IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2003 HCV 1026

BETWEEN	**CHASROSE LTD**	**CLAIMANT**
AND	**KINGSTON AND ST. ANDREW CORPORATION**	**DEFENDANT**

IN OPEN COURT

Keith Bishop and Andrea Moore instructed by Bishop and Partners for the claimant

Rose Bennett-Cooper, Crislyn Beecher Bravo and Sidia Smith instructed by Bennett and Beecher-Bravo for the defendant

CLAIMS AGAINST PUBLIC BODIES - APPLICATION FOR SUMMARY JUDGMENT – APPLICATION FOR EXTENSION OF TIME TO FILE ADDITIONAL WITNESS STATEMENTS – COSTS – RULE 64.6

July 11, 12, 13, 14 and 25, 2011

SYKES J.

[1] This matter came on for trial on Monday, July 11, 2011. What was expected to be a trial quickly became a vigorous summary judgment application by Mrs. Rose Bennett-Cooper on behalf of the Kingston and St. Andrew Corporation ('KSAC'), the defendant. Not to be outdone, Chasrose applied for an extension of time to file further witness statements and to seek additional documentation to support its claim. The court dismissed the summary judgment application and granted the application for extension of time. An oral judgment was delivered on July 14 with written reasons to follow. These are the reasons for judgment.

[2] Undoubtedly, Chasrose Ltd ('Chasrose), the claimant, was taken off guard by this development and thereafter was scrambling to make up ground in response this unexpected attack. It needs to be pointed out that Mr. Keith Bishop was not counsel who represented Chasrose in the earlier years. This case is now entering its ninth year. He recently came into the matter after the pleading and witness statements were already in place.

Consequences of failing to identify the issue early

[3] The submissions that have consumed four days of valuable time allocated to trial ought not to have happened, at this stage of the process, if the issues were

properly identified earlier. In ***Evans v James*** [2001] C.P. Rep 36, the Court of Appeal of England and Wales deprecated this situation. This court wholly agrees with the comments of the President cited below. In ***Evans***, the case came on for trial having been through the case management regime. On the first day of trial, the judge asked counsel for the defendant to indicate how he (counsel) intended to resist the claim because he (the judge) having read the pleadings and the witness statements could not see how the defendant could succeed. After submissions, the judge entered summary judgment against the defendant who appealed. The trial judge's decision was upheld but the President was less than pleased with process leading up to trial. His Lordship said:

> *This case however discloses a number of unsatisfactory features, principally the failure of case management at the interlocutory stage. The judge rightly referred in his judgment to the importance of active management and Rule 1.4 (2) (C). That management should however have been at a much earlier stage and before witnesses were called to attend court. Steps should have been taken to avoid such an unsatisfactory position by earlier identification of the issues and the strength of the defendant's case. A more rigorous identification of issues at an earlier stage ought to have elicited the significance attributed by the defendant to the telephone conversation with the deceased's solicitor and the*

question of the incapacity of the deceased and the extent of the ostensible authority of the deceased's solicitor. This inquiry as to the issues should have been conducted before Judge Gaskell at the directions hearing on the 23rd February 1999. I appreciate that both counsel were taken by surprise at the hearing by Judge Moseley suggesting that there was no reasonable defence to the claim. They had little time to formulate their arguments but the judge was not alerted by Mr Griffiths for the defendant to the importance attached to the telephone conversation nor, following from that, the impact of the deceased's lack of mental capacity upon any reliance placed upon that conversation.

[4] This passage makes it abundantly clear that the case management procedure is not a formality to be engaged in as a meaningless ritual that must be endured on the route to trial. The case management is designed to be a rigourous process. Probing questions must be asked. It is not sufficient for a litigant to say his case is so and so. The process must involve an enquiry into how the litigant intends to prove the point in issue. If it cannot be proved by relevant and legally admissible evidence then what is the point of moving forward? It is by rigourous case management that cases which have no real prospect of either being successfully prosecuted or defended are identified and removed.

[5] The Three Rivers litigation is a particularly striking example of failed case management. The result was significant and colossal wasted funds – eighty million pounds to the Bank of England alone, yes eighty million. Adrian Zuckerman in his article, *A Colossal Wreck – The BCCI Litigation* C.J.Q. 2006, 25 (July), 287 – 311, chronicles the consequences of the refusal by the House of Lords to conclude that after an exhaustive inquiry by Bingham LJ (as he was at the time) which generated a two hundred page report and eight large appendices which contained contemporaneous documents from the Bank of England, there was unlikely to be any new evidence or document to be unearthed that would justify the pursuit of the Bank through the courts. The decision of the House in ***Three Rivers District Council v Governor and Company of the Bank of England*** (No. 3) [2003] 2 A. C. 1., on the summary judgment issue, precipitated a two hundred and fifty six day trial before Tomlinson J. After one hundred and thirty days, the learned judge raised polite enquiries about the claimants' case. The trial judge had great difficulty in seeing how the claimant intended to prove the case. He was assured that proof would come. It took another one hundred and twenty six days before the claimants', without getting to the end of their case, accepted that they could not make good the allegations. Thus twelve years of litigation at a cost of eighty million pounds to the bank came to an end. What was remarkable about the case was that it did not appear that anyone was able to suggest what other document, or indeed evidence there might possibly be that Bingham LJ had not already unearthed. Before ***Three Rivers*** arrived in the

House, the summary judgment issue was decided in favour of the bank. Clarke J who struck out the claim and the majority of the Court of Appeal shared the view that Bingham LJ's inquiry was so thorough that the probability of anyone finding out something that he had not was rather remote. In the House, two of their Lordships took the same view. By a bare majority the House rejected these views and held out the hope that the allegations should be tested a trial.

[6] Had the case management process been rigourous the problems now being encountered by Chasrose would have been unearthed. This court must accept responsibility because it is this court as presently constituted who conducted the pre-trial review. Had the pre-trial review been as thorough as ***Evans*** indicates, then we would not be in this present position. It has taken eight years and several thousand dollars only to discover that the case is not ready for trial.

[7] The learned President, in ***Evans***, continued his rebuke by adding:

> *I do not suggest that a case that ought to be concluded in half a day should continue in order to call witnesses but the situation which arose before Judge Moseley whereby witnesses are waiting to be called and the case is summarily dismissed must not be allowed to happen again. There is now a greater burden upon the Bar, solicitors and judges*

and district judges to exercise proper case management. Apart from anything else, it is a disproportionate use of appellate time for this Court to have to spend a day to review a county court decision to dispose summarily of a relatively small claim.

[8] Wright J, for his part, in his judgment gave an indication of the intended rigourous nature of case management conferences under the new litigation regime. The hard questions need to be asked and answered by all concerned. It is no longer, 'Let us go to trial and see what turns up' or a more common variant, 'The witness can be asked to expand on his witness statement and he may provide evidence to fill the gap that now exists' or worse, 'When the opposing side and his witnesses are cross examined, some evidence may emerge that supports the case of the claimant.'

[9] In the present case, witnesses for both sides were in attendance and those that were not in attendance were within easy reach. The court wishes to say that as inconvenient as the timing was, having regard to the far reaching nature of the submissions, the court considered it a necessary exercise if for no other reason than that it has certainly brought into sharper focus some important sub-issues which ought to be resolved, if possible, by affirmative evidence rather than by inference from testimony from witnesses who may well be suffering from fading

memories regarding a sequence of events that took place over fourteen years ago. Additionally, while the court agrees with Mr. Bishop that counsel for the defendant ought to have taken the point sometime ago (and she conceded as much), the legal point was a matter of substantive law which would have to be given effect once it became apparent. It was not a procedural defence akin to a limitation defence.

[10] The present case is sharp reminder of the clear distinction between private law claims against private persons and private law claims against statutory bodies. As will be seen, where a statutory body is shown to have acted outside of the statute then any resulting contract will be held to be of no legal effect even if the parties have acted in reliance on it. Indeed, in their text, Sealy, LS and Hooley RJA, *Commercial Law,* (4th) (OUP) (2009), the learned authors state:

> *A commercial lawyer cannot afford to ignore the impact of public law on commercial transactions. Public law impacts on commercial transactions in at least three ways.*
>
> *First, public bodies or local authorities may themselves enter into commercial transactions. Public authorities whose powers derive from statute are subject to the doctrine of ultra*

vires, which is designed to protect the public funds entrusted to such bodies.

The background

[11] Chasrose alleges, in its amended particulars of claim, that it had either a lease or licence with the KSAC and pursuant to that arrangement it took possession of property, known as Oakton House, located at 7 – 9 Hagley Park Road, in the parish of St. Andrew, registered at volume 323 folio 93 of the Register Book of Titles. KSAC is the registered proprietor of the property. Chasrose alleges that, on June 2, 1997, it was put into possession by the KSAC through the then Town Clerk, Mr. Keith Osbourne who it is said, gave Chasrose the key to a storeroom on the property. Chasrose alleges that it expended $6,500,000.00 dollars in preparing the property for carrying out its intended business for which the property was leased. It is common ground that Chasrose was removed from the property by the KSAC sometime in July 1997. Thus it was in possession for approximately one month.

[12] Arising from this, Chasrose is seeking:

a. a declaration that it had a lease or licence with the KSAC;

b. an order that it is entitled to immediate possession;

c. in the alternative, special damages in the sum of $6,500,000.00;

d. interest and damages

[13] The KSAC has denied any arrangement of any kind with Chasrose and has put forward the case that Chasrose is not entitled to any of the reliefs sought.

[14] Chasrose is seeking private law remedies against a statutory body. In saying this, the court recognises that a declaration may be considered a public law remedy but in this case, Chasrose is not seeking judicial review and in that sense is not pursuing the declaration as public law remedy. Chasrose is asking that a court declares that it has the benefit of an arrangement governed by private law.

[15] Mrs. Bennett Cooper made powerful submissions to the effect that any agreement, whether lease or licence, between Chasrose and the KSAC is void and of no legal effect because of the failure by Chasrose to allege or include in its intended evidence that, in relation to the lease, the sanction of the Minister

was granted and, in relation to the licence, that the council of the KSAC agreed to such an arrangement. What is the foundation for such submissions?

Statutory bodies

[16] Private law claims against statutory bodies can be minefield to the uninitiated. It was on March 7, 1881, that Mr. Joseph Chapleop and his wife Martha received the distressing decision that the their claim against a building society and six of its directors failed. Baggallay LJ uttered these words in ***Chapleo and Wife v The Brunswick Permanent Building Society and Others*** (1880-81) L.R. 6 Q.B.D. 696, 712 – 713:

> *It has also been urged upon us that the plaintiffs had no means of knowing or ascertaining whether the society had exhausted its powers of borrowing or whether indeed there was any limit to such power. To this argument I can only reply that persons who deal with corporations and societies that owe their constitution to or have their powers defined or limited by Acts of Parliament, or are regulated by deeds of settlement or rules, deriving their effect more or less from Acts of Parliament, are bound to know or to ascertain for themselves the nature of the constitution, and the extent of the powers of the corporation or society with which they*

deal. The plaintiffs and everyone else who have dealings with a building society are bound to know that such a society has no power of borrowing, except such as is conferred upon it by its rules, and if in dealing with such a society they neglect or fail to ascertain whether it has the power of borrowing, or whether any limited power it may have has been exceeded, they must take the consequences of their carelessness. It may be that the plaintiffs in the present case have been misled, by the misrepresentations or conduct of others, into the belief that the company had full authority to accept the loan from them; that is a question which I shall have to consider when dealing with the other appeal; such representations or conduct may doubtless give rise to a claim against the parties making such misrepresentations or so conducting themselves, but in my opinion they can in no way give rise to or support a claim against the society.

[17] In the same case Brett LJ added his voice at pages 715 - 716:

If the society had an unlimited power to borrow, but had nevertheless given secret orders to its agent not to borrow beyond a certain amount, I should have thought

nevertheless the society was bound, because the plaintiffs would not have been called upon to inquire as to any secret authority: but where a society or a company has upon the face of its constitution, that is either by the statute or statutory rules under which it is constituted, only a limited authority to borrow, then it seems to me that a person dealing with such a society or company must either inquire or run the risk. Here this society by reason of the Friendly Societies Act, and also by reason of its own rules gave to its directors only a limited power to borrow. That limit was exceeded. The plaintiffs did not inquire; and though probably if they had inquired they would have learned nothing; yet that is their misfortune, and they are debarred from recovering against this society. Then it is said that the society had held out Keighley Lea as a person to accept this loan. That it did so by the directors it cannot be doubted, but the directors had no authority from the society or its rules to authorize anybody to hold out anything on behalf of the society. On no ground that I can see can this finding be maintained as against the society; as a matter of law it could never bind the society, and therefore our judgment ought to be for the society on this appeal.

[18] This was a case in which the building society had limits placed on its powers of borrowing which were in fact exceeded by the directors. The Court of Appeal in reversing the decision below held that no action could be brought against the society for exceeding its borrowing limits because the society had to act strictly within its statutory powers. The result was that the claim against the society failed.

[19] One hundred and fifteen years later, on May 8, 1996, the Court of Appeal of England and Wales had to consider whether a claim by a bank against a council could succeed. This was the case of ***Crédit Suisse v Allerdale Borough Council*** [1997] Q.B. 306. In that case the council sought to make a swimming pool for its constituents. To that end, it established a company and borrowed money from the claimant bank to invest in the project. The loan was to be repaid by revenue earned from time share units that were to be built. The scheme failed and the bank sued to recover its loan. The bank was pursuing a private law claim against a statutory body. The court held that the council acted outside of its statutory powers. The bank's claim failed. Equally important as the outcome was the reaffirmation by Hobhouse LJ (as he was at the time) of the continued vitality of ***Chapleo***. The learned Lord Justice noted that 'local authorities are corporations of limited capacity and competence. Any third party dealing with a local authority should be aware of that fact and of the potential legal risk' (page 348). In addition, Hobhouse LJ cited cases which supported the proposition that a contract entered into which is contrary to or not permitted under the enactment

governing the statutory authority cannot be ratified because the contract is 'extra vires and wholly null and void' (page 349 citing a passage from Lord Cairns LC in ***Riche v Ashbury Railway Carriage and Iron Co. Ltd*** L.R. 7 H.L. 653, 673, who was quoting Blackburn J in the same case, in the Exchequer Chamber, at L.R. 9 Ex, 224, 262). To put it bluntly, once the statutory body acts outside its statute ratification is a legal impossibility. The reason is that the contract was void (not voidable) from the outset. This court appreciates that ***Riche*** was decided in the early years of the Companies Act of 1862 and the judges of that era took a rather strict approach to the ultra vires doctrine in respect of companies formed under that Act. It only remains to say that any time spent reading and analyzing the judgments in ***Crédit Suisse*** will be time well spent.

[20] These developments found their way to the shores of Jamaica by way of the Judicial Committee of the Privy Council's decision in ***National Transportation Cooperative Society v The Attorney General of Jamaica*** [2009] UKPC Ref 48. One of the issues before the Board was whether a franchise agreement entered into by the Government of Jamaica with franchise holders who were to provide efficient, reliable and safe public transportation was enforceable against the Government. The Government argued, successfully, that the franchise agreements were not enforceable under section 3 (1) of the Public Transport Act because the Minister did not have the power under that provision to enter into such agreements. Again, the private law claim failed under this particular statute because the agreement as outside of the statutory power of the

Minister. The claimant was rescued from total failure because their Lordships were able (with some difficulty) to find a peg in the Road Traffic Act on which to hang the claim. The ***Crédit Suisse*** case was cited by the Board for the proposition that where a public body enters into a contract outside of its powers then such a contract is of no effect. As Lord Neuberger said at paragraph 32:

> *It would therefore follow that, when a Minister enters into a contract which grants a franchisee a licence to provide public transport in circumstances where the licence is on terms not permitted by legislation, the contract is unenforceable, even it has been acted on.*

[21] Mr. Bishop sought to distinguish these cases (except ***National Transportation Cooperative Society***) by saying that they involved borrowing of money whereas the present case involves a lease or licence. While the distinction is factually accurate, there is no distinction in principle. A statutory body cannot act beyond the legislation governing it and where the statute prescribes a particular method to achieve a permissible object, then the body must comply with those legislative directives. A statutory body cannot grant a lease or licence in respect of property it owns if it has no power, express or implied, so to do.

[22] In the preceding paragraph, the point was made that where the statute lays down a particular method of achieving an objective that method must be followed. This is supported by the judgment of Neil LJ in ***Crédit Suisse***. His Lordship made the clear point that even if the object sought to be achieved was within the statutory power of the body but the means by which it did so was ultra vires the statute, then any resultant agreement would be impugned.

[23] The case of ***Auburn Court Ltd v Kingston and St. Andrew Corporation and others*** (2004) 64 W.I.R. 210 provides an application of the principle that a statutory body can only act in a manner authorised by its enabling or other statutes. The appellant was ordered by the KSAC to tear down a building which it had not received permission to build. It sought to argue among other things that one Mr. White, an official of the KSAC, had told the appellant that its plan would be approved. The appellant also sought to introduce fresh evidence, in the Court of Appeal, that Mr. White had indicated the development submitted by it was in fact approved. The court declined to hear this fresh evidence. What is important is this: the Board pointed out that there was no evidence that Mr. White had been authorised by the KSAC to indicate any of the things being attributed to him. The Board emphasised that where the KSAC Act indicated that certain decisions were to be made by the Council then only the Council could make those decision.

[24] The broad principle emerging from the case law is that when a person is dealing with a statutory body, that person has an obligation to ensure that the body is indeed acting within its powers. The person has a positive duty to see if there are any limitations on the powers of the statutory body or whether the relevant statute lays down any procedural requirements that must be met before the body can enter into an enforceable contract with anyone. Anyone who fails to do this is indeed taking a very serious risk that any agreement may be found to be unenforceable against the statutory body. Admittedly, in the modern world where so many services are delivered by governments through statutory bodies, this rule may need revision. The Privy Council in ***National Transport Cooperative Society*** case did not indicate that this might happen any time soon.

[25] The other important point to note, which is implicit in the case law cited above, is that it appears that principle of ex post facto ratification of actions done by persons purporting to act on the behalf of the statutory body does not a unless the act done by the person was itself within the powers and procedures laid down by the relevant legislation. In addition, where the statute imposes preconditions to the exercise of a power then such preconditions must be met. The preconditions, as stated by Neil LJ in ***Crédit Suisse***, are statutory controls on the power of the statutory body. It will be shown below that section 220 of the Kingston and St. Andrew Corporation Act ('KSAC Act') contains a statutory control on the KSAC leasing its own property to persons. The control is in the form of ministerial approval.

The KSAC Act

[26] The KSAC Act has a number of provisions which are important for this case. In section 3 the following definitions are found:

> ‘Corporation’ means the body corporate constituted by the incorporation of the inhabitants of the parishes of Kingston and St. Andrew;
>
> ‘Council’ means Council of the Corporation;

[27] Section 5 (1) of the Act states that the inhabitants of the parishes of Kingston and St. Andrew are hereby declared to be a Municipal Corporation bearing the corporate name ‘The Kingston and St. Andrew Corporation’ and by such name shall have perpetual succession.

[28] Section 10 (1) states that the Corporation shall be capable of acting by the Council, and the Council shall exercise all powers vested in the Corporation or the Council by this Act or otherwise. Section 10 (2) states that the Council shall consist of the Mayor and Councillors. It is important to pause at this point to note that section 10 makes it very clear that it is the Council that can act on behalf of

the Corporation. The Council has two parts: the Mayor and the Council. None by itself constitutes the Council.

[29] Section 118 provides for the establishment of committees but such committees have to be appointed by the Council. Under section 118 (1), the Council 'may appoint for any such general or special purpose as in the opinion of the Council would be better regulated and managed by means of a Committee, and may delegate to a Committee so appointed (with or without restrictions or conditions, as they thing fit) any functions, except the power of fixing rates or of borrowing money, exercisable by the Council either with respect to the whole or a part of the Corporate Area.'

[30] Section 220 (1) reads:

> *All lands vested … in the Corporation may with the sanction of the Minister be sold or leased by the Corporation upon such terms and conditions and subject to such covenants, obligations and agreements as the Minister may in each case determine.*

[31] In respect of a lease or sale of land, section 220 makes it clear that the Corporation may lease or sell but such action must have the sanction of the relevant Minister who in this case is the Minister with responsibility for the KSAC. On the face of it, the Corporation can only act through the Council. It appears therefore that unless the Council or a committee authorised by Council acted in this matter, Chasrose would have no enforceable lease or licence agreement against the KSAC. Equally, if the KSAC acted through its proper organs and in respect of the lease (not licence), there was no ministerial sanction, then the lease is not enforceable.

[32] When read together, all these provisions of the KSAC Act establish that subject to the specified restrictions found in section 118 (1) or any other legislation, the Council can act through general or special purpose committees. This means that in exercising its power under section 220, the Corporation may act through either a general or special purpose committee but this can only be done where the committee is established in accordance with section 118. Equally important is this point: if there is no evidence that the Council had delegated any or all of the power given to it under section 220, then the power under that section can only be exercised by Council. Finally, whether through a committee or the Council itself, all leases of land vested in the Corporation need the sanction of the Minister who may impose covenants, obligations and agreements in addition to any imposed by the Council.

[33] Mrs. Bennett Cooper submitted that there is nothing in the proposed witness statements of the claimant or in the body of agreed documents that shows that the Minister sanctioned the lease being relied on by Chasrose. This means, she submitted, that even if there was such a lease in fact, even if acted upon by the parties, it is of no legal effect because there is no evidence that section 220 was complied with and consequently the lease is unenforceable. Though this was not part of her submission, it must necessarily follow that in the absence of evidence that any of the powers vested in the Council under section 220 was properly delegated to any committee or any other person, then such powers can only be exercised by the Council. In any event, whether the power was exercised by the Council itself or through a committee, the Minister's approval was mandatory.

[34] In response to these submissions, Chasrose secured a witness statement from the then Minister, Mr. Roger Clarke, who is saying that he communicated approval to the then Mayor of Kingston, Councillor Marie Atkins who has since died. There is no documentation of any kind - not even a letter from the Minister – supporting this purported decision. Mr. Bishop's response was that time be given to Chasrose to see if it can unearth any supporting documentation.

[35] In relation to the licence, the position is that only the Council or any other body lawfully authorised by it can enter into any licencing agreement with another party. This is so because the KSAC is the registered proprietor of the land and according to the KSAC Act, the Council is authorised to act on behalf of the KSAC. Section 118 authorises the Council to delegate some functions to committees. There is nothing before the court to suggest that the Council delegated any power exercisable by the Council in relation to a licence to any committee or any other person. A reading of the witness statements of Mr. Robert Harriot, Chairman of the Finance Committee and the Sub-Finance Committee of the KSAC at the material time, and Mr. Desmond McKenzie, now Mayor of Kingston, and member of the Sub-Finance Committee at the material time, suggests that the Council had not delegated the power to grant a licence in respect of the property to either the Finance Committee or the Sub-Finance Committee. Paragraphs seven and eight of Mr. Harriot's statement speak of recommendations being made to the Finance Committee and the Council approving the recommendation. Mr. McKenzie in paragraph twenty six of his witness statement speaks of the Sub-Finance Committee making recommendations to the Finance Committee. The language found in the witness statements is more consistent with non-delegation by the Council of its power to grant licences than with delegation of the power.

[36] Mr. Bishop quite correctly noticed that nothing in section 220 requires ministerial approval for the grant of a licence and to that extent there may be no

breach of the KSAC Act provided there is some evidence capable of proving that the Council granted a licence to Chasrose to enter the property and do the things that it had begun to do. The court observes that it is indeed remarkable that, at present, there is no explicit documentation supporting such an important commercial decision by the municipal body. In the agreed bundle of documents there are no minutes indicating that the Council explicitly decided to grant a lease or licence to Chasrose, or even a letter from the KSAC to Chasrose clearly indicating that it was granting a lease or a licence and what the conditions of the grant were. To date, Chasrose has not produced any lease or licence agreement between itself and the KSAC. It simply makes the assertion. Chasrose has not produced a letter from the KSAC setting out an offer and the terms of either a lease or licence. This led Mr. Bishop to suggest that Chasrose be given time to embark upon a search for any documentation that may support its position.

Chasrose's application

[37] Chasrose applied for an extension of time to file a witness statement of Mr. Roger Clarke and a possible further witness statement from another witness. Chasrose is also asking for time to secure documentation, if it exists, to bolster its position. Regarding the second part of the application, Chasrose is asking for an order for disclosure from the KSAC and the then ministry with responsibility for the KSAC. In effect Chasrose, eight years after dragging the KSAC to court, has found out that it is not ready to present its case because it did not appreciate

fully the import of section 220 of the KSAC Act and more remarkably, did not think it should bolster its assertions of lease or licence with documentary evidence where possible. All this has slowly dawned on Chasrose in light of Mrs. Bennett Cooper's submissions.

[38] At one point Mr. Bishop submitted that the pleading of the defendant did not put directly in issue the ability of the KSAC to contract with Chasrose to grant a lease. While this is true it is still the duty of the claimant to make sure that it is in a position to make the case against the defendant. Counsel for the KSAC was indeed obliged to take the point because it was a matter of law. It would be a point that the court would have to consider once it came to the attention of the court that an Act of Parliament imposed certain restrictions on the ability of the KSAC to act in a particular manner. The strict compliance with the statute is required before the KSAC can be found to have lawfully exercised the powers given to it. This is not like a limitation defence which is a procedural defence that a party may waive if he so chooses. Parliament has stated how the KSAC is to act. The fact that the KSAC did not raise section 220 in its pleadings or whether it acted through the proper committees or persons is ultimately beside the point. No statutory body can act outside of its statute and such conduct held to be lawful. If that were the case then it would be pointless trying to establish controls and restrictions through legislation. Once the issue of whether the KSAC has complied with statute which lays down not only who can exercise some powers but also the procedural pathways to the exercise of the power then such an issue

must be determined. Thus in the absence of evidence that the KSAC complied with the statute then needless to say any lease or licence could not bind the KSAC.

Resolution

[39] Under the CPR, the court is mandated to deal with cases justly and fairly. In carrying out this mandate, the court takes into account not only the particular litigants in this case but also other persons who are waiting to use the court's resources. Dealing with cases justly requires the court to take into account the complexity of the matter and the sum involved. An examination of the cases referred to above where a private law claim was brought against a statutory body shows that the determination of whether the body had the capacity to enter into the agreement sought to be enforced against it is not always an easy question to determine. Sometimes that statute sets down a particular way in which the power is to be exercised by the body. The moral of the story so far is that private law actions against statutory bodies is not always a straight forward process. The very case before the court shows that a successful private law action against the KSAC where the claimant is seeking to enforce a lease or a licence has many traps for the unsuspecting. For these reasons the court decided to grant Mr. Bishop's application.

[40] It does not mean that Mrs. Bennett Cooper's submissions have no effect. They do have an impact on costs. Despite the case management system, the claimant who brings a defendant to court must still make the case against the defendant. As Baggallay and Brett LJJ emphasised, in ***Chapleo***, those who are dealing with public bodies need to make sure the entity can do what it is purporting to do. In other words, it is prudent for those contracting with public bodies to know the statute or statutes and any attendant regulations governing the body and always ask, 'Is what I am proposing to do with this statutory body within the boundaries of the statute?' Where the statute sets out a procedural path, it is prudent for the person to receive, at the very least, written assurances that the procedure was adhered to. As Baggallay LJ indicated, such an assurance might not bind the statutory body but it may expose whomever gave the assurance to personal liability.

Costs

[41] On the question of costs, the court has considered the submissions of both counsel. The court has taken into account rule 64.6. Under that rule, the general principle is that the unsuccessful party is to pay the costs of the successful party (see rule 64.6 (1)). Rule 64.6 (2) empowers the court to order the successful party to pay the costs of the unsuccessful party. In making an order which is contrary to the general principle the court must have regard to the matters set out in rule 64.6 (4). Not all the matters listed in rule 64.6 (4) apply in

every case. For example, offers of settlement would not be applicable in this case (rule 64.6 (4) (c)). As Lord Woolf MR explained in ***AEI Rediffusion Music Ltd v Phonographic Performance Ltd*** [1999] 1 W.L.R. 1507, 1522 – 1523:

> *I draw attention to the new Rules because, while they make clear that the general rule remains, that the successful party will normally be entitled to costs, they at the same time indicate the wide range of considerations which will result in the court making different orders as to costs. From 26 April 1999 the "follow the event principle" will still play a significant role, but it will be a starting point from which a court can readily depart. This is also the position prior to the new Rules coming into force. The most significant change of emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new Rules are reflecting a change of practice which has already started. It is now clear that too robust an application of the "follow the event principle" encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so.*

[42] The point being made is that the costs-follow-the-event principle often times obscures the fact that a successful party may have imposed unnecessary costs on the losing party by the manner in which he conducted the claim. Under the new rules the litigants and the courts are being encouraged to look more closely at how a matter was conducted from beginning to end. Such an examination may reveal that a successful party ought to be deprived of some or all his costs. It is also expected that costs are to be part of the amoury of the courts used to police the rules. It must not be forgotten that one of the goals of the rules is to reduce unnecessary costs in litigation. This goal is supported by the power of the court to exclude issues 'from determination if it can do substantive justice between the parties on the other issues' (see rule 26.1 (k)). Rule 25.1 (c) is consistent with cost reduction. It says that the court is to manage cases actively and this includes 'deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others.' These considerations must be given full weight in this case when considering the question of costs.

[43] This present litigation is in its ninth year and because of the success of Chasrose in its application, the new trial date is one year away with attendant costs. There is no reason why the KSAC should not have pursued the summary judgment application, inconvenient though it may be. The basis of the submission

was one of substantive law. After all, pleadings were closed, the proposed evidence was now before the court; the documents being relied on were placed before the court. It would be a serious omission of counsel representing a party appreciating that her opponent's case was not on a secure footing and not seek to take full advantage of that fact at this stage.

[44] In light of what the court understands the law to be, that is, it is on the claimant to dot the 'I's and cross the 'T's, when seeking a private law remedy against a statutory body, then it should pay the costs of this summary judgment application and also its successful application for an extension of time to file witness statements and procure additional documentation.