[2010] JMCA Civ 48

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 117/2004

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN NATIONAL TRANSPORT CO-OPERATIVE SOCIETY LIMITED APPELLANT

AND THE ATTORNEY GENERAL OF JAMAICA RESPONDENT

Lord Gifford QC, Patrick Bailey and Miss Kristina Exell instructed by Patrick Bailey & Co for the appellant

Richard Mahfood QC, Miss Haydee Gordon and Miss Tasha Manley instructed by the Director of State Proceedings for the respondent

27, 28, 29, 30 September and 20 December 2010

Decision on the scope of Privy Council Referral and Admissibility of Evidence

MORRISON JA:

Introduction

[1] The appellant ('NTCS') is a co-operative society registered under the Co-operative Societies Act and its principal objects are to purchase, equip, maintain and operate public transport vehicles, motor coaches or other vehicles appropriate for the carriage of

passengers, goods and personal luggage and effects within the island of Jamaica. The respondent was made a party to the action from which this appeal arises in her capacity as the representative of the Government of Jamaica ('GOJ'), in particular the Minister of Transport and Works (the Minister) and the Transport Authority.

[2] By an award handed down on 2 October 2003, arbitrators (Messrs Justice Boyd Carey and Justice Ira Rowe, retired, and Mrs Angela Hudson-Phillips QC) ('the arbitrators'), appointed pursuant to an agreement dated 7 March 2001 between the parties to submit their differences to arbitration ('the March 2001 Heads of Agreement'), ordered GOJ to pay to NTCS various amounts by way of damages totalling $4,544,764,113.00, with interest and costs. This award represented the losses claimed by NTCS for the six year period 1996 - 2001 for the breach by GOJ of two franchise agreements dated 1 March 1995, whereby NTCS was given exclusive licences by GOJ for the carriage of passengers in the Northern and Portmore zones of the Kingston Metropolitan Transport Region ('KMTR'), for a period of 10 years commencing 1 March 1995.

[3] Dissatisfied with the award of the arbitrators, GOJ challenged it by an action in the Supreme Court, on the ground of misconduct by the arbitrators and alleged errors on the face of the award. In a judgment dated 29 November 2004, Brooks J found for GOJ (though not on all the grounds of challenge) and set aside the award, with costs to GOJ. NTCS appealed to this court, which, by its order dated 6 June 2008, dismissed the appeal and affirmed the judgment of Brooks J. NTCS pursued the matter to the Judicial

Committee of the Privy Council, which, in a judgment delivered by Lord Neuberger of Abbotsbury on 26 November 2009 ([2009] UKPC 48), allowed the appeal and ordered (at para. 79) that the matter should be remitted to this court in the following terms:

> "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."

[4] Shortly after the delivery of this judgment, a sharp disagreement arose between the parties as to the scope of the Board's referral of the matter to this court and, on 10 March 2010, after an unfruitful exchange of correspondence between the attorneys-at-law on both sides as to the way forward in the light of the judgment of the Board, GOJ's attorneys wrote to the Registrar indicating its view that the judgment "raises complex issues of law and facts relevant to the quantification of damages". In the light of this, GOJ's attorneys requested that the matter be set down before a single judge of the court for a case management conference "for directions to be given for the filing of written submissions, affidavit evidence in support (which we believe will be necessary) and an agreed (or separate) statement of issues which will guide the court in its determination of the case". In a swift riposte dated 15 March 2010, NTCS' attorneys advised the Registrar that they disagreed with the view that "the reference raises complex issues of law and facts" and took the position that all that the judgment of the Board called for was "a simple matter of calculation".

[5] The case management conference duly took place on 20 April 2010, when Phillips JA made orders for the completion of the documentation for the appeal, the filing of written submissions with supporting affidavits, notices of objection to such affidavit evidence, if any, and notices to produce witnesses for cross-examination, if necessary. The hearing of the matter was also set for 27 September 2010 for five days.

[6] On 30 June 2010, obviously further to its understanding of the scope of the Privy Council's referral, GOJ filed an affidavit sworn to by Dr Alton Fletcher, who had formerly been employed by GOJ as a transport consultant and who had given evidence on its behalf in the proceedings before the arbitrators. This was met by a notice of objection filed on behalf of NTCS on 30 July 2010, stating its intention to object to the evidence contained in Dr Fletcher's affidavit, primarily on the ground that that evidence fell outside the scope of the Privy Council's referral.

[7] When the appeal came on for hearing on 27 September 2010, the first question that arose for consideration was therefore whether Dr Fletcher's affidavit should be admitted into evidence, and the parties were agreed that the determination of this question would necessarily involve consideration of the wider question of the scope of the Privy Council's referral. The court accordingly heard argument on these issues, at the conclusion of which it was agreed that it would deal with them by way of a preliminary ruling, to be followed in due course by a further hearing to consider the substantive issue of the quantum of damages (including the question of mitigation) in the light of that ruling. This judgment is therefore concerned in the first place with the question of

the scope of the referral and secondly, following on from the answer to that question, the admissibility of Dr Fletcher's affidavit.

The background

[8] The factual background to the matter has been fully described in the award of the arbitrators, in the judgments of Brooks J and of this court, and in paras. 5 - 20 of the judgment of the Board, and I do not therefore propose to rehearse it beyond that which may be necessary for the purposes of this judgment. However, I think that it is important for a determination of the scope of the Privy Council's referral to this court, to have in mind what was in issue between the parties and what was decided at each stage as the matter proceeded, through the arbitration and onwards up the appellate ladder.

The arbitration

[9] The first issue decided by the arbitrators arose as a result of a preliminary point taken on behalf of GOJ at the outset of the hearing before them, which was that the franchise agreements and the March 2001 Heads of Agreement were illegal and/or void, because the Minister had acted unlawfully in dividing up the KMTR into a number of zones and issuing an exclusive licence in respect of each. It was submitted that the Minister had only had authority under section 3 of the Public Passenger Transport (Kingston Metropolitan Transport Region (KMTR)) Act ('the PPT Act'), to issue a single licence in respect of the KMTR. This submission was dismissed by the arbitrators as being without merit and they therefore proceeded to hear and determine NTCS' claim on the substantive issues.

[10] What the arbitrators described (at para. 13 of the award) as "the very heart of the problem placed before us for decision", was the question whether GOJ was under a contractual obligation pursuant to the franchise agreements, having awarded exclusive licences to NTCS upon certain terms, to implement a new table of the fares that it was permissible to charge for public passenger carriage in the KMTR ("the second fare table"). This obligation was said to arise from clause 32A of the franchise agreements, in which both parties acknowledged "the inadequacy" of the fares provided for in the agreements and GOJ undertook that the second fare table would be made available "not later than April 30, 1998 to apply with effect from June 1, 1998". Clause 32A(b) provided that the fares in the second fare table would be determined so as to provide to NTCS a rate of return on capital employed of 15% and "to recognize in full all operating and administrative costs minus [GOJ's] contribution".

[11] It was common ground that GOJ did not provide a second fare table meeting these criteria, notwithstanding the recommendations of a team of experts, chaired by Professor Gordon Shirley ("the Shirley Commission"), which had been asked to consider the matter. NTCS nevertheless continued to operate the bus services pursuant to the franchise agreements until 7 September 1998, when GOJ unilaterally purported to terminate the agreements and granted an exclusive licence to Jamaica Urban Transit Company Ltd ('JUTC'), a company wholly owned by it, to operate bus services throughout the KMTR. NTCS refused to accept this unilateral termination and continued to operate its two franchises until 7 March 2001, when a compromise arrived at between

the parties was embodied in the March 2001 Heads of Agreement. This agreement provided for the settlement by GOJ of some of NTCS' claims arising out of the termination of the franchise agreements and for the submission of all outstanding claims to arbitration.

[12] Among other things, GOJ argued strenuously before the arbitrators that its obligation to implement the second fare table had been varied and/or suspended by a subsequent agreement between the parties ('the 1996 Heads of Agreement') and that, in the circumstances, the provision of the second fare table was intended by the parties to be conditional upon NTCS achieving "improvements in the transportation system", which were never in fact achieved. The arbitrators rejected this argument and found that GOJ was in breach of its obligation (which had not been varied or suspended in any way) to provide the second fare table to NTCS "from the inception of the Franchises up to March 7 2001" (see the arbitrators' Reasons for Award, para. 40).

[13] The arbitrators then turned their attention to the question of damages and subjected the detailed evidence adduced by NTCS in this regard to exhaustive and exacting scrutiny. Among the witnesses called to give evidence before the arbitrators was the Registrar of Co-operative Societies (the statutorily appointed regulator of co-operative societies), whose team of auditors also earned out detailed checks on the accounting evidence provided by NTCS and found that there were no material differences between the income and expenditure figures reported by the auditor engaged by NTCS and their own findings. Indeed, counsel for GOJ is recorded by the

arbitrators as stating that GOJ "had no real quarrel with the expenditure figures developed by [NTCS' auditor]" (Reasons, para. 58). At the end of the day, the arbitrators resolved the differences between the parties on the revenue side in favour of NTCS (while at the same time acknowledging the "remarkable job" done by GOJ's counsel, who, it was observed, had "said...everything that could be said on behalf of [GOJ] in this matter" - see Reasons, para. 67). The arbitrators accordingly found that the evidence adduced on behalf of NTCS provided "a fair basis and proper material on which we can rely in our assessment of the loss and damage for which [GOJ] is liable to [NTCS]" (Reasons, para. 69), and stated their conclusion as follows (at paras. 70 -72):

"**THE QUANTUM OF DAMAGES**

> The Society is entitled to receive a return of 15% on its capital employed as guaranteed under the Franchises. There was no challenge by the Government as to the amount claimed by the society as representing capital employed. The Arbitrators were invited to award interest on any damages awarded at the rate of interest approved by the Court of Appeal in ***Williams et ors v UGI Insurance Company Ltd***. SCCA 82/97 dated 30 November 1998. There was no challenge to this basis of the award of interest, and it was conceded by the Government that costs followed the event.

CONCLUSION

> Based on the claim made by the Society we make the following awards:
>
> For the year 1995 - 1996 the sum of -$52,886,561.00
>
> For the year 1996 - 1997 the sum of -$635,530,827.00
>
> For the year 1997 - 1998 the sum of -$692,998,537.00
>
> For the year 1998 – 1999 the sum of -$1,028,162,434.00

For the year 1999 - 2000 the sum of -1,220,274,092.00

For the year 2000 - 2001 the sum of -$914,910,662.00

We hereby award damages to be paid by the Government to the Society in the sum of $4,544,764,113.00; with interest calculated from the end of each accounting year in which damage was suffered until the date of the award herein calculated at the average of the Treasury Bill rate and the Commercial Bank lending rate and that the Government do pay the Society's costs incurred in relation to Suit CL 2000/N212 and of this Arbitration, to be taxed or agreed."

The challenge before Brooks J

[14] In the action filed in the Supreme Court, GOJ mounted its challenge to the award of the arbitrators on eight grounds, which were as follows:

(a) The arbitrators erred in holding that the 1996 Heads of Agreement did not vary or amend the 1995 Franchise Agreement.

(b) The arbitrators erred in dismissing the preliminary objection by the claimant 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.

(d) Accepting as correct the arbitrators' findings of fact as to the method of calculating damages, the arbitrators applied the wrong principle in arriving at the sums awarded.

(e) The arbitrators wrongly construed Clause 32 of the 1995 Franchise Agreement.

(f) The arbitrators failed to reduce the portions of the award which represented profit, by an amount representing income tax on those sums.

(g) The arbitrators erred in failing to comply with section 4(c) of the Arbitration Act, by neither making their award within three (3) months, nor enlarging the time for making an award.

(h) The arbitrators erred by failing to hold that the society failed to take reasonable steps to mitigate its losses.

[15] NTCS for its part filed a defence and also counterclaimed the amount awarded by the arbitrators for damages and interest, in the total sum of $8,342,023,277.00, together with interest at the average of the Treasury Bill rate and the commercial bank lending rate, from the date of the award until judgment, plus costs of the arbitration and the action.

[16] Before the matter came on for trial, the parties came to certain agreements which had the effect of narrowing considerably the issues which the court was asked to decide. Thus, ground (e) was not pursued by GOJ, grounds (d) and (f) were conceded by NTCS and ground (g) was dealt with by agreement between the parties. In an open letter dated 16 June 2004, GOJ's attorneys-at-law wrote to NTCS' attorneys-at-law setting out their detailed calculations of the impact on the arbitrators' award of the agreements that had been reached by the parties. Table 1 of that letter reflected the adjustments arising from NTCS' concessions on grounds (d) and (f), while Table 2 set out what was described as the "final adjusted award with interest to the date of the award". The unchallenged evidence is that these calculations were accepted by NTCS, subject to a qualification that did not affect either Table 1 or Table 2 (see the affidavit of Patrick Delano Bailey, sworn to on 16 July 2010).

[17] Further, in a joint letter to the Registrar of the Supreme Court dated 17 June 2004 (written after the evidence had been concluded before Brooks J), the parties set out the figures that had been agreed between them as payable to NTCS, taking into account the concessions made by NTCS on grounds (d) and (f), as well as the qualification referred to in para. [16] above, in the event of the judge finding for one or the other of them on the issues that remained live for his consideration. The current status of this letter, which was referred to and reproduced by the judge in his judgment, remains a live issue for determination in this appeal when the question of the actual quantum of damages comes directly into focus, as it will in due course.

[18] As a result of these agreements, the four issues that remained for the court's determination were issues (a) (the variation point), (b) (the illegality point), (c) (the statutory construction point) and (h) (the mitigation point). In a judgment justly described by the Board as "full and careful" (per Lord Neuberger, at para. 20), Brooks J found for GOJ on issues (a), (b) and (h), and accordingly set aside the arbitrators' award. As regards issue (h) (the mitigation point), the judge specifically found that the arbitrators ought to have considered whether NTCS had been under a duty to take reasonable steps to mitigate its losses once it accepted GOJ's repudiation of the franchise agreements, and that NTCS had in fact failed to do so. In the result, judgment was entered for GOJ on the claim and the counterclaim.

The appeal to this court

[19] NTCS appealed to this court and in its notice of appeal dated 23 December 2004 sought orders setting aside Brooks J's judgment and entering judgment for NTCS on its counterclaim in the sum of $4,635,271,519.87 (the sum which had been agreed between the parties in their joint letter dated 17 June 2004 as the amount that would have been due to NTCS in the event that GOJ failed in its challenge to the award), plus interest. Two of the six grounds of appeal filed by NTCS specifically challenged the judge's ruling that the arbitrators had erred in law by failing to address the issue of mitigation and that NTCS had been under a duty to mitigate its losses.

[20] In unanimous written judgments handed down on 6 June 2008, this court dismissed NTCS' appeal and affirmed the order of Brooks J. Panton P's judgment was silent on the issue of mitigation and Harris JA observed that in the light of the decision that the judge had acted correctly in setting aside the award of the arbitrators, it was unnecessary to deal with the issue. Harrison JA also took the view that the issue would only have arisen if NTCS had succeeded on its other grounds, but observed (at para. 62) that, had the result been otherwise, NTCS ought to have mitigated its losses, on the basis that "an innocent party will not be allowed to elect to keep a contract alive, and to recover all its losses from the other party where the continuation of the contract would be wholly unreasonable".

The appeal to the Privy Council - the respective positions

[21] By leave of this court granted on 25 November 2008, NTCS appealed to the Privy Council. In its statement of facts and issues settled by counsel and filed as part of its case for the Privy Council, NTCS identified the issues upon which the Board's decision was being sought as the illegality and the variation points. It went on to suggest that, if the appeal was allowed, "the matter will have to be remitted to the Court of Appeal to deal with the mitigation point" (appellant's statement of facts and issues, para. 25). In its written case, after a full account of the history of the matter (including, at para. 72, a reference to the agreement which the parties had reached at trial on the issue of damages, as embodied in the 17 June 2004 joint letter to the Registrar), NTCS concluded as follows (at para. 137):

> "The appellant respectfully submits that this appeal be allowed, and that judgment be entered for the appellant on its counterclaim as modified by the agreement of the parties contained in their joint letter dated 17th June 2004; and that the quantum of damages on the counterclaim be remitted to the Court of Appeal for determination; and that the respondent do pay to the appellant its costs before the Board and before the courts below to be taxed if not agreed,..."

[22] GOJ for its part, in its statement of facts and issues (also settled by counsel), also identified (at para. 24) the illegality and the variation points as two of the issues for the Board's decision, but added to these the mitigation point ("Did the Arbitrators err by failing to hold that the Appellant failed to take reasonable steps to mitigate its losses or to consider the point when they ought to have done so?"). In its written case, GOJ also made reference in its summary of the factual background to the appeal (at para. 2 (I)) to the agreement which had been reached by the parties before Brooks J "as to the amounts, if any, which

would be awarded to [NTCS] in respect of its Counterclaim depending on his ruling on the various heads of claim", and set out in full their joint letter to the Registrar of 17 June 2004. GOJ then went on (in the same paragraph) to make the following assertion:

> "It is convenient to note at this juncture that notwithstanding its acknowledgement of this agreement, the Appellant, at paragraph 137 of its written Case, seeks an order remitting the quantum of damages on the counterclaim to the Court of Appeal, in the event that its appeal is allowed. The Respondent submits that this approach is misconceived as the joint letter of June 17, 2004 was an agreement entered into by the parties to settle the financial results of the action by reference to the issues raised in the Particulars of Claim. This agreement was made consequent on the recognition by both the parties, as well as Brooks J, that the matter could not be remitted to the Arbitrators in light of the death of one of its j members. The agreement arrived at in the joint letter clearly establishes the quantum of damages depending on the outcome of each issue. This agreement is binding on the parties and it would therefore not be appropriate for the matter to be remitted to the Court of Appeal."

[23] After full treatment of the illegality and the variation points, GOJ devoted the remainder of its written case (paras. 162 -197) to the issue of mitigation. Although it had already invited the Board, in the event that the appeal was allowed, to remit the matter to this court to deal with the mitigation point, NTCS, perhaps out of an abundance of caution (the matter having been raised by GOJ), put in a supplementary written case, in which it addressed the issue. In the first place, it pointed out (at para. 5), that "there was no unequivocal decision made by a majority of the Court of Appeal to dismiss the grounds of appeal relating to the mitigation point", and that it would therefore be appropriate, if the appeal were allowed, for the point to be remitted to this court for determination. NTCS nevertheless went on, in the event that the Board thought it appropriate to hear argument on the point, to set out its

submissions (on the law and on the facts) as to why the appeal should be allowed on the mitigation point as well, concluding (at para. 19) that the arbitrators had not been guilty of misconduct "in failing to hold that the appellant's claim should be reduced as a result of any alleged failure to mitigate".

[24] In a brief response to NTCS' supplementary case, GOJ then said this:

> "In light of the matters including allegations of fact raised by the Appellant in relation to the Mitigation Point, which cannot be investigated at this stage, the Respondent agrees that the correct Order, if the point arises, is that the Mitigation Point be remitted to the Court of Appeal for determination.
>
> Accordingly, in the circumstances, the Mitigation Point does not arise for the Board's consideration, and the Board need not consider paragraphs 162 to 197 of the Respondent's Case."

[25] Both parties then made additional submissions on the illegality point, which are not relevant for present purposes. As matters stood at the outset of the actual hearing of the appeal by the Board, therefore, the position was that the parties were of the same mind as to the issues upon which a decision was being sought, viz, the illegality and the variation points. They were also agreed that, in the event that NTCS' appeal was allowed, the matter should be remitted to this court for determination of the mitigation point. Finally, with regard to the detailed calculation of the damages due to NTCS if the appeal was allowed, the parties also appear to have been agreed that the agreement that had been reached between them at trial, as reflected in the 17 June 2004 joint letter to the Registrar, would continue to hold good.

Lord Neuberger's judgment

[26] At the outset of his judgment, Lord Neuberger accordingly identified the two issues which fell for the Board's consideration on the appeal as the illegality and the variation issues, but observed (at para. 4) that there were other issues, "particularly 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".

[27] After summarising the factual background to the appeal, Lord Neuberger dealt firstly with the illegality point, and concluded, in agreement with the courts below, that the franchise agreements were indeed ineffective and unenforceable on the ground of illegality (see para. 30). However, Lord Neuberger then went on to consider in some detail a point which the Board itself had raised with the parties during the hearing of the appeal, which was whether, in spite of their illegality, the franchise agreements could be saved by other legislation, in particular by the provisions of the Road Traffic Act ('the RTA'), section 63(1) of which empowers the Transport Authority to grant a road licence in respect of the classes of vehicle covered by the franchise agreements, subject to certain conditions, for a period of three years from the date of issue of such a licence. After considering the further submissions received from the parties after the Board had raised this point with them, Lord Neuberger concluded his discussion on the illegality point as follows (at para. 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."

[28] Lord Neuberger's comment on the question whether it was appropriate to hold the franchise agreements effective on the ground that they constituted valid licences under section 63 of the RTA, given that the point had not been taken below, was as follows (at para. 75):

> "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."

[29] As regards the variation point, Lord Neuberger's conclusion was that, contrary to the conclusion reached in the courts below (but in agreement with the arbitrators, albeit on a different basis), there had been no variation or suspension, by subsequent agreement, of GOJ's obligation as contained in clause 32A of the franchise agreements to provide the second fare table.

[30] In the result, NTCS' appeal succeeded and the matter was remitted to this court for further consideration in the terms already set out (at para. [3] above). The parties were

invited to make written submissions on costs and the Board subsequently ordered that NTCS should have 60% of its costs before the Board, to be assessed if not agreed. All the orders for costs made below were set aside and it was directed that all issues of costs in the Court of Appeal, the Supreme Court and the arbitration should also be remitted to be dealt with by this court, or in accordance with its direction.

Dr Fletcher's affidavit and NTCS' objection

[31] Before going to the main issue that now arises, which is what is the true scope of the Board's referral of the matter to this court, it may be helpful to spend a moment on the general tenor of Dr Fletcher's affidavit and NTCS' objection to its use, which, taken together, neatly encapsulate the current dispute between the parties.

[32] Dr Fletcher is the holder of an undergraduate degree in training and development, a master's degree in applied behavioural science and a Ph.D. in international education. He has had many years of working experience in the transport sector, including an eight year stint as a senior manager with the New York City Transit Authority in the United States of America and over 10 years experience as transport consultant to the Ministry of Transport and Works. In this latter capacity, he was responsible for the design, implementation and management of the GOJ project to introduce a rationalised bus service for the KMTR.

[33] Dr Fletcher was asked to provide his opinion as an expert on the following question:

> "Whether the losses suffered by the Appellant would have been recovered by the Appellant if it had been granted Road Licences under Section 63 of the Road Traffic Act and the Respondent had performed its contractual obligation and implemented the Second Fare Table which called for a 98% increase in fares and the reduction in length of each fare stage not later than April 31st 1995 to take effect on June 1st 1995."

[34] Taking as his starting point the recommendations which the Shirley Commission had made in 1995 (for a 98% increase in fares and the reduction of the length of each fare stage), but which had never been implemented, Dr Fletcher proceeded to compare in detail the salient features of the 10 year licences which NTCS had actually been awarded pursuant to the franchise agreements under the PPT Act with those of a three year licence issued under section 63 of the RTA. In particular, he considered the operational limitations imposed by the RTA, as well as the non-exclusivity of licences issued under section 63, and concluded that, had NTCS been obliged to operate under the terms of the latter, its scope of operation would have been "adversely affected" (para. 19), given that, under a section 63 licence, NTCS "would be required to fulfil all the service standards of the Franchise Agreement, while being required to adhere to the restrictions of a Road Licence" (para. 20). The result of these restrictions would have been that NTCS would not have been able "to reap the efficiencies contemplated by the Franchise Agreement and instead sustaining loss of revenue" (ibid).

[35] Dr Fletcher then went on to express the opinion that if the recommendations of the Shirley Commission had been implemented, the resultant level of fares "would have been such that it would not have been affordable for the majority of those utilizing public transportation" (para. 21), thus resulting in reduced revenues for NTCS. That level of fares would have, Dr Fletcher continued, "created a hostile environment for NTCS, as it would have provided a powerful financial incentive for illegal operators to undercut the legitimate operator and 'poach' passengers" (para. 29), again with the resultant loss of revenue, without any corresponding reduction in overhead expenses.

[36] As a result of all of these factors, Dr Fletcher concluded, "...the losses suffered by [NTCS] would not have been recovered...if it had been granted Road Licences under Section 63 of the Road Traffic Act and [GOJ] had performed its contractual obligation and implemented the Second Fare Table which called for a 98% increase in fares and the reduction in length of each fare stage...", on 1 June 1995.

[37] In the light of the earlier correspondence between the parties, it was to be expected that NTCS would object vigorously to the admission in evidence of Dr Fletcher's affidavit, which it did by filing a notice of objection on 30 July 2010. The relevant paragraphs of the notice are as follows:

> "1. The entirety of the evidence sought to be given by Dr. Fletcher is outside the scope of the referral ordered by the Privy Council

2. The Privy Council did not intend that this Honourable Court should address the hypothetical question posed in paragraph 7 of the Affidavit of Dr. Fletcher.

3. The limits of the referral ordered by the Privy Council were (a) to establish the portion of the Arbitrators' Award which was referable to the first three years of the operation of the Franchise Agreements; (b) to consider any other issues raised in the Courts below (and in particular the relevance of the duty to mitigate) which the Board had not had to consider.

4. In relation to the duty to mitigate, the issue raised in the Courts below was whether the Appellant should in September 1998, have ceased its operations. However, under the ruling of the Privy Council no damages are recoverable by the Appellant after the first three years of the Franchise Agreements, namely after 28th February 1998. Accordingly the issue of mitigation is now moot and of no relevance.

5. The evidence tendered by Dr. Fletcher as to the affordability of the Second Fare Table and the increased level of activity of robot operators (paragraphs 21 to 32) could have been adduced before the Arbitrators and was not.

6. The Arbitrators made findings of fact as to the losses suffered by the Appellant as a result of the breaches by the Government of Jamaica of the Franchise Agreements. Those findings of fact were challenged before the Supreme Court on certain grounds which were conceded by the Appellant. Save as conceded, and save for consequences of the reduced duration of the Franchise Agreements as held by the Privy Council, those findings of fact stand and cannot be re-argued before this Honourable Court."

[38] NTCS also objected to Dr Fletcher's affidavit on the further ground that he did not qualify as an expert. Having been a full time employee of GOJ over the relevant period, the court had not given permission for him to be called and his affidavit was not in compliance with the relevant rules.

However, during the course of the argument before us, Lord Gifford indicated that he might not pursue this objection in the light of the fact that Dr Fletcher had in fact been a witness for GOJ in the proceedings before the arbitrators.

[39] In my view, the dispute over the admissibility of this affidavit throws into sharp relief the wider question of the scope of the Board's referral of the matter to this court, reflecting as it does GOJ's strongly held view that the entire issue of damages has been reopened for the court's consideration and NTCS' conviction that this court's enquiry as to damages should be confined to an assessment of the impact of the licences having been declared to have been effective for three rather than 10 years, subject only to the issue of mitigation. This therefore brings me to the parties' submissions on this wider issue, as well as on the narrower issue of the admissibility of Dr Fletcher's affidavit.

NTCS' submissions

[40] NTCS' submissions on the scope of the arbitration and the admissibility of Dr Fletcher's affidavit may be summarised (without, I hope, injustice to its detailed and very helpful written submissions filed on 14 July 2010) in the following way:

> (i) By its decision to allow NTCS' appeal on the illegality point, "save that the term of each of the Franchise Agreements was three years rather than ten years", the Board in effect upheld the findings of the arbitrators with regard to breach of contract and damages. The effect of the challenge to the award on the ground of illegality having failed and the Board allowing NTCS' appeal is that award of the arbitrators, as reduced by

agreement between the parties, now stands to be enforced.

(ii) The only issue, save for the question of mitigation, remitted to this court for determination is the calculation of damages and interest covering the three year period, 1 March 1995 - 28 February 2008. Given that the arbitrators made clear and specific findings, on ample evidence, of the losses suffered by NTCS as a result of GOJ's breach of contract, for each of the six years, 1995 - 2001, the task of arriving at the appropriate figure for the reduced period is purely a matter of arithmetic, subject to the agreed reductions.

(iii) Save for the two points in respect of which NTCS had conceded GOJ's challenge, and the issue of mitigation in the post September 1998 period, GOJ pursued no other ground of challenge before Brooks J relating to the assessment of damages and should not now be allowed to raise new points which have never been raised before and which are not within the purview of the referral to this court ordered by the Board.

(iv) GOJ should not be allowed at this stage to canvass points with regard to the possible effects of implementation of the second fare table which could have been, but were not, taken by it before the arbitrators. The evidence proffered in support of such points by Dr Fletcher is accordingly purely hypothetical and irrelevant in the light of the facts and ought not to be admitted.

(v) The Board by its decision did not mandate the reopening of the issue of damages and the making of a new award based on hypothetical events which did not happen. Rather, it dismissed GOJ's challenge to thdid not happen. Rather, it dismissed GOJ’s challenge to the award of the arbitrators, which had been based on actual, proved losses, flowing from the breach of the existing agreements, which the Board has now held to be legal.

(vi) Findings made by arbitrators with regard to damages are usually treated as final.

(vii) The agreement of the parties on damages embodied in their 17 June 2004 joint letter to the Registrar remains valid and relevant to the exercise contemplated by the Board's decision.

GOJ's submissions

[41] Mr Mahfood QC for GOJ also relied on full written submissions filed on 30 June 2010, as well as on a further submission by way of a reply filed on 16 August 2010. As had been the case with Lord Gifford for NTCS, we also had the benefit of careful oral argument from Mr Mahfood, who disagreed fundamentally with NTCS' characterisation of the task that had been set for this court by the judgment of the Board as a purely arithmetical exercise. It was submitted that the effect of the matter having been remitted to this court "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)...", was that "factors such as causation, certainty of loss and mitigation must be considered in quantifying the damages". Against this background, I would summarise GOJ's submissions (again, I hope, faithfully and accurately) in this way:

(i) NTCS position and reliance on the letter agreement of 17 June 2004 were misconceived, that agreement having been arrived at to deal with the problem created by the death of one of the arbitrators prior to the hearing before Brooks J, and the consequent impossibility of remitting any aspect of the matter to the arbitrators for reconsideration. That agreement had become "irrelevant null and void since the Privy Council allowed the appeal on an issue never pleaded or argued in the courts below".

(ii) As a result of the letter agreement, however, no submissions were made to Brooks J or to the Court of Appeal on any issue relating to damages (save with regard to mitigation), and it cannot therefore

be maintained successfully that the Board affirmed the arbitrators' award of damages. In fact, given the history of the matter, this is the first occasion on which a court has been called upon to look critically at the arbitrators' award of damages and the entire issue of damages is now at large.

(iii) The arbitrators erred in approaching the matter on the basis that all they were required to do was to quantify losses as opposed to assessing the damages that NTCS was entitled to recover as a matter of law. They also erred in awarding as damages both capital losses and expected profit.

(iv) In any event, NTCS cannot now rely on an award of damages made by the arbitrators for breach of an exclusive licence granted under the provisions of the PPT Act, as the basis upon which the licences have now been held to be valid, that is, as licences issued under section 63(1) of the RTA, is "fundamentally different in character, concept and scope of operation" (as Dr Fletcher's proposed evidence demonstrates).

(v) Accordingly, the critical question at this stage of the proceedings is the one posed by Dr Fletcher in his affidavit (see para. [33] above) and his affidavit is therefore clearly relevant and admissible.

(vi) Unless it discharges the burden of proof borne by it on the issue of damages, is entitled to no more than nominal damages.

[42] In support of these submissions, GOJ cited a number of authorities, directed in the main at demonstrating that the arbitrators proceeded contrary to well-established principles of damages and compensation in their assessment of the quantum of damages to which NTCS was entitled in the circumstances of this case. It may become necessary to refer to these authorities in detail in due course.

Discussion

[43] As the rival contentions demonstrate, the court is called upon at this point to determine the intention of the Board in referring the matter back to us on the issue of

damages. It is, I think, completely uncontroversial to suggest that "...a judgment must be read in the light of the facts of the case in which it was given" (Smith and Bailey, The Modern English Legal System, 2nd edn, page 374). This is, of course, no more than a modern echo of an old principle, well expressed by Lord Halsbury LC in the well-known older case of ***Quinn v Leathem*** [1901] AC 495, 506, when he stated (in an observation of "a general character") that "every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found". I would regard it as equally uncontroversial to suggest that, in the quest to discover the meaning of a judgment, as in the case of any other document or written instrument, particular passages should be taken in their context, both with regard to the "factual matrix" (to borrow Lord Wilberforce's famous formulation in a not entirely dissimilar context in ***Reardon Smith Line Ltd v Hansen-Tangen*** [1976] 3 All ER 570, 573), as well as the known legal framework within which the particular issue has arisen.

[44] Taking the factual context first, it is clear that, as regards the question of damages, the three issues which gave rise to GOJ's dissatisfaction with and subsequent challenge to the arbitrators' award were those identified (in para. [14] above) as grounds (d), (f) and (h). As I have already recounted (at paras, [16] and [17] above), grounds (d) and (f) were conceded by NTCS and the impact of these concessions on the quantum of damages awarded by the arbitrators was reflected in GOJ's attorneys' open letter to NTCS' attorneys dated 16 June 2004 and in the 17 June 2004 joint letter to the Registrar. Thereafter, save with regard to ground (h) (the mitigation point), which remains to be determined, the quantum of damages have

played no part whatsoever in either of the courts below or in the proceedings before the Board.

[45] It seems to me therefore that, as a matter of fact, GOJ's concerns with the arbitrators' award of damages (save for the mitigation point) must be taken to have been fully allayed by NTCS' concessions referred to above and the consequential agreed recalculation of the damages awarded by the arbitrators to reflect those concessions. In this regard, it seems to me that it surely cannot be without significance that the actual formulation of ground (d) in GOJ's statement of claim in the Supreme Court action was as follows: **"Accepting as correct the Arbitrators' findings of fact as to the method of calculating damages,** the Arbitrators applied the wrong principle in arriving at the sum awarded" (emphasis mine).

[46] I am prepared to accept that, as GOJ contends, the parties were driven to the agreements reflected in GOJ's attorneys' letter dated 16 June 2004 and the 17 June 2004 joint letter to the Registrar by the consideration that one of the arbitrators had died since the handing down of the award, with the result that, in the event that GOJ's challenge to the award on these points succeeded, it would not have been possible for the matter to be remitted to the arbitrators for reconsideration or correction. However, I am unable to see why this consideration should in any way diminish the status of those agreements, which were conditional only on what conclusions the judge came to on the substantive issues affecting GOJ's liability.

[47] Indeed, it seems to me that this view of the matter finds further confirmation in the stance taken by GOJ in its written case to the Privy Council in response to NTCS' proposal that the issue of the quantum of damages should be remitted to the Court of Appeal. GOJ's emphatic response was that NTCS' approach was misconceived, as the 17 June 2004 joint letter had settled "the financial results of the action by reference to the issues raised in the Particulars of Claim" and that the agreement which it documented was "binding on the parties and it would not therefore be appropriate for the matter to be remitted to the Court of Appeal" (see para. [22] above). But I shall nevertheless have to consider further in due course whether the validity of that agreement has now been, as GOJ submitted that it has, completely eroded by the basis upon which the Board ultimately found for NTCS.

[48] Turning now to the legal framework, it may be relevant to consider briefly the principles which underpin binding arbitrations. Halsbury's (4th edn, reissue, vol. 2, para. 601) describes arbitration as "the process by which a dispute or difference between two or more parties as to their legal mutual rights and liabilities is referred to and determined judicially with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law". By its very nature, arbitration involves the consequence that the decision of the arbitral tribunal will be legally binding on the parties and this is reflected in section 4(h) of the Arbitration Act, which provides that, unless a contrary intention appears, agreements to submit differences to arbitration shall be deemed to include a term that "the award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively". In the instant case, the position is further reinforced by clause 11.5 of the March 2001 Heads of Agreement (by which the parties agreed to submit their outstanding

differences to arbitration), which provided that the award of the arbitrators "shall be binding on the Parties". The binding nature of arbitration is yet further underscored by the fact that there is at common law. An implied promise in every arbitration agreement that the parties will perform the award (see Halsbury's, para. 712).

[49] There is no provision in the Arbitration Act for an appeal from the award of arbitrators. It therefore remains the case in Jamaica that an award may only be challenged in a court of law pursuant to the court's inherent power to set aside an award which is bad on its face (error of law on the face of the record) and/or by reason of misconduct by the arbitrators, pursuant to the provisions of section 12(2) of the Arbitration Act (see generally Russell on Arbitration, 18th edn, ch. 21). In the instant case, GOJ based its challenge to the award in the Supreme Court action on the inherent jurisdiction of the court or, in the alternative, pursuant to section 12(2) of the Act.

[50] It is therefore clear that, save for the limited jurisdiction described in the foregoing paragraph, courts do not exercise any general supervisory or appellate jurisdiction over the awards of arbitrators (and I cannot in these circumstances regard Lord Neuberger's observation at para. 71 of his judgment that "the function of the court can be described as being to review and supervise the arbitral process and determination", as having been intended to convey anything more). In the light of this, it seems to me that GOJ's submission that this is the first occasion on which a court has been called upon "to look critically at the arbitrators' award" is wholly beside the point, since such critical examination is only possible

pursuant to an application to the court in the limited circumstances already referred to. To the extent that the action initiated by GOJ did in fact invite such an examination of the arbitrators' award of damages in the respects specifically pleaded by GOJ, that aspect of the matter was, as I have attempted to demonstrate, resolved (with the exception of the outstanding issue of mitigation) by what Brooks J described as "the concord" between the parties as recorded in the 17 June 2004 joint letter. So while it may well be the case as GOJ submits, that it cannot be said that the Privy Council "affirmed" the arbitrators' award of damages, the true position is, it seems to me, that the question of the correctness or otherwise of the award simply did not "arise on this appeal" (per Lord Neuberger, at para. 4), because by the time NTCS' appeal came to be heard, the only outstanding issue that remained between the parties with regard to damages was the issue of mitigation.

The scope of the referral

[51] It is against this background of fact and law that I can now come to the first of the two questions with which this judgment is concerned, that is, the scope of the Privy Council's reference of the matter to this court. In this regard, it will already have become apparent that I favour NTCS' approach to this question, which is to say that the two principal matters that this court has been directed by the Privy Council to consider are, firstly, the consequences for the arbitrators' award, "in the light of the fact that the duration of the Franchise Agreements was only three, not ten, years..." (per Lord Neuberger at para. 79), and, secondly, "the relevance of the duty to mitigate" (ibid). In the light of the undisputed backdrop of fact and the well-established principles of law against which the appeal to the Privy Council came to be heard,

I cannot regard Lord Neuberger's reference to "other issues relating to quantum" as an invitation to the parties, and a mandate to this court, to completely reopen the question of damages and to treat damages as "at large", as GOJ submitted. It seems to me that, if the award of the arbitrators, as reduced by the agreement between the parties, is to be further reduced by this court, as inevitably it must be, in the light of the reduced term of the licences, there will be other issues relating to quantum, in addition to mitigation, such as interest, which may also require consequential adjustment.

[52] GOJ attributes considerable significance to the fact that the basis upon which the Privy Council allowed NTCS' appeal was one which was never pleaded or argued in the courts below. This is obviously a fact, and a result of which the parties had no forewarning before the appeal was heard. But I have found it difficult to see why the conclusion ultimately reached by the Board, that is, that the franchise agreements, though not validly granted, nevertheless took effect as valid road licences granted pursuant to section 63 of the RTA, should itself be taken as a licence to jettison entirely the arbitrators' award of damages, which was based on evidence that was in some respects unchallenged, in favour of this court's assessment of what those damages should be. Nor can it justify, in my view, a radical revision of the operational history of the franchises, as described by evidence accepted by the arbitrators, in favour of Dr Fletcher's untested hypothesis.

[53] What the Board's decision achieved was to provide a means by which the franchises, which had been operated by NTCS over a number of years on the assumption

made in good faith by all concerned, not least of all GOJ, that they had been validly granted, could be saved. By that means, the conclusion that the franchise agreements were invalid, a result which all who had had to contemplate it considered to be wholly unattractive in the light of all that had gone before between the parties (Brooks J had described GOJ's submission that the licences were invalid as "truly remarkable" and Lord Neuberger, for his part, observed that the learned judge's obvious distaste for the conclusion he had felt obliged to reach was "unsurprising"), was avoided. Lord Neuberger described the Board's conclusion variously, as enabling the franchise agreements to be "rendered effective by other legislation" (at para. 22), as enabling the franchise agreements to be "…as it were, saved by other legislation" (at para. 30), and as providing NTCS "with a lifeline" (at para. 50).

[54] What this lifeline achieved, in my view, was that it enabled the franchise agreements that had in fact been entered into to survive the challenge of illegality, by treating them as if they had been validly granted as road licences under section 63 of the RTA. In other words, the validity of the licences originally granted was by this means preserved. In any event, as Lord Neuberger also pointed out, the result of so treating the franchise agreements was, save for the fact that it was "significantly less beneficial" to NTCS than it would have liked, otherwise the same as it would have been if its original argument that the franchise agreements had been validly granted under the PPT Act had prevailed (see para. 75 of the judgment of the Board).

[55] It follows from all of the foregoing that, in my view, the 17 June 2004 joint letter remains alive and has neither been invalidated nor rendered irrelevant by the Board's conclusion. It appears to me that the result of this is that it is not now open to GOJ to reopen and revisit the arbitrators' award by reference to factors affecting the assessment of damages (such as causation and the like) which it was open to it to have taken issue with in the proceedings before the arbitrators. I think that the relevance of those factors has now been completely overtaken by the award itself and by the manner in which the award was dealt with by the agreements arrived at by the parties when it was challenged by GOJ in the Supreme Court proceedings.

[56] I would therefore conclude on this point that the scope of the Privy Council's referral of the matter to this court is confined to a consideration of the effect on the arbitrators' award of the reduced period of the franchises and the question of mitigation. As part of this exercise, it will no doubt be necessary to have regard to the question of interest, as a purely consequential matter. The issue of costs in respect of the arbitration, the proceedings in the Supreme Court and in this court has also been specifically remitted by the Board to be dealt with in these proceedings (see para. [30] above).

The admissibility of Dr Fletcher's affidavit

[57] It follows from the foregoing discussion and my conclusion on the scope of the reference that I accordingly consider the proposed evidence contained in Dr Fletcher's affidavit to be irrelevant to any issue that can possibly arise on the referral to this court and therefore inadmissible. Taking as his starting point a wholly hypothetical question, Dr

Fletcher has then proceeded to express opinions that are necessarily purely speculative and not in any way related to the reality of the situation in which NTCS found itself, as the arbitrators found, as a result of the non-implementation of the second fare table. Given the view that I have already expressed as regards the limited nature of this court's remit from the Board, that evidence, it seems to me, can be of absolutely no assistance to the court in that exercise.

The question of mitigation

[58] Although the parties' respective positions on this issue have already been adumbrated by their counsel in opening the matter before us, they will no doubt wish to turn their full attention to it when the hearing resumes. As regards the parameters of the dispute between the parties on this issue, NTCS had taken the position in its written submissions that, because GOJ's contention (and indeed its pleaded case) had always been that NTCS ought to have taken steps to mitigate its losses as from September 1998, the issue of mitigation was no longer relevant in the light of the Board's conclusion that the licences took effect for three years only, which meant that NTCS was not in any event entitled to recover any damages for any period after 28 February 1998. However, it soon became clear that GOJ did not share this view and that it proposed to argue that NTCS had been under a duty to mitigate its losses from the point of GOJ's failure to implement the second fare table on the contractually agreed date, that is, 1 June 1995.

[59] During Mr Mahfood's opening of the case for GOJ, Lord Gifford took the point that that position was not open to GOJ on its own pleading in the Supreme Court action, in which it had expressly tied its contention on NTCS' duty to mitigate to the post September 1998 period. As a result, Mr Mahfood applied for permission to amend GOJ's statement of claim to reflect the more general complaint that "the arbitrators erred by failing to hold that [NTCS] failed to take reasonable steps to mitigate its losses". After hearing and considering Lord Gifford's objection to this application, the court decided to grant permission to amend in the terms sought. However, permission was also granted to NTCS to file a further affidavit from Mr Ezroy Millwood, the president and chief executive officer of NTCS, to deal with the issue of mitigation in the period commencing in June 1995. This affidavit was duly filed on 29 September 2010 and it is expected that Mr Millwood will in due course be cross-examined on it by Mr Mahfood when the hearing of the matter resumes.

Conclusion

[60] My conclusions on the questions of the scope of the reference and the admissibility of Dr Fletcher's affidavit are therefore as stated in paras. [56] and [57] above. I would therefore propose that the Registrar be asked to set the earliest available date for the resumption of the hearing of the matter (subject, naturally, to the convenience of the parties) in the light of those conclusions.

DUKHARAN, JA

[61] This is a referral from the Privy Council to this court for us "to consider the consequences [of the decision that the franchise agreements are valid], 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".

[62] The factual background giving rise to this referral has been comprehensively set out by my brother Morrison, JA and it is therefore unnecessary to repeat it. Lord Neuberger who delivered the judgment of the Board was of the view that the above formulation clearly expressed the nature of the task this court should undertake. At paragraph 2 of the judgment, he set out an outline of the facts relevant for the purposes of this discussion:

> "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."

[63] There were six defined areas with the appellant being the franchise holder of two, namely, the Northern and Portmore zones. The Board held that the franchise agreements were illegal, and therefore unenforceable because the Minister had exceeded his power under section 3 (1) of the Public Passenger Transport (Corporate Area) Act ("the PPTA") to issue one exclusive licence in respect of the Kingston Metropolitan Region. The Board also held the view that the franchise agreements could take effect as road licences under section 63 of the Road Traffic Act ("the RTA").

[64] The parties before this court made submissions as to the interpretation of the scope of the referral. It was the contention of the appellant that all that is required is an arithmetical exercise to adjust the arbitrators' award to reflect damages for a three year period instead of a 10 year period. It was the contention of the respondent (who was made a party as the representative of the Government of Jamaica (GOJ)) that the quantification of such is to be determined by this court upon proof of same, by the appellant. The GOJ also contended that the award of the arbitrators cannot be relied on, as the basis of that award is an exclusive licence granted under section 3 (1) of the PPTA, whereas the agreements are to be regarded as taking effect under section 63 of the RTA and the quantum of damages under each would differ since "those provisions are fundamentally different in concept, character and scope of operation".

[65] Lord Gifford, QC submitted that, the fact that there is not a neat fit between the terms of the franchise agreements and the provisions of the RTA did not prevent the agreements from being valid and lawful, since the agreements achieved the broad

purpose that the RTA was designed to do, namely, the granting of a licence to provide effective service along defined routes. He adverted to Lord Neuberger's examination (paragraphs 51-56) of the statutory provisions relating to a road licence (section 63) and demonstrated that despite the differences in these requirements when compared to those required for the grant of an exclusive licence, there was "no good reason why the Franchise Agreements should not have taken effect as road licences". He further submitted that in practice, the object of exclusivity could have been achieved, at least to a substantial extent, by the exercise of the flexible powers granted under sections 63 and 64 of the RTA. He argued that there was no mandate from the Privy Council for there to be any further modification of the award, save for the adjustment which resulted from the shorter duration of the licence.

[66] Mr Mahfood, QC for GOJ submitted that there is nothing in the reasoning of the Privy Council to indicate that it upheld the arbitrator's award of damages. He argued to the contrary, that in paragraph 4 of Lord Neuberger's judgment that "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". He further submitted that the calculation of damages on the assumption that the licence was under section 3 (1) of the PPTA was wrong in law because the very franchise agreement was found to be under section 63 of the RTA whereas the agreement was linked to the considerations under section (1) of the PPTA. He submitted that the Privy Council having decided that the licence was valid as a road licence, the critical question was, "would the losses suffered by the appellant have been

recovered by the appellant if it had been granted Road Licences under section 63 of the RTA and the respondent had performed its contractual obligation and implemented the second fare table which called for a 98% increase in fares and the reduction in length of each fare stage …?"

[67] Counsel for GOJ further submitted that a section 63 road licence under the RTA is inferior in nature to an exclusive licence under section 3 (1) of the PPTA, and the operation of the former, because of its limitations, had resulted in a "fragmented system of licensing individual buses to specific routes which had caused a decline in the overall quality of the bus service". It was also further submitted that the non-exclusive nature of the road licence would have resulted in the appellant being faced with competition from other operators and other means of transport. It was further argued that the implementation of the second fare table would have resulted in increased fares that would have been prohibitive which would lead to the commuting public resorting to alternative means of transport. This would result in a decrease in fare revenue and there was no guarantee that the appellant would have made a profit if the second fare schedule had been instituted. To support these arguments, an application was made to rely on the evidence of Dr Alton Fletcher, a travel consultant to the Ministry of Transport and Works.

[68] Dr Fletcher was asked to provide an opinion as an expert on the following question in paragraph 7 of his affidavit:

> "Whether the losses suffered by the Appellant would have been recovered by the Appellant if it had been granted Road Licences under Section 63 of the Road Traffic Act and the Respondent had performed its contractual obligation and implemented the Second Fare Table which called for a 98% increase in fares and the reduction in the length of each fare stage not later than April 31st 1995 to take effect on June 1st 1995."

[69] Dr Fletcher compared the 10 year licence awarded to the appellant pursuant to the franchise agreements under the PPT Act with those of the three year licence under the RTA. It was his view that under a section 63 licence the appellant "would be required to fulfil all the service standards of the franchise agreement while being required to adhere to the restrictions of a Road Licence". These restrictions, he concluded, would cause the appellant to be unable to "reap the efficiencies contemplated by the Franchise Agreement and instead sustain loss of revenue". Dr Fletcher also opined that the recommendations of the Shirley Commission, if implemented, would have caused the majority of the travelling public to be unable to afford the increased fares. The result would be that illegal operators would undercut the legitimate operation of the appellant with a resultant loss of revenue. According to Dr Fletcher "the losses suffered by [NTCS] would not have been recovered … if it had been granted Road Licences under section 63 of the Road Traffic Act and [GOJ] had performed its contractual obligation and implemented the Second Fare Table which called for a 98% increase in fares and the reduction in length of each fare stage …"

[70] The appellant opposed the admission in evidence of Dr Fletcher's affidavit on the basis that evidence sought to be given by him is outside the scope of the referral and

that the Privy Council did not intend that this court should address the hypothetical question posed in paragraphs 7 of Dr Fletcher's affidavit.

[71] The proposed evidence in the affidavit of Dr Fletcher is, in my view, irrelevant and inadmissible. The hypothetical question is speculative and would not in any way affect the referral to this court. In my view, the Privy Council did not mandate a reopening of the issue of damages based on hypothetical events which did not happen. The Privy Council discussed the challenges to the award which was based on actual damages flowing from the breach of the actual agreement which was held to be a legal agreement. Dr Fletcher's evidence at paragraph 21 of his affidavit which speaks about the affordability of the second fare table and other issues such as robot operators was not raised before the arbitrators. I am of the view that it should not be introduced at this stage.

[72] Following the Board's decision, it is not disputed that the appellant is entitled to damages for breach of contract. Damages must be assessed, according to the contract that the parties signed to, which was supposed to take effect and in this case took effect for a period of time before breach. The question is whether the franchise agreement could have been performed according to its terms in circumstances where the appellant was operating a road licence or a number of road licences.

[73] Lord Neuberger analysed and demonstrated how the franchise agreements could have taken effect as road licences. He was however careful to point out the feature of

exclusivity that distinguished the character of the exclusive licence from the road licence, but he stopped short of making a determination on how the operations as envisaged by the terms of the franchise agreement could be reconciled with the operations under a road licence. At paragraph 53 of the judgment he said:

> "So if the licence 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."

[74] It is clear that although the operation of an exclusive licence may be different from the operation of the road licence, it is possible that a road licence may take effect and operate in a similar manner to an exclusive licence (see section 64 of the RTA). Section 64 of the Act limits the number of road licences that can be issued in respect of a particular route. The appellant therefore could have been the sole entity issued with road licences in respect of the routes in the two areas for which it was responsible under the franchise agreement. The effect of this would be to confer on the appellant the exclusive right to control the operation of all buses on all the routes in these regions.

[75] For the foregoing reasons, I am of the view that there is no justification for rejecting the award of the arbitrators which was based on the agreement. The court should therefore deal with the reduced period of the franchises and the issue of mitigation.

PHILLIPS J A

[76] The hearing before the court arose out of a direction from the Privy Council in Appeal No 0017 of 2009 which was delivered on 26 November 2009. The matter has had a long and interesting journey by way of arbitration and through the courts. I have had the opportunity of reading in draft the judgments of my brothers and I agree with their reasoning and conclusions and only wish to add a few words of my own.

[77] The background to the litigation and the manner in which the issues were distilled as the matter proceeded through the courts have been dealt with in great clarity and thorough detail by Morrison JA, and I therefore will not repeat any of that history. Suffice it to say that when the matter went to the Privy Council the first and main issue on appeal was whether the finding in the courts below, that the exclusive franchise agreements issued to the appellant in respect of the provision of bus services in the Kingston area in the Northern and Portmore zones were invalid and therefore unenforceable, was correct. The second issue was whether the second agreement, the Heads of Agreement" of 1996 entered into between the Government of Jamaica and the appellant and which recognized the existence of the franchise agreements, operated to discharge the Government's obligation under the franchise agreements. Lord Neuberger in delivering the decision of the Board in paragraph 4 of the judgment stated that "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 Board did not deal with any aspect of the damages awarded by the arbitrators.

[78] In their judgment the Board indicated that there were three questions in connection to the first issue and they were:

> (i) whether either or both of the franchise agreements granted to the appellant in respect of the Northern and Portmore zones fell within the ambit of section 3 (1) of the Public Passenger Transport (Corporate Area) Act the ("PPT Act").
>
> (ii) whether the franchise agreements were therefore ineffective unless they could be saved by reference to other legislation; and
>
> (iii) whether the franchise agreements can nonetheless be rendered effective by other legislation.

[79] The Board ultimately found that the franchise agreements did not comply with section 3 of the PPT Act, and were unenforceable because the Minister did not have the power under section 3(1) to grant them. However, the franchise agreements satisfied the provisions of Part III, and in particular section 63 of the Road Traffic Act,("the RTA") and were therefore saved and rendered effective by other legislation. The appellant's appeal was allowed on this point, save as was pointed out, the term of each of the franchise agreements was three years as opposed to 10years which had been granted under the PPT Act.

[80] On the second issue the Board concluded that the provisions of paragraph 7 (b) of the Heads of Agreement because they were too uncertain 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. (Paragraph 78)

[81] The Privy Council therefore disposed of the appeal finally in this way:

> "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."

Subsequent to this direction, the parties pursued putting the matter back before the Court of Appeal and it became evident at the case management conference that there was a divergence of views in respect of the understanding of this direction from the Privy Council. There were orders that the parties could file supporting evidence, if any, by way of affidavit, and that notices of objection to the affidavit evidence presented could be filed also.

[82] Pursuant to those orders, Dr Alton Fletcher, an expert in, inter alia, education and economic planning, policy analysis and quantitative methods, swore to an affidavit on 30 June 2010, which was filed by the respondent, attempting to answer the following question which had been posed to him;

> "Whether the losses suffered by the Appellant would have been recovered by the Appellant if it had been granted Road Licences under section 63 of the Road Traffic Act and

> the Respondent had performed its contractual obligation and implemented the Second fare table which called for a 98% increase in fares and the reduction in length of each fare stage not later than April 31st 1995 to take effect on June 1 1995."

He therefore endeavored to compare the different types of licences issued under the two Acts, and the difficulties likely to be experienced in operating under the RTA and the potential losses which would occur. A notice of objection was filed by the appellant on several grounds, firstly that "the entirety of the evidence sought to be led by Dr Fletcher is outside the scope of the referral ordered by the Privy Council"; secondly, that it was not the intention of the Privy Council that evidence should be led to address such a hypothetical question; thirdly, that the limits of the referral related to the establishment of such portion of the arbitrators' award which was referable to three years, and to consider other issues such as the duty to mitigate which the Board did not have to consider, which issue, bearing in mind the Board's ruling that the franchise agreements would run for three years (March 1995 - February1998) and the respondent having advanced that the appellant should have acted or terminated the agreements in December 1998, appeared to be irrelevant; fourthly, that Dr Fletcher should also not give evidence of affordability of the second fare table due to increased robot operators as that evidence could have been given before the arbitrators and it had not been adduced; and finally the losses suffered by the appellant had been vigorously challenged before the arbitrators and they had made their findings and any other issues as to the computation of the losses had been resolved in the Supreme

Court hearing and could not be re-opened at this stage of a referral from the Privy Council.

[83] At the hearing before us, counsel advanced their respective positions in thorough detailed submissions. The appellant was maintaining that the reference really required an arithmetical calculation making adjustment for the reduced period of the licences, whereas the respondent was maintaining that "the judgment raises complex issues of law and facts relevant to the quantification of damages". I hope, therefore in light of that divergence of approach, I will be forgiven if I indicate succinctly how I viewed their import.

[84] It was the appellant's submission that the appeal had been allowed by the Privy Council with the only qualification being the three years adjustment from ten years in respect of the period of the franchise agreement. The illegality point had failed and the award must now be enforced. The licences took effect as road licences under the RTA granted by the Transport Authority, and as they were valid, the obligation to implement the second fare table was valid and the losses which flowed from the breach of failing to do so, were found by the arbitrators and were recoverable. The fact that there was not a "neat fit" between the terms of the franchise agreements and the provisions of the RTA, did not prevent the agreements from being valid and lawful, particularly since the agreements achieved the broad purpose which the RTA was designed to achieve, namely the provision of an efficient bus service along defined routes. Counsel submitted that in practice the objective of exclusivity could have been achieved, at least to a substantial extent, and concluded that "there was no mandate from the Privy Council

for there to be any further modification of the award save for the adjustment resulting from the three year period of the licence". Counsel pointed out that the Privy Council did not direct that the issue of mitigation was relevant, but that the Court of Appeal should consider whether it was relevant. Counsel submitted that it was necessary for the Court of Appeal to make two rulings on the following two questions:

> "(i) Is the evidence of Dr. Fletcher relevant and admissible; and
>
> (ii) Is the issue of mitigation relevant having regard to the ruling of the Privy Council as to the duration of the licence and having regard to the consistent pleading and argument in our courts on the part of the respondent that the case has always been that the issue of mitigation was only relevant from September 1998…."

[85] It was the respondent's contention that the judgment of the Privy Council raised important issues in relation to the assessment of damages which included factors such as causation, certainty of loss and mitigation of damages which were all matters that fell to be considered under the rubric 'other issues relating to quantum' referred to in the final paragraph of the decision of the Board. The letter of agreement dated 17 June 2004 which had settled the amounts payable by the respondent depending on how the matters before Brooks J were resolved, could no longer be relevant as the positions taken by the parties related to the situation as it existed before Brooks J which no longer obtained. The agreement was therefore null and void as the Board had allowed the appeal on an issue never pleaded or argued in the courts below. There had not been any submissions before Brooks J on the issue of the law relating to

damages save and except the issue of mitigation of damages which was decided in favour of the respondent. Counsel submitted that the arbitrators had quantified the losses on the misguided notion that under the PPT Act, the appellant was entitled to get all their losses as damages which was clearly erroneous, and in any event that approach was inapplicable in respect of an assessment of damages under the RTA. The appellant, counsel said could not rely on damages assessed under the PPT Act as if they were awarded under the RTA since the provisions of the latter Act are "fundamentally different in character, concept and scope of operation". The respondent maintained that if the appellant was unable to discharge the burden of proof on the issue of damages then it was only entitled to nominal damages. The respondent further contended that the appellant could not recover losses that it would not have recovered if it had been operating its licences under the RTA and the respondent had implemented the second fare table as set out in the franchise agreement and increased the fares by 98% and reduced the length of each fare stage. This was the main question that the respondent said formed the basis of what the Court of Appeal ought to consider now. Additionally, the appellant it was submitted, was not entitled to capital losses and expected profits and would have had to have made an election. Finally, even if the appellant could prove that it had sustained the losses it claimed it had, it ought to have taken steps to mitigate those losses and to the extent that it had not done so, those losses would not be recoverable.

[86] It was clear that the respondent's approach and understanding of the referral from the Privy Council was that the appellant was to begin *de novo* with regard to the

proof of its losses. The consequences of the finding of the Privy Council that the licences were to operate as though originally granted under the RTA meant, according to the respondent, that the appellant was to pursue an assessment relating to a hypothetical situation, and somehow produce information in relation to buses and passengers on routes all of which may not have existed at the material time, and expenses and revenues which would not have been recorded as they did not occur. The appellant would also have to show that it would have been able to earn inspite of robot operators and increased competition generally. In my view, this endeavour would be entirely speculative and an exercise in futility, and all the more unreasonable bearing in mind that very thorough and detailed information had already been placed before the arbitrators and been challenged by skilled counsel for the respondent with much experience, and in respect of which the arbitrators had made their findings. Indeed the letter of 17 June 2004, which reflected the figures finally agreed between the parties, was prepared by and signed by the Solicitor General for the Director of State Proceedings on behalf of the respondent, and co-signed by one of the appellant's counsel.

[87] I do not accept that the above interpretation can be ascribed to the decision of the Board. In light of the foregoing and in the circumstances as set out herein, I find that the evidence of Dr. Fletcher is neither relevant or admissible. I find that the court should proceed to deal with the issue of the quantum of damages bearing in mind that the franchise agreements are limited to three years and not 10 years. I find however that the issue of the duty to mitigate is relevant in respect of the referral to this court

in assessing the quantum of damages. The position with regard to the relevant periods which may be applicable, in light of what the parties had advanced previously, will no doubt be a matter for the court to take into consideration in its deliberations.