for judicial review was lodged, in the prescribed form, on 16 April 2018. The decision sought to be reviewed is described in the said application as:
   (1) The decision ("The Decision") of the Utilities Regulation and Competition Authority (URCA) by letter dated 15 June 2017 whereby URCA pursuant to Section 27(1)(a) of the Communications Act purported to vary the Applicants

license with immediate effect from the Commencement Date of the license ("the 15 June 2017 Decision");

(2) The Decision by URCA, with the assistance of the Royal Bahamas Police Force, on or about the 9th April AD 2018, pursuant to s.16(1) and 33 of the Communications Act, to enter upon the Applicant's property to remove without notice or reasonable or lawful basis the following property of the Applicant; (i) Black Dell CPU, (ii) Silver FM Transmitter (iii) White and green Reciever, and (iv) Demixer; (3) The Decision of Paramount Systems Ltd. to accept issuance, by URCA of the Applicant's license pursuant to and in accordance with the Decision complained of herein.

(3) The Decision of Paramount Systems Ltd. to accept issuance, by URCA of the Applicant's license pursuant to and in accordance with the Decision complained of herein.

2. Navette has sought numerous heads of relief including, inter alia, Certiorari to quash the decisions of URCA, Declaratory Orders, and Mandamus for the reissuance of the license and for the return of property. The decisions identified as (2) and (3) above flow from the 15 June 2017 Decision.

3. The factual matrix surrounding the application is as follows:

(1) On 2 September 2009 Frank Rutherford and Blossie Smith (as owners of a radio station with a FM frequency license) and Van Ferguson and Cheryl Braynon (as operators) entered into an agreement for the operation of the radio station as a sports radio station. Navette was the vehicle by which the operation of the sports radio station would take place.

(2) An Individual Spectrum Licence (ISL) was issued by URCA on 18 January 2010 in relation to the use of the frequency 103.5FM ("*the Original Licenses*") as set out in the following letter:

January 18, 2010

Messrs Frank Rutherford & Phillip Smith
Navette Broadcasting & Entertainment Co. Ltd.
P.O. Box N-296
Dewgard Plaza, Madeira Street
Bahamas

Dear Messrs Rutherford & Smith:

Re: Issuance of Individual Spectrum Licence

In exercise of the powers conferred on it under sections 26 and 113(4)(a) of the Communications Act, 2009 ("Comms Act"), the Utilities Regulation and Competition Authority (URCA) hereby issues Messrs Frank Rutherford & Phillip Smith an Individual Spectrum Licence for Navette Broadcasting & Entertainment co. Ltd..

Signed and Sealed by:) _____
(Signed)
) *Michael J. Symonette*
) *Chief Executive Officer*

For the Utilities Regulation & Competition Authority
Date:) *18/1/10*
_____

Signed and Sealed by:) _____
(Signed)
) *Frank Rutherford & Phillip Smith*

For Frank Rutherford & Phillip Smith/ Navette Broadcasting & Entertainment Co. Ltd.) *2/16/10*
_____

(3) Navette is said to be majority owned by Frank Rutherford and Blossie Smith (successor to Philip Smith) whilst Van Ferguson and Cheryl Braynon are minority owners. URCA says it was always represented that Frank Rutherford and Blossie Smith were the owners of Navette and that Van Ferguson represented the operators.

(4) URCA says it received an application for Merger in February 2017 submitted by the Original Licensees (and their lawful representatives) in partnership with Paramount Systems Ltd. ("*Paramount*").

(5) By letter dated 5 April 2017 URCA sought representations from interested parties including Navette. That letter provided as follows:

April 5, 2017

Mr. Vann Ferguson
Navette Broadcasting & Entertainment Co. Ltd.
Dewgard Plaza, Madeira Street
Nassau, The Bahamas

Dear Mr. Ferguson,

Re: Application for Change of Control of ZSR 103.5FM

The Utilities Regulation and Competition Authority (URCA) has received an application for approval of a change of control of ZSR 103.5 FM on behalf of Mr. Frank Rutherford and Mrs. Blossie Smith. URCA is currently in the process of reviewing the said application and hereby requests that Navette Broadcasting and Entertainment Co. Ltd. (Navette), as an interested party, provide any representations or comments which it considers URCA should take into consideration.

Navette is required to provide its representations on or before close of business on April 19, 2017.

URCA looks forward to the usual co-operation received from Navette on matters of mutual concern. Please do not hesitate to contact Ms. Samantha Rolle at srolle@urcabahamas.bs should you have any questions or concerns.

Yours faithfully,

_____ (Signed)
Stephen Bereaux
Chief Executive Officer

(6) Written representations were received on 19 April 2017 from Mr. Vann Ferguson for and on behalf of Navette as an interested party in response to URCA's 5 April 2017 letter to the Applicant.

(7) By letter dated 15 June 2017 URCA advised of its decision, which it says was made in accordance with the exercise of it's power under section 27(1)(a) of the Communications Act, 2009.

(8) According to Navette,

(a) URCA, in arriving at its decision, effectively adjudicated upon matters which lay entirely outside of its jurisdiction and purview in purporting to in effect pierce the corporate veil and find that Mr. Frank Rutherford and Mr. Phillip Smith (deceased) were in fact the applicants.

(b) The Act expressly mandated that applicants "must" be duly incorporated entities, Navette's Individual Spectrum Licence was expressly stated to be issued to "*Messers Frank Rutherford & Phillip Smith*...for *Navette Broadcasting & Entertainment Co. Limited.*" However, URCA failed to acknowledge the fact, clear on the face of the said individual licence, that the said licence was "for" the Applicant, which was the only incorporated entity listed thereon capable of applying for and being granted an individual licence.

(c) URCA ought to have directed Mr. Rutherford, and or anyone acting on his behalf, to approach the Supreme Court for the adjudication of their claims to Navette's license as the said dispute was clearly a civil matter. URCA's said letter reads like a purported judgment in a civil dispute in the absence of the requisite hearing and due process to which Navette was entitled before being deprived of its license and property.

(d) If there was doubt as to whether the license was granted in the name of Messrs. Rutherford and Smith or Navette, the reasonable and lawful variation ought to have been to remove the names of Messers. Rutherford and Smith from the said licence, as they were statutorily prohibited from holding the same, leaving Navette as the holder of the licence.

(e) The application for change of control came from Brickell Management Group, a stranger to the Applicant's licence, without any evidence that the Applicant, the actual holder of the said licence agreed with the said change. In the absence of consensus, URCA as regulator ought

reasonably to have recused itself as opposed to acting as arbiter in a private dispute wholly unrelated to regulation.

(f) If, as URCA insisted, the Applicant's licence was void, how could URCA employ s. 27(1)(a) of the Act to vary the same. Clearly if the Applicant's license was void as alleged, the appropriate power to exercise under s. 27(1)(a) is not variation but rather revocation in the circumstances. Substituting Paramount Systems Limited for the Applicant in the circumstances does not cure the alleged defect in the original licence it is merely an unlawful and unconstitutional taking of the Applicant's property.

(9) According to URCA,

(i) In 2007 the Original Licensees were approved by the Government of The Bahamas for the grant of a licence to operate a radio station;

(ii) On URCA being constituted regulator of the Electronic Communications Sector effective 1st September 2009, the Original Licence was issued to the Original Licensees on the basis of the 2007 approval;

(iii) Navette was not an Applicant nor the licence holder of the Original Licence, but URCA was informed that Navette would at all material times manage and operate a radio station on behalf of the Original Licensees pursuant to a management agreement between the Applicant and the Original Licensees;

(iv) Navette was represented to them as being owned by Rutherford and Smith only.

(10) Navette purported to lodge an appeal of the 15 June 2017 Decision with the Utilities Appeal Tribunal ("the UAT") by way of an unfiled Notice of Appeal dated 4th September 2017 which was served on URCA. URCA says that it advised Navette to contact the UAT regarding its appeal.

(11) On 10th November 2017 Navete filed in Supreme Court Action No. 2017/PUB/jrv/0026 an application for leave to commence judicial review of the 15th June 2017 Decision. In that action Navette also sought leave to

commence judicial review in respect of a 26th October 2017 decision by URCA by virtue of which the Applicant was served a cease and desist notice citing Navette's use of the 103.5FM frequency without being a licensee as a contravention of sections 16 and 33 of the Communications Act and punishable by criminal prosecution. The first action was commenced by Navette closely following the said Cease and Desist Notice of 26th October 2017.

(12) Navette's leave application in the First Action was heard and determined by ***Charles J*** on 13 December 2017. The basis of URCA's opposition to the leave application was that the UAT has exclusive jurisdiction to hear the disputes which were the subject matter of the intended judicial review and there were no "exceptional circumstances" on which the Court could accede to the leave application in place of the alternative remedies before the UAT. Additionally, Navette did not rely on any evidence of exceptional circumstances on which the Court could exercise a discretion. ***Charles J*** refused the application for leave and dismissed the judicial review application with costs.

(13) Navette filed a Notice of Appeal with the UAT on 20 November, 2017 as well as an application for extension of time by way of a Summons and Affidavit of 11 November 2017 and 14 November 2017 respectively.

(14) Following the dismissal of the First Action on 13th December 2017, Navette obtained a hearing of the UAT Extension Application on 21st December 2017. That UAT extension application was opposed by URCA on the basis that there was no good explanation for the delay and no exceptional circumstances under which the extension could be permitted pursuant to rule 9(2) of the UAT Rules. On 21 December 2017 the UAT, in addition to refusing the extension of time application, dismissed Navette's appeal.

(15) On 19 January 2018, Navette appealed the 21 December 2017 decision of the UAT to the Court of Appeal. Navette filed a Withdrawal of this UAT appeal on 30 April 2018.

(16) On 29 January 2018, Navette also filed a Notice of Appeal Motion in the Court of Appeal seeking to appeal the 13 December 2017 Order of ***Charles J*** in Supreme Court Action No. 2017/PUB/jrv/0026. Application was made by Navette for leave to appeal, out of time, on 6 February 2018. The Notice of Withdrawal of Appeal in SCCivApp. No. 20 of 2018 was filed on 17 April 2018 and sent by email to Counsel for URCA on 28 May 2018 the day before the hearing of the appeal on 29 May 2018. The appeal was dismissed with costs to URCA on 29 May 2018.

4. URCA has applied by Summons for an Order that the action be struck out pursuant to Order 18 rule 19(1)(d) of the Rules of the Supreme Court. The Summons seeks an Order pursuant to Order 18 rule 19(1)(d) of the Rules of the Supreme Court, and the inherent jurisdiction of the Court that the action herein be struck out and dismissed as constituting an abuse of the process of the Court, on the grounds that:
   (1) The issues raised in the Applicant's Notice of Application for Leave to commence Judicial Review, filed herein on 17th April A.D., 2018 ("the Leave Application") were the subject of prior proceedings before this Court in Supreme Court Action No. 2017/PUB/jrv/0026 and accordingly the Applicant is estopped from seeking leave to commence judicial review to re-litigate the issues raised on *res judicata* grounds;
   (2) The Leave Application is otherwise an abuse of process having regard to the Applicant's pending Appeals in the Court of Appeal matters No. SCCivApp. No. 20 of 2018 and SCCivApp No. 11 of 2018 ("the Appeals");
   (3) The Leave Application be dismissed on the grounds that the Applicant has adequate alternative remedies having regard to the exclusive jurisdiction of the Utilities Appeal Tribunal in respect of the matters in dispute.

5. Apart from their own challenges, URCA and Paramount have raised issues of delay and the presence of alternative remedies as the primary basis upon which I ought to exercise my discretion to refuse the grant of leave to Navette.

6. According to URCA, these judicial review proceedings are an abuse of process as "[t]he 15th June 2017 Decision challenged by the Applicant in the First Action and the UAT-URCA Appeal, is the same decision which the Applicant seeks to challenge in this Action". Further, they say, "[h]aving regard to the contents of the Leave Application herein the 15th June 2017 Decision is also the substantive basis of the challenge of the purported 9th April 2018 Decision of URCA which the Applicant also seeks to challenge. ...[T]he Applicant cannot be permitted to challenge the 15th June 2017 Decision again in light of the 13th December 2017 Supreme Court Order of Charles J and the 21st December 2017 Order of the UAT. ...The causes of action relied upon in the First Action and in the UAT-URCA Appeal are the same as the causes of action relied upon in this Action. ..[H]aving regard to the determination of the First Action and the UAT-URCA appeal, the Applicant cannot be permitted to advance the same causes of action in this Action.

7. Navette says that the First Action has not been heard on its merits and therefore should not bar to it obtaining leave to commence judicial review of the same decision.

Alternative Remedies and Abuse of Process

8. The Respondents argue that [Navette] ought to be refused leave to commence Judicial Review having regard to the adequate alternative remedies available to it in light of the UAT's exclusive jurisdiction. They say that "[t]he proper statutory procedure by which the Applicant can obtain redress in respect of the Decisions of URCA which it seeks to challenge in this Action, requires that the Applicant to file an appeal of any decision made by the First Respondent with the UAT, the statutory tribunal which has the exclusive jurisdiction to hear and determine all appeals."

9. The principles with respect to the presence of alternative remedies and judicial review are fairly well settled and were recently considered by the Caribbean Court of Justice in the case of ***The Medical Council of Guyana v Jose Ocampo Trueba*** **[2018] CCJ 8 (AJ).** According to Mr. Justice Barrow, who delivered the decision of the CCJ, at paragraph 25 of the decision, "the mere existence of a right of appeal does not preclude judicial review and that an applicant may be permitted to proceed with judicial review if he shows there are exceptional circumstances which justify so proceeding rather than appealing".

10. This succinct expression of the principle, as regards the alternative remedy of appeal, echoes the view of ***Isaacs JA*** in the case of ***Moxey v Bahamas Bar Council*** **[2017] 1 BHS J. No. 125 .** In ***Moxey*** the applicant had challenged the decision of the Bar Council to refuse her application for admission to practice as Counsel and Attorney-at-Law. The Bar Council applied to set aside the leave initially granted to her ex parte, on the ground, inter alia, that she had an alternate and adequate remedy of appeal under the provisions of the Legal Profession Act. The Supreme Court agreed and for this and other reasons, set aside the leave which had been granted ex parte. In respect to the issue of alternative remedies in ***Moxey***, ***Isaacs JA*** discussed, at paragraphs 41-45 as follows:

> **Alternative remedy**
> **41** Mr. Glinton submitted that the Judge was wrong to find at paragraph 40 of his judgment that the appellant had to pursue an appeal under section 54 of the Act; and that the section afforded her the opportunity to challenge the legality of Bar Council's actions. Mr. Glinton submitted also that section 54 of the Act was not intended to be an exclusive remedy if indeed it was capable of providing the relief the appellant was seeking, to wit, to impugn the legality of Bar Council's approach to its preliminary function and duty as related to the appellant's call application.
> **42** I readily accept that a statutory right of appeal is not necessarily to the exclusion of an applicant availing himself of judicial review proceedings. However, in my judgment, where a person is accorded an appeal route to a tribunal superior to the tribunal to which judicial review lies, it would border on an abuse of the courts' processes to allow him to circumvent the appeal process. Mr. Glinton spent a great deal of energy to convince us that an appeal would not have provided the appellant the opportunity to

challenge the legality of Bar Council's decision; and that there is a marked difference between an appeal and judicial review, i.e., an appeal focuses on the merits of the decision but judicial review focuses on its legality.
43 While that may very well be so in a great many cases, it is not the case here. There are no constricting words used by Parliament in section 54 of the Act to limit the breadth of an appellant's appeal. The section reads:

"54. (1) Any person aggrieved by --

(a) the failure or refusal of the Bar Council to make a determination in his favour under subsection (2) of section 12; ... may appeal on that account to the Court of Appeal; and in relation to every such appeal section 9 of the Court of Appeal Act shall mutatis mutandis apply as if the matter in respect of which the appeal is brought were a judgment or order of the Court."

44 There is no reason to restrict the amplitude of an appeal under the section to the merits only. As a matter of fact, by bypassing the Supreme Court pursuant to section 54 of the Act. Parliament has indicated that issues involving counsel and attorneys-at-law should be heard quickly and definitively. It would make a nonsense of the section if a person was able to approach the Supreme Court, a court subordinate to this Court, for judicial review, bearing in mind that Bar Council's decision under section 12 is placed on the same footing as "a judgment or order" of the Supreme Court. In effect then, the Judge was being asked to rule on a decision taken by a tribunal of concurrent jurisdiction. That is not the purpose for judicial review, that is the purpose of an appeal as is provided in section 54.
45 I am satisfied therefore, that the Judge was right to find that section 54 afforded the appellant an alternative remedy. He ought, in my view, to have gone even further to find that the application before him was misconceived. In the premises, I dismiss this appeal and affirm the decision of the Judge. The costs of the appeal are the respondents; such costs to be taxed if not otherwise agreed.

11. As the background facts of the instant case reveal, the question of alternative remedies has already been considered by this Court and a finding made in respect thereof. That finding, by ***Charles J*** was that the remedy of an appeal to the UAT is an adequate alternative remedy to Judicial Review and that there are no exceptional circumstances. ***Charles J***, in dismissing the first judicial review application so found. Mr Parker, for Navette, urges that this Court is not precluded from entertaining a fresh application for Judicial review having regard

to the (dicta) of ***Charles J*** in dismissing the judicial review application. In the transcript of the December 2013 hearing, ***Charles J*** is recorded as stating:

> *Ms. Daxon, the law is clear. It's not that the Court will make or will have jurisdiction – the Court will make or will have jurisdiction at some point in time. As far as I see it, this is not the right time. The appeal process has to be completed before you can apply for judicial review. You have to wait for that decision and prosecute it with speed, if you can. That does not shut you out after that tribunal has made a decision. You can come back to the Court; but, as I see it now, what exceptional circumstances are there for me to bypass this tribunal because that is what it is. Or take away from them that what they were set out [sic] to do.*

12. According to Mr Parker, ***Charles J*** left open the possibility of a return to pursue judicial review upon the exhausting of the appeal process.

13. At paragraph 35 of the Supreme Court decision in ***Moxey***:

> **35** I accept, as does Counsel for both parties that the writings of Messrs. Auburn, Moffett and Sharland, the learned editors of ***Judicial Review, Principles and Procedure,*** 2008, Oxford press, represent the correct statements of the law on the question of alternative remedies. At paragraph 26.90, it is stated,
>
> > Because judicial review is a remedy of last resort where an adequate alternative remedy is available the court will usually refuse permission to apply for judicial review unless there are exceptional circumstances justifying the claim proceeding. The availability of an adequate alternative remedy is a matter that is relevant to the exercise of the courts discretion to grant permission to apply for judicial review; it does not go to the court's jurisdiction to entertain a claim for judicial review.
>
> At paragraph 26.97, it was stated,
>
> > If an alternative remedy is not actually available to a claimant it is difficult to see how the mere existence of that remedy could justify the court refusing permission to apply for judicial review. However, if what would otherwise have been an adequate alternative remedy

ceases to be available to a claimant because he or she have instead, choosing to bring a claim for judicial review the previous availability adequate alternative remedy may cause the court to refuse permission.

In respect of statutory appeals it continued at paragraph 26.104 as follows,

> A court is extremely unlikely to grant permission to apply for judicial review in any case where there is a statutory right of appeal against the decision under challenge unless there are wholly exceptional circumstances. The fact that a claim raises a point of law of general importance might constitute an exceptional circumstances for this purpose, but when considering this issue the court will be likely to have regard to whether the relevant appellate body can itself definitively determine the relevant point and if not, whether there are ***subsequent avenues of appeal to other bodies (or to the court) which could provide the requisite determination***. (emphasis added)

14. Here, Navette pursued the appeal to the UAT simultaneously with its first judicial review application. That effort to the UAT, which also required an application to extend time, was unsuccessful. In rendering the decision the UAT stated in its ruling:

(1) The Tribunal heard Counsel for the Applicant on the application for an extension of time to file the Notice of Appeal pursuant to Rule 9(1) of the UAT Rules, 2014.

(2) The Applicant have failed to satisfy the Tribunal of any cogent or acceptable reason for its delay in complying with Rule 9(1) of the UAT Rules, 2014.

(3) Additionally, it is noted by the Tribunal that the Applicant has failed to provide any evidence of its compliance with Clause 2(d) of its Management Agreement (Exhibit 1 – Applicant's Bundle of Documents, filed November 20, 2017) of any consent of the parties to that Agreement to waive their rights to Arbitration under the said clause.

(4) After hearing and considering the arguments of Counsel for the Applicant and Counsel for the Respondent, it is the decision of the Tribunal that the application is dismissed with costs to be paid by the Applicant to the Respondent, costs to be assessed or taxed, if not agreed.

15. The UAT appeal, which was a part of the statutory framework to challenge decisions of URCA, was to a superior court in the Court of Appeal. This is a circumstance not unlike the situation in ***Moxey***. However, on 30 April 2018, before the UAT appeal could be heard, a Notice of Withdrawal of the UAT Appeal was filed. The appeal was withdrawn after this second judicial review proceedings had already been filed (16 April 2018) and following the filing of URCA's strike out application for abuse of process. Navette withdrew its appeal to the Court of Appeal, without explanation.

16. In all the circumstances I am not satisfied that this is a proper case for the exercise of my discretion to grant leave. Even if the applicant seeks to rely on the words of ***Charles J***, and that recourse could still be had to the Supreme Court, on a fresh application for judicial review, once the alternative remedy had been exhausted, that pursuit of the alternative remedy (which ought to have included appeals) was not concluded but withdrawn by Navette without hearing. It cannot be denied that the appeal process is a part of the statutory framework to challenge decisions of URCA. I accept the submission of the Respondents that it would otherwise be an abuse to seek to retrace ground already determined by ***Charles J.***

17. In any event, were the court to consider the matter de novo, and putting aside the issue of abuse of process, I would nonetheless refuse leave having regard to the circumstances of this case. In this regard I find the writings of ***Messrs Auburn, Moffett and Sharland***, the learned editors of ***Judicial Review, Principles and Procedure,*** instructive. Those writings, as discussed above, require the Court to have "regard to whether the relevant appellate body can itself definitively determine the relevant point and if not, whether there are subsequent avenues of

appeal to other bodies (or to the court) which could provide the requisite determination".

18. Section 8 of the UAT Act provides:

> "8. The Tribunal may in relation to any matter before it-
> (a) ...
> (b) when –
> (i) deciding an appeal by applying the same principles as would be applied by the Supreme Court on an application for judicial review; or
> (ii) deciding an appeal by drawing any inferences that are not inconsistent with the findings of fact made by an authority and that are necessary for determining a question of law or jurisdiction, quash or uphold the whole or part of the relevant regulatory measure. Where it quashes the whole or part of such regulatory measure, the Tribunal may refer the matter back to the relevant authority with a direction to reconsider and make a new decision in accordance with the findings of the Tribunal;"

19. It appears to me to be an entirely uphill argument to persuade any court that this statutory body, the UAT, which is empowered to apply all the principles of Judicial Review which the Supreme Court would apply, does not afford an adequate alternative to judicial review.

20. Section 13 of the Utilities Appeal Tribunal Act provides:

> 13. (1) Subject to any provisions in any other law determining otherwise including Article 28 of the Constitution, any party to a matter before the Tribunal is entitled as of right to appeal to the Court of Appeal on any of the following grounds —
>
> (a) that the Tribunal had no jurisdiction in the matter, but it shall not be competent for the Court of Appeal to entertain such ground of appeal, unless objection to the jurisdiction of the Tribunal had been formally taken at some time during the progress of the matter before the making of the order or award;
>
> (b) that the Tribunal has exceeded its jurisdiction on the matter;
>
> (c) that the order or award has been obtained by fraud;
>
> (d) that any finding or judgment of the Tribunal in any matter is erroneous in point of law;
>
> (e) that some other specific illegality not mentioned in paragraph (a) to (d) and substantially affecting the merits of the matter has been committed in the course of the proceedings.

(2) On the hearing of an appeal from the Tribunal in any matter brought before it, the Court of Appeal shall have power —

(a) to confirm, modify or reverse the order or award appealed against;

(b) if the Court of Appeal confirms the order or award appealed against, to order that there shall be included in the sum which is the subject of the appeal, interest at the rate of ten per centum onthe whole or any part of the sum, from the date of the order or award appealed against;

(c) if it appears to the Court of Appeal that a new hearing should be held, to set aside the order or award appealed against and order that a new hearing be held; or

(d) to order a new hearing on any question without interfering with the finding or judgment upon any other question, and the Court of Appeal may make such final or other order (other than an order as to costs) as the circumstances of the matter may require.

21. The Court of Appeal in hearing an appeal from the UAT, is empowered to confirm, modify or reverse the order or award appealed against and was therefore empowered to remedy any perceived fault in the UAT decision not to disturb URCA's decision. The decision of Navette, whether:

(1) in failing to apply timely to the UAT; or

(2) to unilaterally abandon the statutory appeal process seemingly to enhance its judicial review prospects;

ought not to inure to a determination that no alternative remedy is available to it. On the strength of ***R. v Regents Park College ex parte Carnell [2008] EWHC 739***, impliedly accepted by the Court of Appeal in ***Moxey***, the fact that the alternative remedy in no longer available is not a bar to the Court refusing leave especially where the remedy is unavailability as a result of Navette's own making. In ***ex parte Carnell, Black J*** (now Lady Black of the UK Supreme Court) refused permission to bring judicial review proceedings on the basis that a complaint to the Office of the Independent Adjudicator (OIA) was an adequate remedy even though the OIA had declined jurisdiction because that Claimant had made a claim for judicial review. At paragraphs 29-33, ***Black J*** had this to say:

29. The OIA observed that the judicial review proceedings had been neither withdrawn nor discontinued. They had been terminated by Mr Justice Collins' ruling. The complaint was therefore caught by rule 3(3)

and could not be entertained. If it were, the OIA would be being asked to disagree with Mr Justice Collins and it indicated that it did not consider it would be appropriate to challenge the findings of a High Court judge.

30. Accordingly the position now is that the Claimant *had* an effective alternative remedy but no longer has. How should the discretion to grant permission for judicial review be exercised in these circumstances?

31. It is well established that permission should not normally be granted where an adequate alternative remedy exists. The authorities quoted in the White Book for this are R v Chief Constable of Merside Police Ex p. Calveley [1986] QB 424, R v Secretary of State for the Home Department Ex p. Swati [1986] 1 WLR 477 and R (on the application of G) v Immigration Appeal Tribunal. [2005] 1 WLR 1445. Permission may, however, be granted where there are exceptional circumstances or where the alternative remedy is not adequate or there is some other reason which makes judicial review particularly appropriate. I sought assistance from counsel as to authorities which dealt with the issue of an alternative remedy in circumstances where the remedy had become unavailable by the time the judicial review permission application was heard. They invited my attention to two cases about the availability of alternative remedies, R v Birmingham City Council, ex parte Ferrero Ltd [1993] 1 All ER 530 and R v Brentford General Commissioners, ex parte Chan and others [1986] STC 65, neither of which addressed themselves to this precise point. The Ferrero case emphasises the presumption against judicial review where an alternative remedy exists but does not expressly deal with the situation where the remedy is no longer available when the question of permission is considered. In that case, as one can see from p 540e, the claimants had in fact lodged an appeal pursuant to their statutory rights and had withdrawn it in the light of their success on judicial review and by the time the Court of Appeal considered the matter and held that it had been wrong to permit judicial review, the whole question was academic because the suspension notice to which the proceedings related had long since terminated. As far as I can see, the Chan case is not an example of a no longer extant remedy either. However, it does contain a consideration of what might be exceptional circumstances in which judicial review could be permitted despite the existence of an alternative remedy and a helpful practical passage which contains a

warning that is relevant also in this case. Taylor J, as he then was, said:

> "It may be tempting to succumb to the approach, well, the case is here now, why not deal with it rather than divert it onto another route which will bring it before another judge in the same building but much later? That would especially be so where the court's initial reaction was to feel that there was substance in the applicants' complaint. But to do so would be contrary to the principles I have earlier stated. It would, in effect, license applicants to achieve judicial review by simply arriving here and relying on the inconvenience and delay of their being redirected. It would clog the already swelling lists of properly brought cases for judicial review."

32. The Defendants submitted that the fact that the remedy is no longer available is the Claimant's own fault and irrelevant. They pointed out that if it were to be a material consideration, a claimant could obtain permission to seek judicial review in a case in which an alternative remedy existed which was perfectly good but not what he would choose simply by waiting until the time limits for that remedy expired and then launching his judicial review claim. This would destroy the important principle that judicial review is a remedy of last resort where no alternative remedies are available to the claimant. In a variant of the mischief contemplated by Taylor J, it would license claimants to make use of delay to bring themselves within the scope of judicial review when they would otherwise have been confined to their statutory or other alternative remedy.
33. I have considered the question of the OIA very carefully. The fact that the OIA complaints procedure is no longer available is by virtue of the Claimant choosing not to pursue it initially and then maintaining that course following receipt the Acknowledgments of Service of the other parties. He would have been within the rules of the OIA scheme had he abandoned his judicial review proceedings at that stage and submitted his claim to the OIA with a request for it to be entertained out of time. The circumstances of this case are not, in my judgment, exceptional in such a way as to justify me exercising my discretion to grant permission for judicial review when that original remedy would have been available to the Claimant had he made different choices.

22. In ***Moxey*** the lower court found, relying on ***R. v Regents Park College ex parte Carnell,*** that it may nonetheless refuse leave to apply for judicial review notwithstanding the appeal may longer be available. In ***Moxey,*** the time limited

for appealing had long passed although the opportunity may have existed to apply for leave to appeal out of time.

23. In ***Moxey***, which was upheld by the Court of Appeal, the Supreme Court found that the Court may nonetheless refuse leave to apply for judicial review notwithstanding the appeal may longer be available. In ***Moxey*** the time limited for appealing had long passed however the opportunity existed to apply for leave to appeal out of time.

24. I should also add for completeness that in addition to being satisfied that an adequate alternative remedy existed, although not now available, I am satisfied that there is nothing exceptional about the facts of this case to warrant the exercise of my discretion to grant leave. As in ***ex parte Carnell***, the original remedy afforded under the statue would have been available to Navette had it made different choices.

Delay

25. The complaint here is that Navette is guilty of delay and or has not acted promptly in pursuing these proceedings. Order 53 rule 4 of the Rules of the Supreme Court provides:

> 4. (1) An application for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
>
> (2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.
>
> (3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.

26. No formal application to extend time has been made however Counsel for Navette has made the application on his feet in the face of the Court, he says the reasons for any delay is well traversed in the affidavits filed on Navette's behalf. Counsel undertook to file a formal application for extension.

27. A review of the appropriate law on the question of promptness and delay was carefully given by ***Isaacs JA*** in ***Moxey.*** At paragraphs 26-28 he stated:

> 26. In Regina Securities Commission of the Bahamas v. Ex Parte Petroleum Products Ltd [2000] BHS J. No. 30, an application for judicial review by Petroleum Products Ltd. ("Petroleum") in respect of the decision of the Securities Commission of The Bahamas (the "Commission") to register a prospectus for the public floatation of Freeport Oil Holding Company Limited ("FOHCL"), the parties disagreed as to the date upon which Petroleum became aware of the 11 grounds upon which a judicial review application could be made. The Commission registered the prospectus on 1 June 1999; but Petroleum contended that the operative date was, 1 July 1999. Hayton, J said at paragraphs 18 and 19:
>
> > 18. In my view, when grounds for the application first arose was on 1 June 1999, when the prospectus was registered, being the complained of conduct of the Commission, not on 1 July 1999 when FOHCL inevitably took advantage of such registration to market itself to the public. Thus, the application is even beyond the six month limit, quite apart from the fact that, as the English Court of Appeal stated in R v Stratford-on-Avon DC ex p Jackson [1985] 1 WLR 1391 at 1322, 'The essential requirement is that the application must be made promptly'
> >
> > 19. If such essential requirement is not satisfied in any event within the objective six month period, the question arises whether or not "the Court considers that there is good reason for extending the period". It is here, in my view, that the Court should take account of

the time the impugned matter came to the knowledge of the applicant, it should consider whether the applicant, after acquiring such knowledge, made the application promptly, there being a greater need to act promptly the greater the period since the objective date of the grounds for the application. If the applicant did then apply promptly the period should be extended to that necessary to make the application timely.

27. In Bahamas Hotel Catering & Allied Workers Union v. The Attorney General and the Bahamas Hotel & Maintenance & Allied Workers Union; West Bay Management Limited v. Bahamas Hotel Maintenance & Allied Workers Union [2010] 1 BHS 3. No. 67, the appellant sought to reverse a decision of then Chief Justice Burton Hall to refuse the relief sought in a judicial review application. Longley, JA (as he then was) delivering the decision of the Court, stated:

> 16. Applying the overriding principle of promptness, it seems to me that where the six month limitation period has expired the court must ask itself several questions. The first is: what is the decision the applicant seeks to impugn? Second, when did the applicant first become aware of the decision it seeks to impugn? Third, did it act promptly in seeking leave to make an application for judicial review once it became aware of the decision? Fourth, as an alternative to question three, if the applicant did not act promptly in making the application to challenge the decision it seeks to impugn has it otherwise proffered good reason for the entire period of delay?
>
> 17. There is undoubted overlap between questions three and four. It is only if the court concludes that the applicant acted promptly after becoming aware of the decision it seeks to impugn, or that it has proffered good reasons to explain the delay in making the application to apply for judicial review, will time be extended on the basis that good reason exists.

28. Longley, JA continued at paragraph 26 and said, inter alia:

> 26. However, for the purposes of Order 53 r.4 of the RSC time begins to run from the date when grounds for the application first arose."

28. Applying the guidelines of ***Longley JA*** (as he then was), in ***Bahamas Hotel Catering & Allied Workers Union v. The Attorney General et al; West Bay Management Limited v. Bahamas Hotel Maintenance & Allied Workers Union***, I begin by determining what the period of delay is. The impugned decision is dated 15 June 2017 and was received by Navette, they say on August 23, 2017. The present application was commenced on 16 April 2018, approximately eight months later. The period of delay is therefore almost 8 months.

29. Did Navette act promptly in seeking leave to make an application for judicial review once it became aware of the decision? Navette says that the issue of delay does not arise as ***Charles J*** indicated, in dismissing the First Judicial Review action, that it could return once they exhausted the UAT appeal. Navette, also says that it acted promptly as it was always acting towards a resolution in the delay period, whether pursuing the first judicial review, pursuing the alternate remedy through the UAT or the various appeals.

30. Could the words of ***Charles J*** obviate the need to comply with the statutory requirements as to promptness and time constraints in a new action, having dismissed the action before her? Respectfully I cannot agree with Navette. Having considered the evidence filed on its behalf, I am not satisfied that there was promptness by Navette in applying for judicial review as activity in the entire period of the delay cannot be accounted for. The UAT gave its determination on 21 December 2017, just one week after ***Charles J*** made her order, yet this application for judicial review was not pursued until some 4 months later (and eight months after becoming aware of the 15 June 2017 Decision). Having

appealed the UAT decision and withdrawn that appeal, without explanation, such activity could not reasonably excuse any period of that delay. In any event the judicial review was filed before the appeal was withdrawn suggesting that the extant appeals was not an impediment to their proceeding.

31. In all the circumstances therefore I refuse the application of Navette for leave to apply for judicial review and grant the relief sought in the Summonses filed by the Respondents with costs.

32. Subsequent to my hearing of the judicial review leave application, on 11 September 2018 I heard Navette's application for a rolled up hearing. I had reserved my decision on that recent application, however, having refused the application for leave the need to determine that application has been made otiose.

Dated the 27th day of September 2018

Ian Winder

Justice