[2009] UKPC Case Ref 48
Privy Council Appeal No 0017 of 2009

JUDGMENT

National Transport Co-operative Society Limited *v* The Attorney General of Jamaica

From the Court of Appeal of Jamaica

before

Lord Phillips
Lord Rodger
Lord Walker
Lord Neuberger
Lord Collins

JUDGMENT DELIVERED BY LORD NEUBERGER ON

26 NOVEMBER 2009

Heard on 29 and 30 June 2009

Appellant	*Respondent*
Lord Anthony Gifford QC	Richard Mahfood QC
	Douglas Leys QC
Patrick Bailey	(Instructed by Charles Russell LLP)
(Instructed by Finers Stephen Innocent)	

LORD NEUBERGER

Introductory

1. This appeal is brought by the National Transport Co-operative Society Limited ("the Society") against a decision given on 9 May 2008 (with reasons provided a month later) by the Court of Appeal of Jamaica, dismissing an appeal brought by the Society against a decision given on 29 November 2004 by Brooks J, setting aside an award made by arbitrators on 2 October 2003 in relation to a dispute between the Society and the Government of Jamaica (acting through the Attorney General).

2. The Government, acting through the Minister of Public Utilities and Transport ("the Minister"), entered into two Franchise Agreements with the Society whereby the Society was permitted and required to provide public transportation services, through a specified number of buses of different capacities along identified routes within defined areas in and around Kingston for ten years at fare rates set out in a table. After the Government had unilaterally determined the agreements, there were arbitration proceedings to determine whether the Society was entitled to damages suffered as a result of the Government having failed to publish a new fare table which would have increased the level of permitted fares. Two lines of defence were raised by the Government which require to be considered on this appeal.

3. The first issue is whether the Franchise Agreements were enforceable at all. The Government contends that they were purportedly entered into pursuant to legislation with which they did not comply, and that they are therefore ineffective, and, indeed, that their operation would have been illegal by virtue of other legislation. The Judge, at the start of his judgment, described the Government's case on this first issue as "truly remarkable", and went on to describe it as follows "although the Minister … on behalf of the Government … entered into a Franchise Agreement with … the Society, and although the parties expended tens of millions of dollars each pursuant to the said agreement, and although the parties entered into a second agreement which recognised 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 …, and although all of this was conducted in the glare of public scrutiny, nonetheless, say the lawyers [for the Attorney General on behalf of the Government], the Franchise Agreement was illegal, and of no effect, as the said Minister had no legal authority to contract as he did."

4. Despite his evident, and unsurprising, distaste for the Government's contention on this issue, the Judge concluded that he was constrained to accept it, and the Court of Appeal agreed. As to the second issue, the Judge also accepted the Government's case, and the Court of Appeal again agreed with him. That issue is whether, contrary to the arbitrators' conclusion, the "second agreement" referred to in the passage just quoted operated to discharge the Government's obligation under the Franchise Agreements, which the Society contended had been breached. There were other issues, in particular relating to mitigation, and the measure of damages awarded by the arbitrators, which were considered in the courts below, but they do not arise on this appeal.

The relevant factual background

5. The relevant facts are as follows. The poor quality of the public transportation system in the Kingston area caused the Ministry of Public Utilities and Transport ("the Ministry") to instigate in 1994 the Kingston Bus Rationalization Project (known as "the KBR Project"), which involved dividing the Kingston area into six zones. Five of those zones, the Northern, Portmore, Spanish Town, Papine, and City, were to be subject to an exclusive franchise for passenger bus services to be awarded pursuant to a bidding process. The sixth zone, the Common Area, which comprised, in effect, central Kingston, was to be open to all the successful franchisees.

6. The bidding process was initiated by a detailed "Invitation to Apply for an Exclusive Licence and Franchise" ("Invitation to Tender"), which included in Section 1 a description of the "New Regulatory Framework", and set out in Section 2 the "Scope of Services and Application Requirements", which included a summary of the new proposed fare structure, bus service routes, recommended operating practices and plans, including safety and training plans.

7. The Society was the successful bidder in respect of two of the zones, namely Northern and Portmore. Prior to the execution of the formal Franchise Agreements, the Government entered into a Memorandum of Understanding with the Society on 14 February 1995. Under this memorandum ("the 1995 MOU"), the Government undertook to provide a subsidy of $10 million in respect of each franchise zone "to offset some of the expenses to be incurred by the [Society] in commencing operations on 1 March 1995". The 1995 MOU also provided that there would be no fare increases before 31 March 1995.

8. Two Franchise Agreements, one in respect of Northern zone, and the other in respect of Portmore zone, but otherwise in identical terms, were duly entered into by the Government (acting through the Minister),

the Transport Authority ("the Authority"), and the Society on 3 March 1995. (Similar agreements were entered into with third parties in respect of the three other franchise zones.) By each of the two Franchise Agreements, the Minister granted to the Society "an exclusive licence to provide public transport services" along specified routes in the relevant zone, on the basis that all the franchise zones "converge in a Common Area where the routes of all franchise holders overlap". Under clause 3, the "Initial Term" of each agreement was ten years, with a provision for extension. There were provisions in clause 11 for determination for breach, and clause 13 provided for determination by the Society with the consent of the Authority.

9. The Society's primary duty under the Franchise Agreements was to provide "public transport services" throughout the area covered by the agreement concerned, and it was plainly envisaged that this would be through the medium of buses, and "bus" was defined as "a vehicle satisfying the requirements of the Road Traffic Act as amended". By clause 5 of the Franchise Agreements, a specified annual fee per bus whose quantum depended on the capacity of the bus, $5,000 for a bus with the smallest seating capacity, was payable to the Authority. Each Franchise Agreement contained an annex which set out the specific routes which were to be covered and the number of "operational" and "spare" buses of various specified seat capacity which were to be initially provided both on an "all day" and on a "peak" basis.

10. The Franchise Agreements included, in clause 15, a requirement that "all buses and other equipment will be maintained and operated at all times in accordance with all applicable rules". It also included an obligation on the Society to "comply with all relevant road traffic enactments and applicable laws and regulations (including permits) for providing public transport services". Clause 15 also stated that the "granting of the franchise does not waive any applicable law or regulation". Clause 17 stated that the Society "will be appropriately licensed and authorised to perform the services required in the Franchise Agreement".

11. By virtue of section 16 of the Transport Authority Act ("the TA Act"), the Authority, subject to the approval of the Minister, had the power to set fares, and clause 32 of the Franchise Agreements was concerned with "Fare Structure and Fare Adjustment". By clause 32(a), the parties recorded that, even taking into account the $10m subsidy, they "appreciate[d] the inadequacy" of the current level of fares which was set out in a table in Appendix D. Of central relevance for present purposes, as it is the term which the Government is said to have breached, is clause 32(a) which provided that "a new fare table will be made available not later than April 30, 1995 to apply with effect from

June 1, 1995." By clause 32(b), it was agreed that the new fare table would be determined so as "to yield a rate of return on capital employed of 15% and adjusted for inflation [assessed pursuant to a specified index]". The expression "capital employed" was defined in clause 32(c) by reference to specified fixed assets. There were further provisions in clause 32 for adjustments to fare levels which it is unnecessary to describe for present purposes.

12. Despite setting up a Commission to consider and prepare a new fare table, and receiving recommendations from that Commission, the Government failed to approve or publish such a table by 1 June 1995 or at all. The Society nonetheless continued to operate bus services in their franchise zones, as well as in the Central Area (as did the other three franchisees), charging fares based on the table set out in Appendix D. Meanwhile, meetings between representatives of the franchisees, the Authority, and the Government took place with a view to agreeing outstanding matters, which eventually led to the drawing up and executing of "Heads of Agreement" on 18 April 1996 (the so-called "second agreement"). This agreement began by referring to the meetings and stating that "the following agreements were reached on the matters indicated". There then followed eight paragraphs.

13. Paragraph 1 of the second agreement stated that the Government would give the Society $26.4m through the medium of the provision of buses on concessionary terms. This was duly done, at least to an extent. Paragraph 2 provided in some detail for further specific buses, at least some of which were provided. There was no paragraph 3. Paragraph 4 required the Government to provide the Society with a new depot at a "concessionary rental". This was never provided. Paragraph 5 stated that the Society would provide a new school bus service as described therein. By paragraph 6, the parties agreed "to cooperate in the design and scheduling of appropriate training programmes for drivers and conductors". Paragraph 7(a) allowed for an upward adjustment in fares based on increases in costs since February 1994. This increase took place with effect from 11 February 1996.

14. Paragraph 7(b)(i) of the second agreement stated that it was "agreed that the proposed new fare table will be reviewed and the computations revised" to reflect both "the concessions and assistance" accorded by the Government and increases in costs since the recommendations of the Committee appointed to determine the new fare table. There was no paragraph 7(b)(ii). Paragraph 7(b)(iii) was in these terms:

> "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."

The KMTR there referred to is The Kingston Metropolitan Transport Region, which is defined by the Public Passenger Transport (KMTR) Act. The KMTR includes the Northern and Portmore zones, as well as the Central Area. The new fare table there referred to was not implemented. There was a dispute, not resolved by the arbitrators, as to whether the "necessary improvements" referred to in paragraph 7(b)(iii) had been effected.

15. Clause 8 of the second agreement provided for the installation of a "cashless/token system" "at the earliest possible time for the entire KMTR". Finally, clause 9 recorded that the Franchise Agreement required amendments, and that these would be discussed and agreed by 1 June 1996. No such amendments were ever agreed.

16. The Society continued to operate the bus services apparently pursuant to the two Franchise Agreements until 7 September 1998, when the Government unilaterally purported to determine those agreements. Thereupon, the Government granted to Jamaica Urban Transit Co Ltd, a company it owned, an exclusive licence to operate bus services throughout the KMTR.

17. On 24 August 2000, the Society started proceedings in the Supreme Court seeking damages for the Government's failure to publish a new fare table by 1 June 1995 in accordance with its obligation under clause 32(a) of the Franchise Agreements. Pursuant to an agreement between the parties of 7 March 2001, this claim was referred to arbitration. In the arbitration, the Government took a preliminary point that the Franchise Agreements were illegal and/or void as the Minister had acted unlawfully in dividing up the Kingston area into a number of zones and issuing an exclusive licence in respect of each. It was said that he only had power to issue a single licence in respect of the Kingston area. The Arbitrators dismissed this argument on 16 May 2002, and went ahead to hear and determine the claim.

18. At the hearing, the Government's principal (but not exclusive) argument before the arbitrators for avoiding liability for its failure to publish a new fare table was that its obligation to do so under clause 32(a) of the Franchise Agreement had been varied, indeed suspended, by

paragraph 7(b)(iii) of the second agreement. Accordingly, said the Government, its obligation to publish that table only arose once the Society had provided "improvements in the transportation system", which had not, in fact, been achieved. The arbitrators dismissed this argument, holding that the provisions of the second agreement were not legally enforceable and had not varied the rights and obligations under the Franchise Agreements. They awarded the Society damages assessed at $4,544,764,113, representing the losses suffered by the Society over the six years from 1996 to 2001, together with interest and costs.

19. The Government applied to the Supreme Court to set aside the award under section 12(2) of the Arbitration Act, on the ground that the arbitrators had made errors of law, two of which are, as mentioned, in issue on this appeal. The first alleged error was that the arbitrators were wrong to reject the Government's preliminary contention that the Franchise Agreements were unenforceable on the ground summarised above, and, in relation to the Portmore zone Agreement, on the additional ground that that zone was outside the Corporate Area, as defined in the relevant legislation (as discussed below). The second alleged error was that the arbitrators were wrong to reject the contention that the Government's obligation in clause 32(a) of the Franchise Agreements was varied by paragraph 7(b)(iii) of the second agreement.

20. In his full and careful judgment, Brooks J upheld both these contentions, and, accordingly, he set aside the arbitrators' award. The Society's appeal was dismissed by the Court of Appeal. Harrison JA and Harris JA (Ag) gave closely reasoned judgments dealing with both issues, and Panton P dealt more pithily only with the second issue.

<u>The first issue: were the Franchise Agreements valid and effective?</u>

Introductory

21. So far as the first issue is concerned, the argument before the courts below revolved primarily around the interpretation of section 3(1) of the Public Passenger Transport (Corporate Area) Act ("the PPT Act"), which is the provision under which the Franchise Agreements were purportedly granted by the Government. This section ("section 3(1)") is in these terms:

> "The Minister may grant to any person an exclusive licence on such conditions as may be specified therein to provide public passenger transport services within and throughout the Corporate Area by means of stage carriages or express carriages or both."

The expression "Corporate Area" is defined in section 1 of the PPT Act by reference to the Kingston and St Andrew Corporation Act, which, in

section 3 and schedule 1, identifies the boundaries of that area. The Corporate Area does not include the Portmore zone, but it does include the Northern zone, and, of course, the Common Area.

22. In connection with the first issue, there are, in the Board's opinion, three questions to be considered. The first is whether either or both the Franchise Agreements granted to the Society fell within the ambit of section 3(1). If the answer to that is no, the second question is whether the Franchise Agreements were therefore ineffective unless they can be saved by reference to other legislation. If the answer to that is yes, the third question is whether the Franchise Agreements can nonetheless be rendered effective by other legislation.

Did the Franchise Agreements comply with section 3(1)?

23. The first question can be answered relatively easily despite the forceful arguments advanced to the contrary on behalf of the Society, and despite the rather unattractive nature of the conclusion.

24. It seems clear that, in order to fall within the ambit of section 3(1), a licence must satisfy two conditions: first, it must be "exclusive", and, secondly, it must extend "within and throughout the Corporate Area". The two Franchise Agreements were exclusive to the Society and therefore, at first sight, they appear to have satisfied the first condition. However, on closer analysis, it must be questionable whether they were in fact exclusive, as they both extended to the Common Area, over which the other three franchisees had similar rights. It is unnecessary to resolve the issue of whether this fact alone would have taken the two Franchise Agreements outside the ambit of section 3(1), as it is impossible to say that either agreement satisfied the second condition.

25. In that connection, although the Northern zone Franchise Agreement was indeed limited in its application to "within … the Corporate Area" (as both the Northern zone and the Common Area are inside the boundaries of the Corporate Area), it is plain beyond argument that it did not apply "throughout the Corporate Area" as the boundaries of that area include the Spanish Town, Papine, and City zones, i.e. the zones the subject of the other three franchise agreements.

26. There is an additional problem with the Portmore zone Franchise Agreement: that zone is not within the Corporate Area, but the physical ambit of section 3(1) is limited by the boundaries of the Corporate Area. The Board would be inclined to accept that the section should not be read as precluding a licence which extends outside the precise boundaries of the Corporate Area, as a degree of what one might call

ancillary exclusivity should be permissible provided it supports the services within the Corporate Area.

27. However, the Portmore Franchise Agreement is primarily, and not ancillarily, concerned with the provision of services outside the Corporate Area. Indeed that Agreement is almost the antithesis of what section 3(1) contemplates. Insofar as it applies within the Corporate Area (i.e. the Common Area), it is non-exclusive; and, insofar as it is exclusive, it is outside the Corporate Area (as its exclusivity is limited to the Portmore zone). Yet section 3(1) is concerned with exclusive licences within the Corporate Area. The Portmore Franchise Agreement therefore cannot be within the ambit of the section. In addition, like the Northern Franchise Agreement, the Portmore Agreement cannot possibly be said to constitute a licence applying "throughout the Corporate Area", and it is outside the ambit of that section for that reason as well.

28. It is true that, when construing section 3(1), section 4(b) of the Interpretation Act applies, so that, "unless there is something in the subject or context inconsistent with such a construction … words in the singular include the plural". However, if one reads the word "licence" as "licences", it results in the concept of more that one "exclusive" licence "to provide … services … throughout the Corporate Area", which is a contradiction in terms. If a licence is to be both exclusive and applicable throughout an area, there can only be one such licence; accordingly, "there is something inconsistent in the … context" with the word "licence" being read as "licences" in section 3(1).

29. If the section had referred in terms to the grant of more than one licence, one might have construed the section so that it envisaged a combination of exclusive licences as applying throughout the Corporate Area, as opposed to each licence applying throughout that area. However, the fact that such a meaning might have to be given to the section if it had unambiguously provided for more than one licence, cannot justify construing "licence" as including "licences", and then giving the section that rather artificial and inconvenient meaning. (Artificial because it is a long way from the natural meaning of the section, and inconvenient because it would seem that all such licences would have to be granted at the same time and would have to determine at the same time).

The effect of the Franchise Agreements not being authorised

30. The conclusion that, because the Franchise Agreements were not authorised by section 3(1), they were ineffective and unenforceable (unless saved by other statutory provisions) is unattractive, as the

observations quoted above from Brooks J's judgment demonstrate. However, in the light of the principles and authorities cited on this appeal, it seems to the Board that the conclusion to that effect, as reached by the Courts below, is correct, subject to the Franchise Agreements being, as it were, saved by other legislation.

31. In *Credit Suisse v Allerdale Borough Council* [1997] QB 306, the English Court of Appeal decided that a guarantee given by a local authority that a loan would be repaid to a bank was unenforceable by the bank as the purpose of the loan was to enable a company set up by the authority to carry out a development which was outside the powers conferred by statute on the authority. Neill LJ said at 343D that, "[w]here a public authority acts outside its jurisdiction … the decision is void", and that where the "decision [is] to enter into a contract of guarantee the consequences in private law are those which flow where one of the parties to a contract lacks capacity. I see no escape from this conclusion." Peter Gibson LJ agreed, starting his judgment at 344D in terms not dissimilar from Brooks J in this case, describing the authority "seeking to assert the illegality of its own action in entering into the contract of guarantee" as "unattractive". Hobhouse LJ also agreed, explaining at 357C that "[w]ant of capacity is a defence to a contractual claim", in contrast with some other, public law grounds for impugning a decision.

32. The present case is, of course, concerned with a contract entered into by a Government minister, not by a local authority. In that connection, it is perhaps worth noting that Hobhouse LJ seems to have thought that the same considerations would, at least in some circumstances, apply to the acts of a minister. At 352H, he said that "[a] minister who purports to exercise a delegated power to legislate must act within that power and, if he does not, the purported delegated legislation is void and of no legal effect". The notion that ministers, as members of the executive arm of government, can only act within the power granted to them by the legislature, appears to accord with principle. If it were otherwise, there would be no point in legislation conferring powers on ministers or government departments: legislation would solely be relevant in that connection with curbing ministerial powers. 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.

33. Support for this conclusion is to be found in *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520. In that case Lord Wilberforce, giving the opinion of the Board, said at 533A-B, that it was "fully established … that … in … states of the Commonwealth of Australia, the Crown

cannot contract for the disposal of any interest in Crown lands unless under and in accordance with power to that effect conferred by statute". Accordingly, at 533C, he approved a dictum of Griffith CJ that "no Minister of the Crown has any authority to enter into any agreement for the disposition of an interest of the Crown in Crown lands which is not authorized by the law". From this, said Lord Wilberforce, at 533F-G, it followed that a Minister, to whom a statute gave certain powers and discretions in relation to disposals of interests in Crown land could not contractually fetter himself in relation to the exercise of such discretions. It followed that the contract in that case, whereby the Minister had agreed with the appellant to fetter his statutorily bestowed discretions, was *ultra vires*, and, even though the appellant had expended substantial sums in reliance on that contract, it "could [not] give rise to any contractual obligation enforceable in the courts" (including founding a claim for breach of contract) – 535D-E.

34. It therefore follows, as the courts below concluded, that, subject to the third and final question on this first issue, the Franchise Agreements were unenforceable because the Minister did not have power under section 3(1) to grant them.

35. An additional argument was raised by the Government, namely that, if the Franchise Agreements were outside the ambit of section 3(1), then any attempt to operate those agreements would be illegal as being contrary to the provisions of Part III of the Road Traffic Act ("the RT Act"). The provisions of that Part of the RT Act are considered in the next section of this judgment. At this stage, all that need be said is that the provisions of Part III of the RT Act require any person who operates a public passenger vehicle to obtain a licence under section 61 or section 63, unless that person has a franchise under section 3(1) of the PPT Act (or under a similar statutory provision relating to rural areas).

36. If the Franchise Agreements cannot be treated as valid licences and agreements under Part III of the RT Act (as discussed in the next section of this judgment), then it would have been necessary for the Society to obtain appropriate licences pursuant to section 61 or 63 of the RT Act to operate the Franchise Agreements lawfully. While that would not of itself render those agreements invalid (particularly as clauses 15 and 17 of the Franchise Agreements require the Society to comply with the law and to obtain all necessary licences) unless it proved impossible to obtain the licences, the commercial consequences would be rather absurd: not only would the purported exclusiveness of the Franchise Agreements be ineffective, but they would merely serve to permit the buses to operate over the specified routes only if licences so to operate them could be obtained. That would not only render them of very little value to the Society: it would make the agreements almost meaningless.

Can the Franchise Agreements be saved by other legislation?

37. This was not a point which was raised in terms by the Society in the courts below, but it was raised with the parties at the hearing at the hearing before the Board, and they both made oral submissions on it, and, indeed, provided further written submissions after the conclusion of the hearing.

38. The Society's case is that, if (as the Board has concluded) the Franchise Agreements were not validly granted pursuant to section 3(1), they were nonetheless valid, and could be freely operated without the need for further licences under Part III of the RT Act, in the light of the provisions of the RT Act. In this connection, the Society has two arguments. The first is that section 112 of the RT Act preserves the Crown's prerogative to grant exclusive licences such as the Franchise Agreements, so that, despite their non-compliance with section 3(1), they were wholly valid, and no further licences under Part III of the RT Act would be required. The second argument is that, although it may involve the Society accepting that the Franchise Agreements lasted for three years, as opposed to ten years, they can and should be construed so as to be valid under the provisions of Part III, and in particular section 63, of the RT Act, so that no further licences under those provisions were required.

39. Part III of the RT Act, which comprises sections 60 to 77, is concerned with "Regulation of Public Passenger Vehicles". Section 61(1) prohibits anyone using a vehicle as a public passenger vehicle without a "road licence" or an "emergency road licence", which can be limited to specific "traffic areas" or "licensing areas". An application for such a licence should be made to "the Licensing Authority" – section 61(2). Section 61(3) states that a road licence continues in force for three years from its date of issue.

40. Section 63(1) empowers the Authority to grant a road licence in respect of all classes of vehicles covered by section 62 (which includes all classes of vehicle the subject of the Franchise Agreements). When considering whether to grant such a licence, section 63(2) states that the Authority must "have regard" to certain matters, including "the suitability of the routes and conditions of the roads" concerned, "the extent, if any, to which the proposed routes are already adequately served" and "the extent to which the proposed service is necessary or desirable". Section 63(2), (4), (5) and (6) also require the Authority to conduct a technical survey and to invite representations from specified parties, in order to identify the extent of the need for public transport in the area concerned.

41. Section 63(9) requires a person applying for a licence under section 63 to submit to the Authority (a) "particulars of the types or type of vehicle to be used accompanied by the certificate of fitness issued in respect of the vehicle", and (b) in certain cases (which would include the present), the "proposed route, the timetables and fare tables of the services proposed to be provided". Section 63(10) requires applications for licences to be accompanied by the prescribed fee.

42. Sections 61 and 63 each contain criminal sanctions for breaches of any conditions contained in road licences granted thereunder. Additionally, section 68 enables a Licensing Authority to revoke or suspend a licence for breach of such conditions.

43. Section 64 of the RT Act enables the Minister, by order, to limit the number of road licences granted in a particular licensing area following receipt of a recommendation to that effect from a Licensing Authority. The remaining sections of Part III are concerned with "General Provisions as to Licences" and "Drivers, Conductors and Passengers".

44. Section 3(1) of the PPT Act, quoted and discussed above, is thus an exception to the prohibition in section 61 of the RT Act, as is made clear by section 10(1) of the PPT Act, which excludes sections 61, 62, 63 and 68 of the RT Act from applying "to any services provided under or by virtue of any exclusive licence granted under section 3" (and there is a similar exception contained in the Public Passenger Transport (Rural Area) Act). Subject to certain specific exceptions mentioned in section 3(3), section 3(2) of the PPT Act prohibits the grant of a road licence authorising the use of a vehicle as a public passenger vehicle within the Corporate Area so long as there is an exclusive section 3(1) licence in existence.

45. The final statutory provision it is necessary to mention is section 112 of the RT Act which states that "Nothing in this Act shall prejudice or affect the prerogative of the Crown to grant any person or company an exclusive franchise to operate a public passenger service … within any traffic area or part thereof."

46. The argument that section 112 of the RT Act empowered the Minister to grant the Franchise Agreements, and avoided any need for the Society to apply for licences under Part III of the RT Act is, at least in the light of the history of these proceedings, startling. No such argument was advanced orally or in writing at any stage, until written submissions were made after the hearing of the present appeal. Even now, the totality of the contentions on the argument scarcely covers three pages. Yet, it is said by the Society that section 112 provides a

complete answer to the Government's case on the first issue. However surprising the argument may be in the circumstances, it must, like the Government's argument on the applicability of section 3(1) of the PPT Act, nonetheless be considered on its merits.

47. Section 112 of the RT Act does not confer any prerogative; nor does it define the extent or limits of any such prerogative. It merely assumes that a prerogative may exist. It also provides that, insofar as any such prerogative exists, it is not to be affected or prejudiced by any provision of the RT Act. There was no attempt by the Society to establish that a prerogative to grant exclusive licences ever existed, or even what the extent of any such prerogative was.

48. The PPT Act contains no provision equivalent to section 112 of the RT Act, and, in this connection it is relevant to mention that, as the Government points out, the RT Act dates back to 1938, whereas the PPT Act originates from 1947. If, after the PPT Act came into force, there was a prerogative power to grant the Franchise Agreements, it would be inconsistent with section 3(1) of the Act. That section purports to permit the Minister to grant an exclusive licence provided that it satisfies certain requirements. If an exclusive licence which does not satisfy some of those requirements could be granted prerogatively, that would mean that section 3(1), at best, has no point: while appearing to confer a power on the executive, it would either replicate an already existing prerogative, or would be more restrictive than that prerogative.

49. In those circumstances, the Society has not established that there ever was a prerogative to enter into contracts such as the Franchise Agreements. Furthermore, even of there was such a prerogative, it did not survive the enactment of section 3(1) of the PPT Act, at least in relation to the grant of exclusive public bus passenger service in central Kingston.

50. Accordingly, the Society gains no assistance from section 112 of the RT Act. On the other hand, the provisions of Part III of the RT Act, and in particular section 63 thereof, do provide the Society with a lifeline, albeit one which is perhaps less than ideal from its perspective, in that it results in the term of each Franchise Agreement being restricted to three years. There is, in the Board's opinion, no good reason why the Franchise Agreements should not have taken effect as road licences granted by the Authority under section 63 of the RT Act.

51. It is true that the licence in each Franchise Agreement was formally recorded as granted by the Minister, but the Authority was party to the agreements, the substantial franchise fees set out in clause 5 were payable by the Society to the Authority, it was the Authority which

had the right to determine the agreements early for cause under clause 3(d), and it was the Authority which had control over the Society's right to effect early determination under clause 13. Indeed, perusal of the Franchise Agreements establishes that it was the Authority, far more than the Minister, which was concerned with their terms and operation. Further, as between the Minister and the Authority, the Minister has power to give "directions of a general character as to policy to be followed in the performance of [the Authority's] functions in relation to matters appearing to him to concern the public interest" - see section 5(1) of the TA Act.

52. It is also true that the term of each Franchise Agreement was ten years, whereas the term of any road licence is stipulated to be three years. But that does not prevent the Agreements from being valid road licences, although it does mean that they cannot subsist, as such, for as long as the parties envisaged. If a grantor, who only has power to grant a licence for three years, purports to grant a licence for ten years, then, in the absence of any reason to the contrary in a particular case, the licence takes effect for three years. Rather than receiving nothing on the ground that the licence is a nullity, the grantee should be entitled to as much of the intended benefit as the grantor is entitled to grant.

53. It can also be said that there was no right to grant the Society an exclusive licence, given that section 3(1) of the PPT Act cannot be relied on. That may be right, but, once again, the Society can rely on the proposition that, if a grantor purports to grant more than that which he is empowered to grant, then, absent a good reason to the contrary, he should be treated as having granted as much as he was able to grant. So, if the licence granted by each Franchise Agreement could not have been exclusive as a matter of law, it was nonetheless a valid licence, albeit non-exclusive. It may be that the exclusivity of the licences could have been justified – for instance through the medium of section 64 of the RT Act – but it is unnecessary to determine the point for present purposes.

54. Reference must also be made to the fact that the Authority is required by subsection (2), and the following subsections, of section 63 of the RT Act to have regard to certain matters before granting a licence under subsection (1). This presents no problem to the Franchise Agreements constituting road licences. In the first place, it appears clear from the Invitation to Tender and from the preamble and terms of the Franchise Agreements that, as one would have expected, the very matters which section 63 required to be considered had been investigated before the agreements were entered into. In order to decide to enter into Franchise Agreements, and in order to determine the many detailed terms of those agreements, it was necessary to investigate the state of the public transport facilities in Kingston, and to analyse how

best to restructure them, structurally, strategically, physically and financially. In any event, although it is not necessary to determine the point, it seems unlikely that failure to comply strictly with the procedures set out in subsection (2) and following of section 63 would automatically invalidate a licence, as between the parties to the licence. Reverting to the analysis in *Credit Suisse* [1997] QB 306, a failure to comply with the precise statutory procedures would not appear to go to the capacity of the Minister or the Authority to grant the licences, although it might have led to the licences being set aside if judicial review proceedings had been brought, but they were not.

55. It must also be acknowledged that section 63(9)(a) requires certificates of fitness to be provided for each vehicle the subject of any road licence, and it does not appear that any such certificates were provided before the Franchise Agreements were entered into. However, as mentioned above, clause 15 of those agreements requires all the vehicles used pursuant to those agreements to be "maintained and operated at all times in accordance with all rules, regulations and codes". This does not represent strict compliance with the literal meaning of section 63(9)(a). However, it may well be sufficient to satisfy that statutory requirement, if interpreted in a practical way, and, even if it is a departure from the statutory requirement, it is quite insufficiently significant a departure to prevent the Franchise Agreements from being valid licences under section 63.

56. Precisely the same point may be made about the fact that the Society paid no fee in advance for the Franchise Agreements, as appears to be envisaged by section 63(10). The level of franchise fees payable under clause 5 of each of the agreements is substantially in excess of the minimum amount contemplated by section 63(10), namely $100. It is probable that it was open to the Authority to defer the obligation to pay a fee, provided it had an enforceable agreement to pay. However, even if that is wrong, the fact that the Authority granted an otherwise valid licence on receiving an enforceable agreement to pay the fee, rather than the fee itself, cannot invalidate the licence.

Conclusion on the first issue

57. The reasoning of Brooks J and the Court of Appeal as to the validity of the Franchise Agreements was correct, in that the Franchise Agreements did not comply with section 3(1) of the PPT Act, and therefore subject to any further argument, were ineffective. However, although the point was not directly taken in the lower courts, the Franchise Agreements satisfied the provisions of Part III, and in particular section 63, of the RT Act. Accordingly, the Society's appeal

on the first point should be allowed, save that the term of each of the Franchise Agreements was three years rather than ten years.

58. It is therefore necessary to face up to the second issue, which can be dealt with somewhat more expeditiously.

The second issue: was clause 32(a) varied by paragraph 7(b)?

The Society's principal argument: paragraph 7(b) is too uncertain

59. The Government's case is that its obligation to publish a new fares table under clause 32(a) of the Franchise Agreements was varied, and in effect suspended, by virtue of paragraph 7(b) of the second agreement. The correctness of that contention ultimately turns, in the Board's view, on whether the concept of "the necessary improvements" in this latter clause is too vague or unclear to give rise to a contractually binding provision, or, to put the point another way, whether it amounted to an agreement to agree, or to negotiate, because the nature of those improvements could not and cannot sensibly be identified unless and until the parties had agreed them, or at least agreed a mechanism for determining them – and that never happened.

60. Courts are reluctant to hold that a provision in a document which is plainly intended to have contractual effect is of no effect in law because it is too vague or uncertain. As Lord Wilberforce said in *Cudgen Rutile* [1975] AC 520, 537F, "in modern times, the courts are readier to find an obligation which can be enforced, even though apparent uncertainty may be lacking as regards some term such as the price, provided that some means or standard by which that term can be fixed can be found." Further, as Lord Wilberforce observed in another case, this time in the House of Lords, *Prenn v Simmonds* [1971] 1 WLR 1381, 1385 the court is not limited to interpreting the words of a contract in a vacuum, but should "inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances which the person using them had in view".

61. Having said that, the principle that an alleged contract is ineffective or unenforceable in law because it is too vague, or because it constitutes an agreement to agree, or an agreement to negotiate, is well-established, and remains an important principle: see *Walford v Miles* [1992] 2 AC 128 and the cases cited therein, including *Courtney & Fairbairn v Tolaini Bros* [1975] 1 WLR 291.

62. In this case, there can be no doubt but that paragraph 9 of the second agreement was unenforceable: an agreement that amendments to

an existing contract are "require[d]" and will be "discussed and agreed" is both far too unspecific to have contractual effect and is, in terms, an agreement to negotiate (or to agree). However, contrary to the contention of the Society, this does not mean that all the other provisions of the second agreement cannot have contractual effect. Paragraph 9 is severable from the other terms of the second agreement, in the sense that the other terms and the provisions of clause 9 can each commercially and practically stand on their own, and there is nothing in the language of the second agreement to suggest that the other terms were to be suspended unless and until the amendments referred to in paragraph 9 were agreed. This point is reinforced in practice by the fact that the parties subsequently implemented many of the other terms of the second agreement (although that may well not be a point which can be relied on, as a matter of law).

63. However, paragraph 9 assists the Society's case to this limited extent, that it undermines the notion that all terms of the second agreement were intended to have legally binding effect, a point which receives a little further support from the title of the second agreement: "Heads of Agreement" is often used to describe a document which is not intended to have legally binding effect, although it should be added that it is common for the parties to intend, and for the courts to decide that such a document has such an effect. In other words, this is not a case where, apart from the provision in question, namely paragraph 7(b), it is clear that the rest of the document has full contractual effect.

64. It seems clear that paragraphs 1, 2, 5 and 7(a) were intended to have, were subsequently treated as having, and did have as a matter of law, contractual effect. Paragraph 6 presents more of a problem in this connection. There is obvious force in the notion that an agreement to "cooperate in the design and scheduling of appropriate training programmes" suffers from too much imprecision and contemplates an agreement arising out of negotiation with insufficiently defined parameters to be effective in law. It may be, however, that its terms could have been sufficiently fleshed out by reference to the provisions relating to safety and training plans set out in Section 2 of the Invitation to Tender.

65. The short, but difficult, issue which falls to be resolved is whether the provisions of paragraph 7(b) were, as the Society contends, too vague and uncertain to be contractually enforceable. The Board has decided that they are. It is hard to see how one could sensibly gather from the terms of the second agreement, even taking into account the provisions of the Invitation to Tender and of the Franchise Agreements, how the "concessions and assistance" and "increases in costs" are to be taken into account, for the purpose of reviewing the new fare table under

paragraph 7(b)(i), or what would constitute the "necessary improvements" in "the conduct and decorum of bus crews", or how they were to be assessed, under paragraph 7(b)(iii).3. In relation to the former point, it may be possible to assess the value of the concessions and assistance by reference to what was provided under the second agreement, but that does not meet the point that there could be all sorts of different views as to how those concessions and assistance might be allowed for, and there is no mechanism for dealing with any dispute in that connection. In relation to the latter point, even if paragraph 6 was enforceable, paragraph 7(b)(iii).3 gives no indication of how successful the training programmes would have to be, what level of improvement was required, and how it was to be assessed. It is true that the Franchise Agreements contained a dispute resolution procedure provision, but they were limited to valuation of assets, termination and questions of fact arising from the actions of the Authority or its agents.

66. While a court is generally reluctant to hold that a provision in a contractual document is ineffective in law, there is some reason for supporting such a conclusion in relation to paragraph 7(b) over and above the fact that paragraph 9 was ineffective and the second agreement's title. Given that the provision of the new depot was largely in the hands of the Minister or the Authority, and there could be much debate, leading to delay and uncertainty, as to many of the points which could have arisen under paragraph 7(b), it seems inherently improbable that the Society would have given up its accrued and valuable right to damages for breach of clause 32(a) of the Franchise Agreements without something more concrete and valuable than a future new fare table, whose terms were very much open to debate, and whose date of introduction was very uncertain and might easily be a long way away. This point is well illustrated by the absence of any time limits for the provision of the new depot referred to in paragraphs 4 and 7(b)(iii).1. Indeed, the force of that point is underlined by the fact that, in the event, the new depot was never provided.

The Government's objections to the Society's principal argument

67. The Government took a jurisdiction point, arguing that it was not open to the Society to contend that paragraph 7(b) was of no contractual effect on the grounds of uncertainty as the point had not been relied on before the arbitrators, Brooks J or the Court of Appeal. It is true that the Society did not put its case in precisely the way in which it has been characterised in the immediately preceding paragraphs of this judgment.

68. However, it is clear from the arbitrators' decision and from the judgments below that it was always the Society's case that the paragraph had no effect on the enforceability of the obligation to publish a new

fare table in clause 32 of the Franchise Agreements. In particular, it was contended that the second agreement, and in particular paragraph 7(b), was lacking in insufficient certainty. Although this contention appears to have been primarily based on the existence and terms of paragraph 9, it was argued, indeed accepted by the arbitrators in their decision, that the language of clause 7(b), read in its context, was such as to be "entirely inapt to constitute any condition precedent". The arbitrators also relied on the commercial unlikelihood of the Government's case, a point which weighs with the Board.

69. In his judgment, Brooks J concentrated on, and rejected, the argument that paragraph 9 of the second agreement meant that the second agreement, and in particular paragraph 7(b), was not intended to have contractual effect. However, he specifically referred to the Society's argument that paragraph 7(b)(iii) was "too vague and uncertain to be capable of being construed as a replacement standard for that described", the last four words being, it appears, a reference to the Government's obligation to provide a fare table in clause 32(a) of the Franchise Agreements. Similarly, in the Court of Appeal, it is clear that the Society contended that paragraph 7(b) was effectively an agreement to agree, albeit on the primary basis that the second agreement, as a whole, should be so characterised – see the references to *Courtney & Fairbairn* [1975] 1 WLR 291 in the judgments of Harrison JA and Harris JA (Ag).

70. It would be wrong, save perhaps in unusual circumstances, for an entirely new argument, not raised before the arbitrators, to be invoked by a court as a reason for upholding an award, at least where the argument is one which may involve a finding of primary or secondary fact, or where it involves the exercise of a discretion. Even when it raises a point which is purely one of law, it may often be wrong for a court to entertain an argument raised on a challenge to an arbitral decision, if it was not raised before the arbitrators. However, in this case, it seems clear that the argument, or a contention sufficiently close to the argument, was raised before the arbitrators and indeed before the courts below, to render it permissible for the argument to be entertained even at this, admittedly very late, stage.

71. The effect of the arbitration agreement reached between the parties is that any issue should be determined by the arbitrators, and that the function of the court can be described as being to review and supervise the arbitral process and determination, rather than resolving new points of law, not raised before the arbitrators. However, it would be wrong to be too technical and strict as to what constitutes a new point in this context. It is almost inevitable that, as a case proceeds through different tribunals, the arguments become refined, and subtly change. It

is sometimes difficult to say whether a point raises an entirely new argument, or a variation or development of a previous argument. (And there will no doubt be cases where, although such a variation or development, it may not be appropriate to permit the argument to be raised.) In the present case, the argument on which the Society now primarily relies for challenging the contractual effect of paragraph 7(b) raises a pure point of law, it is very similar to some of the arguments raised before the arbitrators and in the courts below, it has the same legal consequences as those earlier arguments, and it has not been suggested that its late appearance has caused the Government any unfair disadvantage.

72. It is also true that the arbitrators did not find for the Society on this second issue on the ground that paragraph 7(b) was unenforceable because its provisions were too uncertain and/or required further negotiation; their decision was based on the proposition that the second agreement as whole was not intended to effect a variation to the Franchise Agreements. But this does not mean that, on an appeal, the court cannot uphold the arbitrators' decision on the ground that paragraph 7(b) was too uncertain to be enforceable, even though most of the other paragraphs of the second agreement were enforceable and did effect variations to the Franchise Agreements. In each case, the nature of the point is the same, and the Board's decision effectively involves upholding the arbitrators' decision as to the effect of paragraph 7(b), but not as to most of the remainder of the paragraphs of the second agreement – the greater includes the less.

73. The Government also relied on the terms of a letter of 17 June 2004 sent by the parties to the Registrar of the Supreme Court, following the hearing and before the judgment, at first instance. It was said that the agreement embodied in that letter precluded the Society from arguing that paragraph 7(b) of the second agreement was ineffective as a contractual term, and that therefore the provisions of clause 32(a) of the Franchise Agreements remained in full and unamended force. In effect it was agreed in that letter that if the Government succeeded in its pleaded case that the arbitrators were wrong to decide that the second agreement effected no variation to the Franchise Agreements, the Society was not entitled to any damages.

74. The answer to this point is the same as the answer to the Government's jurisdiction point, namely that the arbitrators' decision was upheld insofar as it related to the only provision of the second agreement directly relevant for the purposes of these proceedings, namely paragraph 7(b).

75. It is worth mentioning that the objections based on jurisdiction and on the 2004 letter could have been, but were not, raised with equal (and possibly more) force in relation to the ground upon which the Society has succeeded on the first issue. It is right briefly to address the question whether it is appropriate to hold the Franchise Agreements effective on the ground that they constituted valid licences under section 63 of the RT Act, given that the point was not taken below. The point involved is purely one of law, it relies on statutory provisions which played a substantial part at all stages of the proceedings, it produces a result which is significantly less beneficial for the Society than the outcome sought, but its effect is otherwise the same as the arguments which the Society did run below, the late raising of the point has caused no unfair prejudice to the Government, and the result it produces is one which seems to accord with the broad merits of the case. Accordingly, the Government was right not to object to the point being raised.

The Society's other arguments on the second issue

76. It is also right to mention that the Society raised other arguments on the question whether paragraph 7(b) of the second agreement had varied clause 32(a) of the Franchise Agreements. However, with one exception, these arguments were (quite rightly in the Board's opinion) not pursued with any vigour in the oral argument.

77. The one exception was an argument that neither of the Franchise Agreements could be varied by the second agreement, because clause 43 of the former agreements stated that the provisions of those agreements would "take precedence in the event of a discrepancy or inconsistency between the Franchise Agreement and any other document …". This argument was rightly rejected by the Courts below. It would mean that the Franchise Agreements could never have been varied, however much all parties wished to vary them. The simple answer to the point is that there is no "discrepancy or inconsistency" between an agreement and a subsequent contract varying that agreement. Although the clause may well apply to subsequently executed documents, its effect is simply that such documents cannot be invoked to contradict what appears to be the original meaning of the Franchise Agreement according to its terms.

Conclusion on the second issue

78. In these circumstances, contrary to the conclusion reached in the courts below, because they are too uncertain and required further negotiation, the provisions of paragraph 7(b) of the second agreement did not operate to suspend, or otherwise impinge on, the obligation of the Government with regard to providing a new fare table as contained in clause 32(a) of the Franchise Agreements.

Conclusion: disposal of these appeals

79. It follows that the Board will humbly advise Her Majesty that this appeal should be allowed, and that the case should be remitted to the Court of Appeal, in order to consider the consequences, in the light of the fact that the duration of the Franchise Agreements was only three, not ten, years, and in the light of other issues relating to quantum (and in particular the relevance of the duty to mitigate) which the Board has not had to consider. The parties have 21 days in which to make written submissions as to costs.