IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2003/HCV0169

BETWEEN	THE ATTORNEY GENERAL OF JAMAICA	CLAIMANT
AND	NATIONAL TRANSPORT CO-OPERATIVE SOCIETY LIMITED	DEFENDANT

Richard Mahfood, Q.C., Solicitor General Michael Hylton, Q.C., Stephen Shelton, Heidi Gordon, Kathryn Francis and Tasha Manley for Claimant instructed by the Director of State Proceedings.

Lord Anthony Gifford Q.C. and Patrick Bailey for Defendant instructed by Patrick Bailey and Co.

Heard: 8th and 11th June and 29th November 2004

Brooks, J.

The advocates representing the Attorney General in this claim have made a truly remarkable submission. When reduced to blunt terms the effect of the submission is as follows: although the Minister of Public Utilities and Transport on behalf of the Government of Jamaica entered into a Franchise Agreement with the National Transport Co-operative Society (the Society), and although the parties expended tens of millions of dollars each pursuant to the said agreement, and although the parties later entered into a second agreement which recognized the existence of the Franchise Agreement, and although upon the said Minister seeking to unilaterally terminate the Franchise Agreement, the parties agreed to have their differences settled by

reference to Arbitrators selected by them, and although all of this was conducted in the glare of public scrutiny, nonetheless, say the lawyers, the Franchise Agreement was illegal, and of no effect as the said Minister had no legal authority to contract as he did.

These lawyers say that in reviewing the decision of the Arbitrators this court ought therefore to turn its face from the Franchise Agreement and refuse to enforce any aspect of it. The result is that although the Arbitrators awarded the Society over $4.5 billion in compensation and interest thereon the lawyers say that the Society should properly get nothing.

Those submissions are in respect of one of the four main areas argued before the court in this claim. The claim embodies the Attorney General's complaint against the award of the Arbitrators. The erudition, diligence and co-operation of the eminent Counsel who appeared in this matter have greatly reduced the scope of the task of the court in adjudicating this matter and I am grateful for their efforts.

The four assertions by the Government are as follows:

> "(a) The Arbitrators erred in holding that the (second) agreement did not vary or amend the ... Franchise Agreement.
>
> (b) The Arbitrators erred in dismissing the preliminary application by the (Government) and by misconstruing sections 2 and 3 of the Public Passenger Transport (Corporate Area) Act.

(c) The Arbitrators wrongly construed sections 3 and 6 of the Public Passenger Transport (KMTR) Act...

(h) The Arbitrators erred by failing to hold that the Society failed to take reasonable steps to mitigate its losses."

The lettering corresponds with the designation in the written submissions for the Government and is retained for ease of reference.

During the course of the arguments counsel for the parties came to certain agreements and promised to provide me with a record of their concord. I now set out in full the agreement between the parties as communicated to me after the conclusion of the hearings.

" 1. If the Claimant is successful in respect of paragraph 13(a)(i) and/or (iv) of the Particulars of Claim (grounds A and/or B in the Claimant's written submissions) then the entire Award will be set aside;
2. If the Claimant is successful in respect of paragraph 13 (a) (ii) of the Particulars of Claim (Ground C) only, then the Award should be reduced to $2,434,090,926.78;
3. If the Claimant is successful in respect of paragraph 13 (a) (vi) of the Particulars of Claim (Ground H) only, then the Award should be reduced to $2,607,372,595.31;
4. If the Claimant is successful in respect of both paragraphs 13 (a) (ii) and (vi) then the Award should be reduced to $2,434,090,926.78, that is, the Award would be reduced by all the amounts that should have been awarded by the Arbitrators in respect of the period 1998 to 2001.
5. If the Claimant is unsuccessful in all of the above grounds, the amount of the Award should be reduced to $4,635,271,519.87;

6. Finally, in accordance with the announced agreement of the parties in relation to Ground (G) there will be **no** interest on any sum that may be awarded between the 2nd of October 2003 to the date of the Consent Order herein."

In light of the great significance of the matter I shall deal with all four grounds regardless of my findings in respect of the first two.

The agreement that was earlier referred to as the 'Second Agreement' will be referred to hereafter as the "1996 Heads of Agreement".

Ground a: The Arbitrators erred in holding that the 1996 Heads of Agreement did not vary or amend the 1995 Franchise Agreement.

In order to properly assess the arguments in respect of this ground a more detailed history of the matter must be stated.

History

In addition to being signed by the Minister and the Society, the Franchise Agreement referred to above, was signed on behalf of the Ministry of Public Utilities and Transport and the Transport Authority, all on the 3rd March 1995.

Under the Franchise Agreement the Government granted an exclusive licence to the Society to provide public transport services for two of five zones created to encompass the Kingston Metropolitan Transport Region (KMTR). The zones involved in this Franchise Agreement were designated the Northern and Portmore Zones respectively and the franchise was for ten

years duration in the first instance. For the purposes of this ground the main aspects of the Franchise Agreement to be assessed are reflected in clause 32, which states in part:

> "32 FARE STRUCTURE AND FARE ADJUSTMENT
>
> A a) The first fare table to apply with effect from March 1, 1995 will be table (sic) identified herein as Appendix D. The fares in that table are those in existence at February 28, 1995. The parties appreciate the inadequacy of those fares, even after taking into consideration a subsidy of $10 Million which is to be provided for each franchise for the three months ending May 31, 1995. Therefore a new fare table (hereinafter called the Second Fare Table) will be made available not later than April 30, 1995 to apply with effect from June 1, 1995.
>
> b) Fares in the Second Fare Table will be determined: -
>
> i) to yield a rate of return on capital employed of 15% and adjusted for inflation point to point February 94 – 95 using the Jamaica all groups Consumer Price Index;
>
> ii) to recognize in full all operating and administrative costs;...
>
> B The parties agree that bus fares shall be adjusted in accordance with the general provisions set forth below and as more particularly described in Appendix B to reflect increases in the costs of operations required by the Franchise Agreement and to ensure that the Franchise Holder can achieve a fair and reasonable profit from public transport operations. The parties also agree that the Office of Utilities Regulation

(OUR) or such other office that may be established for the purpose will administer the fare adjustment mechanism. Until the OUR is established a joint commission will be set up to review the fare adjustment mechanism. The commission will consist of three individuals: one selected by the Government; one selected by the Franchise Holder and both commissioners will select the third who shall be Chairman. The commission shall dispose of all applications within thirty days.

(a) Operating Cost Increases

When increases to the Franchise Holder's operating costs are caused by increases in the costs of fuel, wages, parts, new buses or the rate of interest payable on debts to a sufficient degree; the Franchise Holder shall be entitled to adjustments to the fares as shown in Appendix B;

1) Six months after June 1, 1995 of the new operations and /or six months after the grant of any subsequent fare adjustments, the Office of Utilities Regulation will calculate the increase or decrease in percentage terms of the Operating Costs Index for the KMTR public transport service. This Index, its components and the method of calculation are defined in Appendix B. Should there have been a 10% or greater increase in the Index since the date when fares were previously adjusted, the Franchise Holder shall be entitled to the same percentage increase in fares. However in these circumstances the Franchise Holder may require the Office of Utilities Regulation to recalculate the percentage increase in the Index on a monthly basis until such time as a 10% or greater increase is recorded..."

The commission mentioned in 32B above was established. It came to be known as the "Shirley Committee". On September 1, 1995 that commission made its recommendations for the Second Fare Table.

It has been agreed between the parties before this court that the Second Fare Table, which should have been implemented as at June 1, 1995, was not implemented at that time or indeed at all.

By late 1995 or early 1996 the parties recognized the untenable situation caused by the non-implementation of the Second Fare Table. They then held discussions which culminated in the 1996 Heads of Agreement which was signed on behalf of the Ministry of Public Utilities and Transport, the Society and another entity. The Society signed the document on 23rd February 1996 and the Ministry on the 18th April 1996.

By the 1996 Heads of Agreement the Government agreed to provide (among other things) a subsidy to the value of $26.4M to the Society. The subsidy was to have been implemented by providing the Society was buses on concessionary terms.

The document also included the following clauses:

> "7. FARES
>
> a) Fare Adjustment Based on Cost Increases
>
> (i) It is agreed that based on the increases in costs which have taken place since a fare adjustment was made in July 1994, an upward adjustment in fares need (sic) to be considered urgently. (Adjustments introduced February 11, 1996)
>
> (ii) It is further agreed that the MPUT would endeavour to obtain approval for this cost based fare increase in order for it to be

implemented in February 1996 (introduced February 11, 1996).

b) New Fare Table

(i) It is agreed that the proposed new fare table will be reviewed and that the computations (sic) revised to reflect:

1. the concessions and assistance being provided by Government in areas which based on the existing Franchise Agreement are the responsibilities of the Franchise Holders, and
2. increases in costs which have taken place since the recommendations of the Shirley Committee.

(iii) It is agreed that the new fare table would be implemented after the necessary improvements have been effected in the transportation system in the KMTR, specifically with respect to:

1. The implementation and maintenance of schedules which would be possible with establishment and operations of new depots.
2. The putting into service of additional buses.
3. Improvements in the conduct and decorum of bus crews which will be achieved through the implementation of training programmes."

"9 FRANCHISE AGREEMENT

It is agreed that the Franchise Agreement between the Government and National Transport Co-operative Society Limited require (sic) amendments, these amendments are to be discussed and agreed by June 1, 1996."

Effect of Clause 7b (iii) and Clause 9

Before the Arbitrators, the Government submitted that the 1996 Heads of Agreement had varied the obligations of the parties under the Franchise Agreement, that the Society had failed to effect the improvements in the transportation system required by Clause 7 (b) (iii) (cited above) and therefore the Government's obligation to provide the Second Fare Table contemplated by the Franchise Agreement never crystallized.

The Arbitrators rejected that submission and in doing held that:

(a) Clause 7 (b) (iii) did not refer to the Second Fare Table in Clause 32 A of the Franchise Agreement, and,

(b) Clause 9 of the 1996 Heads of Agreement made it clear that the document was not meant to be an amendment to the Franchise Agreement.

The Government on this ground has submitted that the Arbitrators erred in their finding in respect of the effect of the 1996 Heads of Agreement because:

(a) The document clearly referred to the Second Fare Table.

(b) The effect of the reference was to alter the time at which the Government's obligation to put the Second Fare Table into effect was triggered.

(c) The document did not represent an agreement to agree as the Arbitrators had found.

(d) The Arbitrators failed to make a determination as to whether the improvements envisaged by clause 7B (iii) were made.

In this court the Society has conceded that the Arbitrators were wrong in finding that the 1996 Heads of Agreement did not refer to the Second Fare Table.

Despite this concession the Society has submitted that at best the 1996 Heads of Agreement provided only a temporary respite to the Government in respect of the fulfilment of its obligation to provide the Second Fare Table.

In support of this stance great reliance was placed on clause 9 of the document and at paragraph 19 of its Skeleton Arguments the Society submitted:

> "The effect of this is that the parties were saying: we will discuss amendments to the Franchise Agreement: if there are to be any they must be agreed by June 1st; but if there are no amendments the Agreement will continue to have full effect unamended." (paragraph 19 of the Skeleton Arguments)

At paragraph 21 the Society's lawyers continued the submission to conclude as follows:

> "No amendments were made to the Franchise Agreement before 1st June 1996 or thereafter. By 1st June 1996 the Heads of Agreement had served their purpose. They had provided for a modicum of compensation for the failure to implement the fare table, in the form of a subsidy paid in kind through the provision of buses. The subsidy was expressed in paragraph 1 (a) to be for the period to 31st December 1995 only .... The parties had in addition given themselves a limited time in which to discuss amendments to the Franchise Agreement. At the end of that time the 1996 Heads of Agreement were spent, and the Franchise Agreement remained binding."

I do not accept that this submission is valid. In my view the flaw in the reasoning lies in the fact that it seeks to make links between clause 9 and the rest of the document (particularly clause 7 (b) (iii)) where none exists.

It is my finding that clause 9 represents an independent concord between the parties. The clause makes no reference to any of the other clauses. There is no conditional connection between it and the others. In my view it reflects recognition by the parties that factors which have intervened, required that amendments be made to the Franchise Agreement. I find that the concession by the Society mentioned above, results in an admission that there was an amendment to the Franchise Agreement. Clause 7 b (iii) introduced conditions for the implementation of the Second Fare Table where before there was none save that of a specific implementation date.

Clause 9, as said before, does not qualify that amendment.

I draw support for this finding from the preamble to the 1996 Heads of Agreement which reads:

> "At recent meetings between the Ministry of Public Utilities and Transport (MPUT) and the Franchise Holders the following agreements were reached on the matters indicated." (emphasis mine)

Thereafter followed the various clauses which dealt with the subsidy; the buses to be provided, etc.. These were all, in my view, independent areas of concord between the parties. The document was aptly titled "Heads of Agreement."

It is my finding that the deadline included in Clause 9 did not expressly or impliedly convey that the other clauses in the document were dependent on that deadline being met. For this reason, but with the greatest of respect to the panel of learned Arbitrators, I find that they erred when they opined at paragraph 23 of the award that:

> "Clause 9 sits very oddly indeed in an agreement, said to be an amending agreement. It is also passing strange that this amending agreement nowhere mentions or refers to any clause in the franchise Agreement which it is intended to amend. Certainly at no point in this Heads of Agreement is it stated that it is intended to vary clause 32 (b) of the Franchise Agreement which set up the Second Fare Table."

It remains to be asked however whether Clause 7 b (iii) may be given effect in light of the reading of Clause 43 of the Franchise Agreement. It would be helpful to quote the latter in full.

"43 FRANCHISE AGREEMENT DOCUMENTS

> The complete Franchise Agreement documents consist of this Franchise Agreement, including all Appendices attached hereto and made a part hereof, the Statement of Pre-Qualifications, the Invitation to Apply for an Exclusive Licence and Franchise Bids, the Application and Franchise Bids, all Addenda issued prior to and all Changes issued after execution of the Franchise Agreement. These form the complete Franchise Agreement, and all are as fully a part of the said Franchise Agreement as if attached hereto or repeated herein. The Franchise Agreement shall take precedence in the event of a discrepancy or inconsistency between the Franchise Agreement and any other document referred to in this section."

Lord Gifford Q.C. on behalf of the Society has submitted in this context that if "the 1996 Heads of Agreement changed the Franchise Agreement it must be read with it and if it is inconsistent with it (then the terms of the Franchise Agreement must prevail)".

The difficulty with that submission is that if it is taken to its logical conclusion it means that the Franchise Agreement could never be subsequently varied. What may be properly read into the clause, is that for any variation to be effective, it must be expressly stated or clearly implied

from the context, to be so intended by the parties. It must be pointed out, as the learned Arbitrators have done at paragraph 23 of their reasons, that nowhere in the 1996 Heads of Agreement is the Franchise Agreement mentioned.

Does the Society's abovementioned concession necessarily mean a concession as to an intention to amend the Franchise Agreement?

As I have mentioned before, the nature of the amendment is such that it cannot but be held to have been manifestly intended by the parties. I therefore so find.

The Society nonetheless has another string in its bow concerning Clause 7b (iii). It says that the clause does not allow for the permanent variation of the Franchise Agreement but allows for a period of time to secure that variation. Lord Gifford argued that the 1996 Heads of Agreement was an agreement to agree. He pointed to the detailed standards set out in Appendix C for the operation of the franchise. This Appendix ran some sixteen pages and dealt with, among other things, timetables and schedules, the on-time operation of buses by drivers, crew discipline and training, performance indicators and target quality standards.

As opposed to this detail, Lord Gifford points to the spare nature of Clause 7 (b) (iii). He complained that it is too vague and uncertain to be

capable of being construed as a replacement standard for that just described. He stated that the clause cannot accommodate a variation of the time frame for Government's obligation to implement the Second Fare Table. In contrast to the detail of Appendix C, Lord Gifford says, Clause 7 b (iii) amounts to the Government saying "we will grant a (new) fare table when things get better".

The learned Solicitor General Mr. Hylton Q.C., for the Government, sought to counter this argument by submitting that courts are slow to find that a provision which has been agreed by parties to a contract is void for uncertainty. He submitted that in any event this was not an issue before the Arbitrators and therefore the Society should not be allowed to argue the point before this court. If it had been an issue before the Arbitrators, says he, then evidence could have been led concerning the intentions of the parties on the point. It not being made an issue, no such opportunity was afforded to the Government, or indeed to either of the parties.

No place in the Arbitrator's award have I found any attempt by them to interpret what "improvements" could have meant in the context of Clause 7B (iii). The learned Arbitrators did not at any time attempt the type of comparison which I have outlined was propounded by Lord Gifford. At paragraphs 24 and 26 of their award the learned Arbitrators did make

reference to the "improvements", but did so in a global sense in the context of Clause 7b (iii) and not in the manner Lord Gifford now suggests.

I accept Mr. Hylton's submission that this court in attempting to carry out its mandate in this case is not empowered to adjudicate on this aspect. The mandate is to determine whether or not the learned Arbitrators misconducted themselves (not, in this case, in the sense of any moral turpitude or personal impropriety, but) in the sense of making an erroneous finding in law, or by not making a finding on an aspect which they ought to have.

On this ground, based on the concession by the Society and on my findings as stated above, the learned Arbitrators committed an act of misconduct in that they misconstrued Clause 7 (b) of the 1996 Heads of Agreement.

The misconstruction is in itself an error on the face of the record. This is because a "question of construction is generally speaking, a question of law." So stated Viscount Cave in *Kelantan Government v Duff Development Co.* [1923] All E.R. Rep 349 at p. 354 I.

Had the learned Arbitrators concluded as they ought to have, that Clause 7 (b) (iii) of the Heads of Agreement did vary Clause 32 of the Franchise Agreement they would have been obliged to consider what the

parties meant by the term "improvement" in the context of the former clause and whether that term was in fact so vague when contrasted with Appendix C of the Franchise Agreement that Clause 7 (b) (iii) was indeed void for uncertainty.

A remittance to the Arbitrators for reconsideration is regrettably impossible in this case. This is due to the untimely death of one of their members; retired Judge of Appeal Ira Rowe. Mr. Hylton has correctly pointed to the case of *Vancouver (City of) v Brandram-Henderson of B.C.* (1960) 23 DLR (2d) 161 at pp. 165-6, as authority for that principle of law.

On this ground therefore I find that the award must be set aside.

Ground b – the Arbitrators erred in dismissing the preliminary application by the Claimant and by misconstruing Sections 2 and 3 of the Public Passenger Transport (Corporate Area) Act.

The preliminary application referred to in Ground B encompasses the point to which I referred at the beginning of this judgment. Lord Gifford on behalf of the Society has described the point as "somewhat bizarre." He, correctly in my view, categorized it as being advanced, "solely as a reason for resisting the claim in the arbitration. (Paragraph 33 of the Defendant's Skeleton Arguments). Whereas it may not be unusual for parties in the private sector to take points such as the present one advanced, for a

Government to do so in the face of all that has been transpired between these parties is, to say the least, surprising.

The Government's point is in its barest terms as follows:

(a) The Society's case depends on the Franchise Agreement being a valid enforceable contract.

(b) By the Franchise Agreement the Minister agreed to grant a licence to the Society which would give the Society the exclusive right to provide transportation services within the areas defined in the Franchise Agreement. The Minister also granted similar licences to other entities which enabled those licensees to provide transportation services in other areas.

(c) The areas defined in the Franchise Agreement constitute only a portion of the area defined as the "Corporate Area" for the purposes of the Public Passenger Transport (Corporate Area) Act. (I shall hereafter refer to this Act as the "Corporate Area Act"). The other portions of the Corporate Area were parcelled out to the other licensees.

(d) The Corporate Area Act by Section 3 (1) only allows the Minister "to grant to any person, an exclusive licence... to provide public passenger transport services within and throughout the Corporate Area by means of stage carriages or express carriages or both." (emphasis mine)

(e) The licence granted pursuant to the Franchise Agreement did not conform to the

> provisions of Section 3 (1) and therefore would have been illegal, null and void as it would have resulted in a breach of the Road Traffic Act which prevents the operation of vehicles on the road without valid road licences.
>
> (f) The Franchise Agreement whereby the parties agreed to the issue of such a licence would itself be illegal, null and void.
>
> (g) The Arbitrators ought to have taken cognisance of the illegality and should have refused to give effect to it. In failing to do so they committed an act of misconduct in law and the award must be set aside.

In answer to this point the Society states that the basis of the Government's thesis is flawed. The flaw, it says, lies in the Government's inaccurate interpretation of the term "within and throughout" as used in Section 3 (1).

The submission on behalf of the Society is that by virtue of Section 4 of the Interpretation Act, the singular includes the plural. Hence, Lord Gifford submits, (at paragraph 34 of the Society's Skeleton Arguments):

> "The provision that the Minister may grant an exclusive licence to any person thus means that he may grant a plurality of exclusive licences to a plurality of persons, which he did. Each licence was exclusive within the area which it served ... (between them) they provided for transport services within and throughout (the area prescribed by the Act).... The fact that there was a common area in which – for sensible administrative reasons

> – the various franchise holders overlapped, did not mean that the licences were not exclusive. They were subject to the condition that all could use the common area, a condition to which all the franchise holders agreed."

In his oral submissions Lord Gifford said in respect of Section 3 (1):

> "The definition of the object of the licence or licences – the object was to provide Public Passenger Transportation Services throughout the Corporate Area by means of carriages.
>
> (The Section) doesn't say that the licence or licences have to be "throughout", it says the services must be "within and throughout."
>
> The Minister therefore may grant a plurality of licences to provide the required services.
>
> That is what (he) did."

I regret that I cannot accept this strained interpretation of Section 3(1).

Section 4 of the Interpretation Act makes it clear that the interchange of singular and plural must not be repugnant to the context of the particular legislation being construed.

Section 4 states:

> "In this Act and in all Acts, regulations and other instruments of a public character relating to the Island now in force or hereafter to be made, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided - …

(b) words in the singular include the plural, and words in the plural include the singular."

(Emphasis mine)

I find that the context of Section 3 (1) does not allow for the interpretation proffered by the Society.

Firstly, on the aspect of exclusivity:

The Collins English Dictionary 6th Edition defines "exclusive" to mean among other things "belonging to a particular individual or groups and to no other; not shared." The latter aspect of this definition would conflict with one aspect of Lord Gifford's submission. The former would be consistent with it. The effect of the submission would be that a shared area could still be exclusive. It would be so if the persons sharing agreed so to do, or failing their agreement, if it was so designated by some authorized entity.

I however do not think that such a sharing is what the legislators intended in this case. I am of this view because a reading of Section 3(2) seems to be inconsistent with such an interpretation.

Section 3(2) in part states as follows:

> "Subject to the provisions of this section during the continuance in force of any exclusive licence granted under subsection (1) no person shall hold or be granted a road licence authorizing the use of any stage carriage or express carriage within the Corporate Area..."

Once therefore an "exclusive" licence was granted, this subsection would prevent the issue of any other licence even if the latter were purported to be also "exclusive". This is particularly so when the exclusive licence must be for the provision of services "within and throughout the Corporate Area".

I now turn to the interpretation of the term "throughout". Mr. Mahfood Q.C. on behalf of the Government has cited the Australian case of *Gartland v Kalamunda Shire* [1973] W.A.R. 37 at p 39. It is referred to in "Words & Phrases Legally Defined" 2nd Edition Supplement. The case is cited as authority for the definition of "throughout" as being "completely or right through (a place), through the whole of (a region)".

The point being that an exclusive licence for providing the service "within and throughout" the Corporate Area does not allow for co-existing licences for the same area.

The flaw in the Society's submission is also revealed by Lord Gifford's answer to a question posed to him by the court. He agreed that the Minister would have been precluded from granting a plurality of licences unless those licences encompassed the entire Corporate Area. This would mean that for the several exclusive licences to be all valid they would have to have been granted simultaneously. Secondly, the revocation of one such

licence for whatever reason would place all in jeopardy as the remainder would not be providing services "throughout" the Corporate Area, and obviously a replacement for the revoked licence would be contrary to Section 3(2).

On this point I also find that Section 3(3)(c) also militates against the interpretation sought by the Society. Paragraph (c) allows for the grant of a licence for a route which is partly within the Corporate Area (emphasis mine). This allowed buses transporting passengers from the rural areas of Jamaica into the Corporate Area without the holder of that road license running afoul of the rights of the exclusive licensee. Paragraph c and the other paragraphs in subsection 3 specifically state how 'sharing' the Corporate Area may be allowed. A plurality of exclusive licences, if contemplated by Parliament, would have found its home in a provision in this subsection.

Section 3(3)(d) falls to be considered at this juncture. That subsection states that a licence may be granted or held for a route wholly within the Corporate Area if the exclusive licensee shall have consented in writing to such a grant or holding. I find that Section 3(3)(d) does not assist the Society as there is no consent in writing included in the Franchise Agreement or

elsewhere by which there is a consent for the grant of other licences for the provision of services within the Corporate Area.

The submissions that were made to the learned Arbitrators were in a slightly different context than was outlined above. The difference being that Counsel who appeared before the Arbitrators made their submissions in the context of the Public Passenger Transport (Kingston Metropolitan Transport Region) Act the (KMTR Act) rather than the Public Passenger Transport (Corporate Area) Act. It is the latter Act which was in force at the time of the Franchise Agreement. The name was subsequently changed to The Public Passenger Transport (Kingston Metropolitan Transport Region) Act and among other things the term "Corporate Area" was removed where it appeared and replaced by the term "Kingston Metropolitan Transport Region."

The changes do not alter the force of the submissions on this ground. The fact that the learned Arbitrators made their ruling on the submissions on the preliminary point in the context of the later Act does not by itself constitute an error in law which would justify the award being set aside.

Where however I do find the learned Arbitrators erred is that they refused to recognize the validity of the submissions on behalf of the Government.

If, as I have sought to demonstrate, the Minister of Public Utilities and Transport was not authorized by law to grant the licences which he purported to grant then clearly his act in doing so was *ultra vires* and therefore void.

Similarly the Franchise Agreement which sought to authorize the Society to operate vehicles on the road pursuant to such a licence would be purporting to countenance an illegal act.

The learned Arbitrators ought not to have refused to accept that the granting of such licences were *ultra vires* and void. This was an error in law evident on the face of the record and as such constituted an act of misconduct. As a result the award would be set aside on this ground as well. The case of *David Taylor & Son Ltd. v Barnett* [1953] 1 ALL E.R. 843 is authority for this result.

Before leaving this ground I must address one other aspect. Counsel for the Government sought to advance an additional basis for saying that the Arbitrators had erred on the point of the illegality. Lord Gifford objected to the argument being advanced on the bases that it was not argued before the Arbitrators and it had not been pleaded in this case so as to alert the Society of the intention to raise it.

I reserved my ruling on the objection and allowed the argument to be proffered both for and against on the basis that I would rule on the objection during the course of this judgment.

The point raised by Mr. Mahfood was that under the Public Passenger Transport (Corporate Area) Act, Portmore would have been considered outside the Corporate Area. A licence granted under that Act which sought to include Portmore would be therefore have been *ultra vires* as it was not "within" the Corporate Area.

Lord Gifford sought to explain the issue of such a licence on the basis of the practical considerations of serving the vast number of persons who worked in the Corporate Area but lived in Portmore.

If I had to decide the point I would find that Lord Gifford's argument would fail. This is because, although Section 3(3)(d) provides for the issue of a licence which would properly allow the provision of such a service, such a licence could not have been an exclusive licence. It would have to have been a road licence issued by the Transport Authority rather than a licence issued by the Minister for the reason advanced by Mr. Mahfood.

I however am of the view that the point ought not to be a basis for setting aside the award of the Arbitrators as it was not argued before them. The Act which was discussed in the submission before them was the KMTR

Act which contemplated a region which included Portmore. I cannot say that they ought to have considered the earlier Act if it was not brought to their attention. Their failure to refer to it would not have amounted to misconduct. I would therefore uphold Lord Gifford's objection to the argument being raised at the trial of the action.

Ground c – The Arbitrators wrongly construed Sections 3 and 6 of the Public Passenger Transport (KMTR) Act.

This was the ground with the shortest arguments. It only properly arises if I am wrong in my finding in respect of both Grounds a and b and there was in fact a valid licence granted to the Society and the Franchise Agreement had not been varied by the 1996 Heads of Agreement. The parties have agreed that if the Government is successful on this ground only then the Award should be reduced to $2,434,090,926.78.

The arguments for this ground turned on the question as to whether the issue by the Minister in 1998 of an exclusive licence to the Jamaican Urban Transit Company (JUTC) under Section 3 of the KMTR Act brought about the termination of the licence granted to the Society, or whether the latter licence continued in force until the parties entered into their agreement in 2001.

The learned Arbitrators on this point ruled that the JUTC licence did not take effect on the date of its issue because the provisions of Section 3 (6)

of the KMTR were not satisfied; they ruled that the JUTC licence did not purport to meet the provisions of that subsection. On the contrary, said the Arbitrators, it expressly stated that it was subject to and in accordance with the provisions of the (KMTR) Act. (Clause 3(1) of the JUTC licence.)

The Arbitrators summarized the requirements in these succinct terms:

> "A new Section 3 exclusive licence cannot become effective, pursuant to Section 3 (6) of the Act unless and until the former player has been removed from the system by the acquisition of its transport assets or that it has not accepted a reasonable acquisition offer within a reasonable time" (paragraph 38)

The result of that finding was that, the Society, if it had a valid Franchise Agreement and consequently a valid exclusive licence, was entitled to be paid damages by the Government for breach of contract for the period beyond September 1998. The Arbitrators found that the Government's breach (by failing to provide the Second Fare Table) continued until March 2001 when the provisions of Section 3 (6) of the KMTR Act were satisfied.

The Government through Mr. Mahfood has challenged the finding. It contends that the Arbitrators misconducted themselves because that finding arose from a misconstruction of Sections 3 and 6 of the KMTR Act.

To properly assess the argument Section 3 subsections 2, 3, 4 and 6 and Section 6 should be quoted in full:

"(2) Subject to the provisions of this section during the continuance in force of any exclusive licence granted under subsection (1) no person shall hold or be granted a road licence authorizing the use of any stage carriage or express carriage within the Kingston Metropolitan Transport Region and no person except the licensee shall carry within the Kingston Metropolitan Transport Region any person on any vehicle while that vehicle is being used as a stage carriage or express carriage.

(3) Nothing in subsection (2) shall prevent -

(a) the operation in any way of the Jamaica Railway Corporation;

(b) the grant or holding of a road licence authorizing the operation of a contract carriage service or a hackney carriage service within the Kingston Metropolitan Transport Region,

(c) the grant or holding of a road licence authorizing, subject to the condition referred to in subsection (4), the operation of any stage carriage service or express carriage service on any route which is partly within the Kingston Metropolitan Transport Region or the carriage of passengers on any service operated under and in accordance with such licence;

(d) the grant or holding of a road licence authorizing the operation of any stage carriage service or express carriage service on any route wholly within the Kingston Metropolitan Transport Region or the carriage of passengers on any service operated under and in accordance with such licence if the licensee shall have consented in writing to the grant or holding of that licence, and for the avoidance of doubt it is expressly declared that -

(i) any consent given by the licensee for the purposes of this paragraph may be given subject to such terms and conditions as the licensee, with the approval of the Minister, may determine; and

(ii) the provisions of section 10 shall not apply in relation to a licence granted pursuant to such consent as aforesaid.

(4) The condition referred to in paragraph (c) of sub-section (3) is that no passenger carried on the service shall be taken up at any point within the Kingston Metropolitan Transport Region or not more than 440 yards beyond the boundary of that area and set down on the same journey at any other point within that area or not more than 440 yards beyond the boundary of that area unless the licensee has consented in writing to the taking up and setting down of passengers as aforesaid on such service and for the avoidance of doubt it is expressly declared that any consent given by the licensee for the purposes of this paragraph may be given subject to such conditions as the licensee may think fit.

(6) No licence granted under subsection (1) shall take effect until the Minister is satisfied that the licensee -

(a) either has made reasonable arrangements for the acquisition of the interests of every other person holding a road licence within the Kingston Metropolitan Transport Region in respect of any stage or express carriage who at the time of such arrangements is operating exclusively within such Area and who will be prejudicially affected by the grant of a licence under subsection (1), in which event the licence shall take effect from such date as the Minister may by order declare; or

(b) has offered to make such reasonable arrangements and that such other person has unreasonably refused to accept such offer or has failed to accept such offer within a reasonable time and that such offer was made prior to two months before the expiration of the road licence held by such other person; and

(c) will, in the absence of circumstances beyond the control of the licensee and arising subsequent to the date upon which the Minister is satisfied as to the matters referred to in paragraph (a) or paragraph (b), be in a position within six months of the date upon which the licence comes into effect, to operate a service which is not less adequate to the needs of the

> community than are all public passenger transport services in operation in the Kingston Metropolitan Transport Region by stage or express carriages under the Road Traffic Act, immediately before the date upon which the licence is granted."

Section 6 is entitled "Revocation or termination of exclusive licence".

> "6. (1) An exclusive licence granted under section 3 shall be revocable in accordance with such provisions as to revocation as are contained therein.
>
> (2) The Board, if satisfied that there exists any ground upon which such licence may be revoked in accordance with the provisions contained therein, shall report the fact to the Minister specifying the ground upon which they are satisfied that the licence may be revoked and the Minister may if he is satisfied that the licence may properly be revoked take such steps as may be necessary to effect the revocation of the licence in accordance with the provisions contained therein.
>
> (3) The licensee may terminate any exclusive licence granted under section 3 by giving to the Minister two years, notice in writing to that effect.

The last two lines of the JUTC licence state respectively as follows "This licence will take effect on 1998, September, 7.", and "Dated at Kingston this 7th day of September 1998."

Mr. Mahfood submitted that the effect of the publication of this licence in the Gazette was that it took effect and came into operation "as law on the date of publication". (Paragraph 71 of the Claimant's written submissions.) He submitted that the holding by the Arbitrators to the contrary was "clearly erroneous in law since they failed to appreciate that

the licences referred to in Sections 3(3) and (4) of the KMTR Act are "Road Licenses" that could only be granted by the Transport Authority and only with the consent of the licensee. It is clear that the Franchise Agreements that form the basis of the Society's claim are not Road Licences granted by the Transport Authority. In the premise, it is clear that the JUTC licence came into full force and effect on the appointed date of September 7th 1998 and cannot be regarded as conditional." (Paragraph 72 of the Claimant's written submissions.)

Section 31 of the Interpretation Act was the main authority relied upon in Mr. Mahfood's submission. It states as follows:

> 31. (1) All regulations made under any Act or other lawful authority and having legislative effect shall be published in the Gazette and unless it be otherwise provided shall take effect and come into operation as law on the date of such publication.
>
> (2) The production of a copy of the Gazette containing any regulations shall be prima facie evidence in all courts and for all purposes of the due making and tenor of such regulations.

Section 5 of the Jamaica Gazette Act also stipulates that publication in the Gazette is *prima facie* evidence in this court that notice was given of the step taken (in this case the issue of the JUTC licence).

The submission as framed clearly does not address the thrust of the finding of the learned Arbitrators. But it is my view that having read these

sections of the KMTR Act, the Arbitrators and Mr. Mahfood have both ignored the framework of the Act.

It is to be noted that Section 3(6) does not speak to the acquisition of the interests of a prior exclusive licensee; it speaks to acquiring the interest of every other person who is operating exclusively in the KMTR by virtue of a road licence. Assuming therefore that the Society did have a valid exclusive licence issued by the Minister pursuant to the Franchise Agreement, subsection 6 did not apply to the acquisition of that licence. The Society did not have a road licence as distinct from an exclusive licence. Road licences are issued by the Transport Authority. This is clear from a reading of subsection 2 of the KMTR Act and Sections 62 and 63 of the Road Traffic Act.

The finding of the learned Arbitrators which is based on there being no compliance with subsection 6 is therefore erroneous.

Mr. Mahfood in his oral submission correctly, in my view, put it this way:

> "The (Society) didn't have a road licence they had an invalid licence issued by the Minister. The operation was illegal. Even if (it was) not illegal before, it became illegal in September 1998 when a valid licence (was) issued to the JUTC."

He stated that the Society has in its pleading sought to rely on the finding of the learned Arbitrators on this point. Indeed Lord Gifford in his arguments did just that.

I however am assessing this ground on the assumption that the operation was based on a valid exclusive licence. Mr. Mahfood did not explain how it was that the operation became illegal when the JUTC licence was issued.

Mr. Mahfood is in error on that aspect of the point. His reasoning as set out above ignores the fact that it is the provisions of Section 6 of the KMTR Act which speak to the proper termination of an exclusive licence. If, as would clearly be the case from the reasoning under Ground A, no exclusive licence may be issued during the existence of a prior exclusive licence, then the prior exclusive licence would either have to have been revoked or the interests of the prior licensee, acquired.

There was no evidence placed before the learned Arbitrators that there was any attempt at revocation pursuant to Section 6.

Was there any evidence that the JUTC had made any arrangements for the acquisition of the Society's interest? The learned Arbitrators found that there were no such arrangements. I find that the learned Arbitrators are plainly correct.

The evidence before the Arbitrators was that there was a letter dated September 8, 1998 (the day after the date of the JUTC licence) from the JUTC and addressed to the Society which stated:

> "The Minister of Transport and Works has recently issued an exclusive licence to the Jamaica Urban Transit Company to operate Public Passenger Transport Service under the provisions of the Public Passenger Transport (Kingston Metropolitan Transport Region) Act.
> Consequently, the J.U.T.C., in an effort to regularize your business operations within the Zones in the KMTR, hereby issues a Sub-Licence to your organization.
> Please refer to this Sub-Licence attached hereto."

The tenor of that letter doesn't seem to be an attempt to acquire the Society's interest. Nor indeed does the fact that notice was given to the Society via the Gazette of the issue of the JUTC licence.

The learned Arbitrators also found from the documentary evidence provided that the Society refused the sub-licences offered and continued to pay the licence fee under the Franchise Agreement. Evidence concerning discussions with the Society prior to the issue of the JUTC licence also failed to convince the Arbitrators of any acceptance by the Society that there could be a valid unilateral repudiation of its two Franchises. There has been no challenge as to those findings of fact.

Although I have found that the learned Arbitrators did in fact misconstrue Sections 3 and 6 of the KMTR Act, there is no misconduct

which would result in the award being set aside on this point. This is because I also find that the JUTC licence could not have come into effect in 1998.

If somehow the term 'road licence' as used in subsection 6 did have a more generic meaning than that given by the Act, it is my view that the finding of the learned Arbitrators on this point could not be faulted. There was no indication by the Minister expressed, either in the body of the JUTC licence or in any other document presented to the Arbitrators, that he was satisfied that any of the terms of subsection 6 had been complied with. There is also no evidence that the Minister had, at any time before the making of the 2001 'Heads of Agreement', issued any statement in accordance with the subsection, that he had been so satisfied.

The result on either interpretation is that despite the statement in the licence that it will take effect on 1998, September 7, it did not then come into force. The JUTC licence, at Clause 3 (1), expressed itself to be "granted subject to and in accordance with the provision of the (KMTR) Act". If there were no attempt at compliance with Section 3 (6) or indeed Section 6, then the JUTC licence would remain ineffective.

If, as I have found, the JUTC licence did not come into effect the provisions of Section 3 subsections (3) and (4) (which deal with co-existing licences) referred to in Mr. Mahfood's submissions become irrelevant.

The Government's complaint on this ground fails.

Ground h – The Arbitrators erred by failing to hold that the Society failed to take reasonable steps to mitigate its losses.

As with ground (c), this ground only arises to be discussed if I have erred in my findings in respect of both grounds (a) and (b).

The essence of the Government's complaint is that in 1998 upon being notified of the issue of the JUTC licence, the Society ought to have ceased operation in order to mitigate its loss. This is so, says the Government, because it should have then been clear that the Government did not intend to issue the second fare table to allow the Society to make the level of profit originally proposed.

The Government asserts that any losses suffered by the Society after September 1998 should not recoverable from the Government and that the Arbitrators erred in law when they failed to so find.

Lord Gifford submitted that the argument placed before this court by the Government on this point was not placed before the Arbitrators. In any event, he submits, the learned Arbitrators made findings of fact concerning the level of loss made by he Society and these are not open to this court's review.

I shall first examine whether the Arbitrators should have made a finding concerning the Society's obligation to mitigate its loss. Thereafter I shall

assess the substantive point as to whether the Society ought to have ceased operation to limit its loss.

Should the Arbitrators have considered Mitigation?

The Government asserts that though it made submissions to the Arbitrators on this aspect the Arbitrators did not make a ruling on the point. Mr. Hylton has submitted that this omission is itself an error of law on the face of the record.

Mr. Hylton supported his submissions in this area by referring to the case of *Kaiser Bauxite Co. v. National Workers Union* (1965) 9 JLR 283.

In that case Fox J. set aside an arbitral award on a number of grounds, one of which was that the Arbitrator failed to address his mind to a fundamental question of law which arose from the facts of the case.

Although the learned Arbitrators in the instant case are silent on the point concerning mitigation they did carry out an extensive assessment as to the level of damages and as to the evidence which they eventually accepted in proof of the damages. In that assessment the methodology of calculating income and the reliability of proof of expenses were closely considered.

In their conclusion of that assessment the learned Arbitrators made the following statement at paragraph 69 of the award.

> "We find that the evidence contained in the accounts prepared by Mr. Wilson, audited by Mr.

> Gallimore and his teams of auditors, supported by the Registrar of Co-operatives, Mr. Corrie, even under great pressure from the Government, provides a fair basis and proper material on which we can rely in our assessment of the loss and damage for which the Government is liable to the Society".

The learned Arbitrators also correctly considered that the burden of proving loss rested on the Society. They also spoke of "the plight of bus operators "and that "the members of the Society had a most difficult time to continue to operate the Franchises." (Paragraph 67 of the award)

Although before me it is disputed as to whether the point was raised before the Arbitrators, I am of the view that the Arbitrators ought to have considered this specific point in their award. The areas assessed by them and the points made should have led them to demonstrate that they did consider the issue of the Society seeking to mitigate its losses.

This was not done and I find applying the reasoning in the *Kaiser* case that that failure constituted misconduct which would allow me to consider whether the Society ought to have taken steps to mitigate its loss.

Was the Society under any duty to mitigate its loss?

Lord Gifford on the question of mitigation submitted that when an "innocent party elects not to accept the wrongful repudiation of the contract, but affirms it and continues to work, he is under no duty to mitigate his

loss". He relied on the case of *Schindler v Northern Raincoat Co. Ltd.* [1960] 2 ALLER 239 as authority for the point.

In that case the court awarded the managing director of a company, damages for wrongful dismissal. The court held that despite the fact that the company had informed him of its intention to repudiate the contract, he was entitled to treat it as still continuing, until he was removed from the post at a meeting of shareholders. He was not therefore obliged to have accepted an offer of alternative employment which was made to him between the dates of the notice and that of the actual removal.

Applying that principle to the instant case Lord Gifford submitted that the Society was not obliged to cease operating at the time of the issue of the licence to the JUTC.

I do not accept that these submissions are valid.

I agree with Mr. Hylton that the principle in the *Schindler* case is not applicable to this case. In 1998 the Government did not just give warning of its intention not to grant the second fare table, what it did was purport to grant a new exclusive contract to the JUTC. Whether it did so properly or not may well have been a live question affecting the applicability of the *Schindler* case.

The evidence however is that the Society through its lawyers had correspondence with the Government speaking to the issue of compensation for the breach of the Franchise Agreement. There was no objection on the basis that the purported JUTC licence was ineffective.

It is perhaps instructive to note that at page 2 paragraph 3 of its letter of October 16, 1998 the firm of Gifford Thompson and Bright makes this (correct in law) statement.

> "Our clients recognize that as in any case of breach of contract, the innocent party has a duty to take reasonable steps to mitigate his damages by seeking alternative sources of revenue."

I therefore find that the Society did have an obligation to mitigate its loss upon its accepting the Government's repudiation of the Franchise Agreement.

Was the continuation of operation unreasonable?

Lord Gifford submitted that the factual situation did not make cessation a realistic option for these reasons:

(a) The Society was invited to be and was interested in being a participant in the new transportation system arrangements, and subsequent to September 1998 there were negotiations between the parties concerning same.

(b) There were also negotiations ongoing concerning the validity of the accounts used

to substantiate the Society's claims for compensation.

(c) The Society had a duty to the travelling public which if it terminated its service would result in "enormous unpopularity." Cessation would "create chaos in the system and alienate the Government which was negotiating with them".

(d) "Shutting down the service would mean making the employees redundant with no funds available to pay redundancy until such time as the Government might compensate them."

As opposed to that Mr. Hylton put it in more practical terms namely, one can "only continue (to operate) if you reasonably expect that you can make profit." In accepting for the purposes of the argument that the Society incurred the massive losses that it says it did ($600 million in the two years prior to 1998) Mr. Hylton submitted that there was no justification for the Society continuing to operate.

In respect of the responsibility to the employees Mr. Hylton submitted that in the face of these losses what the Society's members ought to have done was to "pay off the workers and send them home" rather than continuing to incur the losses which would see substantial cash being paid out.

I agree with Mr. Hylton. In addition I find that the Society had no obligation to the commuting public. It is the Government which had that responsibility. If the Society had ceased its operations the Government would have had the responsibility of filling the gap caused thereby.

I therefore find that the Society failed to mitigate its losses and to the extent that it failed to do so the Government would not be liable to it for those losses. I accept that the case of *Clea Shipping Corp. v Bulk Oil International Ltd. The Alaskan Trader* [1984] 1 All E.R. 129 provides guidance for this decision.

The Arbitrators award should therefore be set aside on this basis as well.

Conclusion:

Despite the remarkable, if not surprising, stance adopted by the Government in respect of the validity of its contract with the Society, I find that I am obliged to agree that the Franchise Agreement between them was invalid and that the Arbitrators erred in finding otherwise.

After hearing the submissions from both sides in the matter on the four areas of dispute I find as follows:

Ground A- The Arbitrators erred in holding that the 1996 Heads of Agreement did not vary or amend the 1995 Franchise Agreement. This was

an error in law on the face of the record and therefore the Arbitrators misconducted themselves in so holding. The consequence is that the arbitral award must be set aside on this ground.

Ground B- The Arbitrators erred in dismissing the preliminary application by the Government that the 1995 Franchise Agreement be declared invalid. The learned Arbitrators ought not to have refused to accept that the granting of licences by zone were *ultra vires* and void. This was an error in law evident on the face of the record and as such constituted an act of misconduct. As a result the award would be set aside on this ground as well.

Ground C- Though the Arbitrators wrongly construed section 3 and 6 of the Public Passenger Transport (KMTR) Act in respect of the effect of the licence purportedly granted to the JUTC in 1998, there was no misconduct which would result in the award being set aside on this point. This is because the JUTC licence did not take effect at that time that it was purported to have come into effect.

Ground H- The Arbitrators erred by failing to hold that the Society failed to take reasonable steps to mitigate its losses. They failed to consider the point when they ought to have done so. These omissions also constituted

errors on the face of the record and accordingly amounted to misconduct in the sense of Section 12 of the Arbitration Act.

On these findings the award would be set aside on grounds (a), (b) and (h), but not on ground (c).

Based on my findings the order of the court is as follows:

1. There shall be judgment for the Claimant on the claim and counterclaim.

2. The award of the Arbitrators be and is hereby set aside.

3. The Defendant do pay the costs of the claim and of the Arbitration Proceedings.