JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 117/2004

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A. (Ag.)

BETWEEN **NATIONAL TRANSPORT CO-OPERATIVE SOCIETY LIMITED** **APPELLANT**

AND **THE ATTORNEY GENERAL OF JAMAICA** **RESPONDENT**

Lord Anthony Gifford, Q.C., Patrick Bailey and Ms. Audrey Reynolds, instructed by Patrick Bailey & Company for the appellant

Michael Hylton, Q.C., Solicitor General, Richard Mahfood, Q.C., Ms. Katherine Francis, Ms. Heidi Gordon and Ms. Tasha Manley, instructed by the Director of State Proceedings for the respondent

January 16, 17, 18, 19, 20, 2006, May 9 & June 6, 2008

PANTON, P.

1. On May 9, 2008, we dismissed this appeal from the judgment of Brooks, J., and promised then to deliver our written reasons today. The learned judge, on a claim arising from arbitration proceedings involving the parties, had on November 29, 2004, entered judgment in favour of the respondent on the claim and counterclaim. He set aside the award of the arbitrators and awarded costs to the respondent.

2. I have seen in draft the reasons for judgment that have been written by my learned colleagues. I agree with their reasoning and conclusion. However, I wish to add a few words on one aspect of the matter. My learned colleagues have given a full statement of the relevant facts, and there is no reason to repeat them except so far as necessary for the expression of my views.

3. These proceedings between the parties stemmed from agreements made by them in respect of the provision of a public transportation service in the Kingston Metropolitan Transport Region. In March, 1995, the relevant Ministry of the Government of Jamaica granted exclusive licences to the appellant which undertook the responsibility of providing a professional service in return for specified fares to be paid by the travelling public. I say "relevant Ministry" as the Ministry has had several name changes and has been variously described in the many documents that have been put before us. In the "franchise agreement", it is the Ministry of Water and Transport (p.70 of the record of appeal), although the signature page shows the document being signed by the Minister of Public Utilities and Transport. Finally, the Permanent Secretary describes himself as being in the Ministry of Transport and Works (p.23).

4. The licences were for a period of ten years and section 32 of the agreement provided for a fare structure and adjustment thereof. At the granting of the licences, there was an acknowledgment of the following:

- The existence of a fragmented system of licensing individual buses to specific routes;
- A decline in the overall quality of service;
- Inconvenience and frustration being experienced by the travelling public; and
- The inadequacy of the existing fares.

5. The preamble to the agreement stated that the appellant had the "management, operating and technical personnel, expertise and other useful assets of sufficient quantity to provide (the required) transport services". Disputes concerning termination were to be resolved in accordance with the provisions of the Arbitration Act. Things did not go as smoothly as the parties would have hoped, and along the way, there were changes and further agreements, one such agreement being the 1996 Heads of Agreement – a significant agreement. These developments climaxed with the Government terminating the relationship.

6. The arbitrators awarded damages against the Government to the tune of four and a half billion dollars with interest which, when calculated, would have by the time of the hearing of the appeal amounted to almost the sum of the award.

7. The learned judge found that the arbitrators erred in concluding that the 1995 franchise agreement was not amended by the 1996 Heads of Agreement. This was one of his reasons for setting aside the award. It is on this specifically

that I wish to express my own views. The 1995 agreement provided in part as follows:

> **"32 FARE STRUCTURE AND FARE ADJUSTMENT**
>
> A a) The first fare table to apply with effect from March 1, 1995 will be table identified herein as Appendix D. The fares in that table are those in existence at February 28, 1995. The parties appreciate the inadequacy of those fares, even after taking into consideration a subsidy of $10 Million which is to be provided for each franchise for the three months ending May 31, 1995. Therefore a new fare table (hereinafter called the Second Fare Table) will be made available not later than April 30, 1995 to apply with effect from June 1, 1995"

8. The 1996 Heads of Agreement was signed by the appellant on February 23, 1996. It is headed "Heads of Agreement Between Franchise Holders and the Ministry Of Public Utilities And Transport". It lists several matters on which "agreements were reached" between the parties. These matters included subsidy, buses, depots, school bus service, training programmes and fares. These agreements were set out extensively in clauses 1, 2, 4, 5, 6 and 7 respectively.

9. It is important to set out the agreements in respect of fares, as this is the area of greatest contention between the parties. The relevant particulars are at pages 151 and 152 of the record and read thus:

" **FARES**

(a) Fare Adjustment Based on Cost Increases

(i) It is agreed that based on the increases in costs which have taken place since a fare adjustment was made in July 1994, an upward adjustment in fares need to be considered urgently. (Adjustments introduced February 11, 1996)

(ii) It is further agreed that the MPUT would endeavour to obtain approval for this cost based fare increase in order for it to be implemented in February 1996 (introduced February 11, 1996).

b) New Fare Table

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

1. the concessions and assistance being provided by Government in areas which based on the existing Franchise Agreement are the responsibilities of the Franchise Holders, and

2. increases in costs which have taken place since the recommendations of the Shirley Committee.

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

1. The implementation and maintenance of schedules which would be possible with establishment and operations of new depots.

2. The putting into service of additional buses.

3. Improvements in the conduct and decorum of bus crews which will be achieved through the implementation of training programmes."

10. The arbitrators found that the 1996 Heads of Agreement did not refer to the second fare table, and that by signing the 1996 Heads of Agreement, the appellant was confirming its affirmation of the franchise agreements. There were, according to the arbitrators, "never any amendments made to the Franchise Agreements". Before Brooks, J., however, the appellant conceded that the 1996 Heads of Agreement did indeed refer to the second fare table. The judge, as said earlier, found that there had been an amendment of the franchise agreements.

11. It will be recalled that section 32 of the franchise agreement provided for a new fare table (referred to in the agreement as the Second Fare Table). This was to be made available no later than April 30, 1995, and to apply from June 1, 1995. It did not come into existence. That is the reason for the reference in clause 7 of the Heads of Agreement to the non-introduction of a fare adjustment since July, 1994, and the need for urgent consideration of such an adjustment. The document indicates that adjustments were introduced on February 11, 1996. The adjustments are to be taken as dealing with the urgency created since the previous adjustment in July, 1994.

12. Clause 7 (b) (i) makes it clear that the second fare table "will be reviewed and ... the computations revised to reflect ... the concessions and assistance being provided by Government in areas which based on the existing Franchise

Agreement are the responsibilities of the Franchise Holders". This is in effect saying that the franchise agreement had been overtaken by the provision of the subsidies. There is absolutely no basis for it to be construed that the parties understood that the Government had decided to provide subsidies, which were not contemplated in 1995, while at the same time having no intention to amend the franchise agreement. Further, clause 7 (b) (iii) states unequivocally that it was agreed that the new fare table would be implemented after certain necessary improvements had been effected in the transportation system, particularly, the implementation and maintenance of schedules, improvements in the conduct and decorum of bus crews and the addition of buses to the routes. These were matters that required action on the part of the appellant.

13. The coup de grace in respect of the submission that the 1996 Heads of Agreement had no bearing or effect on the 1995 franchise agreement was clause 9 of the former. It states quite clearly that the parties agreed that the 1995 agreement required amendments, which were to be discussed and agreed on by June 1, 1996. In the circumstances, it seems to me that the parties had moved on from the 1995 agreement and had settled on a new position by their Heads of Agreement in 1996.

14. The parties placed before Brooks, J. a further agreement that if the claimant were to be successful in respect of paragraph 13(a)(i) and or (iv) of the particulars of claim, then the entire award would be set aside.

Paragraph 13(a)(i) of the particulars of claim reads:

> "That the said Award by the Arbitrators was improperly procured and/or the Arbitrators misconducted themselves in the making of the Award within the meaning of Section 12(2) of the Arbitration Act in that the Arbitrators erred in Law by:
>
> (i) Wrongly holding and/or construing that the 1996 Heads of Agreement did not vary or amend the Franchise Agreements;"

In my view, there was ample material for the learned judge to have concluded that the 1996 Heads of Agreement had amended the franchise agreements. There is no basis for disturbing his finding.

HARRISON, J.A:

1. This is an appeal by National Transport Cooperative Society ("the Appellant") against the judgment of Brooks J, who on November 29, 2004 set aside an Arbitral award of $4,544,764,113 made on October 2, 2003 in favour of the Appellant.

The background to the appeal

2. In 1994 the Government of Jamaica decided to re-organize the bus service in the Kingston Metropolitan Area so it invited applications for exclusive licenses and franchises. The Invitation culminated with the signing of a Franchise Agreement by the Government and the Appellant on March 1 1995. This Agreement was to last for ten (10) years unless terminated. Zones were created

and the Appellant was granted exclusive licences by the Minister of Public Utilities and Transport ("the Minister") for Portmore in the parish of St. Catherine and the Northern Zones in the Corporate Area. Three other operators were awarded franchises for the other zones. A Common Area was provided and buses converged at this central point.

3. The Appellant contended that the fixing of a fare table was very crucial to the successful operation of the franchise and this was to be carried out by the Transport Authority acting with the approval of the Minister. Clause 32 of the Agreement provided that a "First Fare Table" would apply until a "Second Fare Table" was determined and was calculated to yield a rate of return of 15% on capital employed.

4. The Second Fare Table, which was contemplated by Clause 32, did not materialize. Its non-implementation led to the creation of A "Heads of Agreement" which was executed by the parties on April 18, 1996 and provided inter alia, that a new fare table would be implemented after certain improvements were effected in the standard of bus services in the Kingston Metropolitan Transport Region (the KMTR). The Respondent alleged that no significant improvement had taken place and as a consequence, the Government unilaterally terminated the licenses granted to the Appellant in 1998. One exclusive licence was granted to the Jamaica Urban Transit Company Limited (JUTC) pursuant to the Public Passenger Transport (KMTR) Act, for the operation

of public transportation services in the Kingston Metropolitan Transport Region. This licence incorporated the two zones, previously licensed to the Appellant.

5. A compromise was arrived at between the parties and another Heads of Agreement was executed on March 7, 2001. Clause 11 of this Agreement indicated that both parties agreed that the claims filed against the Government together with any other related claim which was not settled under the 2001 Heads of Agreement should be referred to arbitration.

6. An Arbitral Panel was constituted in order to deal with the claims brought by the Appellant. At the commencement of the arbitration proceedings the Respondent made a Preliminary Application and contended that the 1995 Franchise Agreement under which the Minister of Public Utilities and Transport had granted exclusive licenses to the various stakeholders was invalid, *ultra vires* and void. This application was dismissed by the Arbitrators and the arbitration proceedings continued. On October 2 2003, the Arbitrators awarded the Appellant approximately $4.5 billion in damages plus interest. Most of the sum awarded represented actual losses allegedly incurred by the Appellant as a result of operating bus services in the KMTR between 1995 and 2001 under the "exclusive licences" granted to it.

7. On October 27, 2003 the Respondent filed a Fixed Date Claim in the Supreme Court challenging the arbitration award on the ground that it had been improperly procured and/or that the Arbitrators had mis-conducted themselves in making the award. The Respondent sought to set aside the Arbitrator's award

and relied on eight (8) grounds in support of the application. In summary, these grounds complained that:

> "(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 application by the Respondent 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 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 the award.
>
> (h) The Arbitrators erred by failing to hold that the Appellant failed to take reasonable steps to mitigate its losses."

It was also contended by the Respondent when the matter came on for hearing in the Supreme Court, that the Arbitrators had erred in not holding that the Portmore Franchise was illegal since Portmore was not within the Corporate Area.

8. Prior to the hearing of the Fixed Date Claim, the Appellant conceded grounds (d), (e) and (f), and the Respondent agreed not to pursue ground (g).

9. The learned trial judge gave judgment in favour of the Respondent and held as follows:

> "Ground A- The Arbitrators erred in holding that the 1996 Heads of Agreement did not vary or amend the 1995 Franchise Agreement. This was an error in law on the face of the record and therefore the Arbitrators misconducted themselves in so holding. The consequence is that the arbitral award must be set aside on this ground.
>
> Ground B- The Arbitrators erred in dismissing the preliminary application by the Government that the 1995 Franchise Agreement be declared invalid. The learned Arbitrators ought not to have refused to accept that the granting of licences by zone was *ultra vires* and void. This was an error in law evident on the face of the record and as such constituted an act of misconduct. As a result the award would be set aside on this ground as well.
>
> Ground C- Though the Arbitrators wrongly construed section 3 and 6 of the Public Passenger Transport (KMTR) Act in respect of the effect of the licence purportedly granted to the JUTC in 1998, there was no misconduct which would result in the award being set aside on this point. This is because the JUTC licence did not take effect at that time that it was purported to have come into effect.
>
> Ground H- The Arbitrators erred by failing to hold that the Society failed to take reasonable steps to mitigate its losses. They failed to consider the point when they ought to have done so. These omissions also constituted errors on the face of the record and accordingly amounted to misconduct in the sense of Section 12 of the Arbitration Act".

The Arbitrator's Award was set aside on grounds (a), (b) and (h).

10. This appeal is from that judgment and the following grounds were filed:

"(a) The learned Judge erred in holding that the Arbitrators misconducted themselves in ruling against the Respondent on the preliminary issue, namely, that the Franchise Agreements were invalid, and in particular:

(i) He erred in law in holding that the grant by the Minister of Public Utilities and Transport licences by zone was *ultra vires* and void;

(ii) He erred in law in not applying section 4(b) of the Interpretation Act so as to hold that the said Minister was entitled to grant a plurality of licences in the exercise of his powers under section 3(1) of the Public Passenger Transport (Corporate Area) Act.

(a) The learned Judge erred in law in not holding that, if the Franchise Agreements were *ultra vires* the Minister of Public Utilities and Works, the Appellant and the Respondent had entered into a binding compromise by the Heads of Agreement signed March 7, 2001 and had in making the said compromise affirmed the validity of the Franchise Agreements, so that it would be unjust and/or contrary to public policy to permit the Respondent to contend thereafter before the Arbitrators and the Court that the Agreements were illegal.

(b) The learned Judge erred in law in holding that the Heads of Agreement made between the parties on the 18th April 1996 had the effect of amending the Franchise Agreement so as to relieve the Respondent of its obligation under the Franchise Agreement to provide a Fare Table determined so as to yield a rate of return on capital employed of 15 percent thereon.

(c) The learned Judge failed to take account of the finding of fact made by the Arbitrators, namely that the Respondent had failed in breach of the 1996 Heads of Agreement to allocate a bus site to the Appellant, and that therefore the

condition precedent relied on by the Respondent was itself subject to a condition precedent which had failed.

(d) The learned Judge erred in law in holding that the Arbitrators had erred by failing to hold that the Appellant failed to take reasonable steps to mitigate its losses.

(e) The learned Judge erred in finding that after the anticipatory breach of contract on the part of the Respondent, the Appellant had a duty to mitigate its losses by ceasing to carry out its obligation under the contract.

11. The Respondent filed a Counter-Notice of Appeal and sought to have the decision of Brooks, J. affirmed on the ground that since he had decided that the licence which the Minister purportedly granted the Appellant under the "Portmore Zone" Franchise Agreement, was *ultra vires* the provisions of the Public Passenger Transport (Corporate Area) Act, his Lordship should also have held that the Award must be set aside on that basis as an error of law on the face of the award.

The Issues

12. The appeal raises four important issues and they are set out hereunder:

(a) Whether the learned judge was in error when he held that the Arbitrators had misconducted themselves when they ruled that the grant of exclusive licenses by zones was not *ultra vires* and void (the preliminary issue).

(b) Whether the learned Judge erred in law in not holding that, if the Franchise Agreements were *ultra vires* the Minister of Public Utilities and Transport, the Appellant and the Respondent had entered into a binding compromise by the

Heads of Agreement signed March 7, 2001 and had in making the said compromise affirmed the validity of the Franchise Agreements (the illegality issue).

(c) Whether the Heads of Agreement between the parties had the effect of amending the Franchise Agreement (the amendment issue).

(d) Whether the appellant ought to have mitigated its losses (the mitigation issue).

Issues (a) and (b) - The Preliminary and Illegality Issues

13. For convenience, I shall be dealing with issues (a) and (b) together.

14. A major concern in this appeal is whether the Minister was empowered to divide the Corporate Area into five regions and to issue exclusive licences in respect of each. It was also contended by the Respondent that a licence granted under the Public Passenger Transport (Corporate Area) Act which sought to include Portmore in the Franchise licence was ultra vires, illegal and void since Portmore was not an area within the Corporate Area.

15. It is very clear that the Public Passenger Transport (Corporate Area) Act was in existence at the time when the 1995 Franchise Agreement was agreed to by the parties. That statute was amended on September 7, 1998 to read "The Public Passenger Transport (Kingston Metropolitan Region) Act." The main amendment sought to expand the area to which the Public Passenger Transport (Corporate Area) Act applied and to include the community of Portmore in the parish of St. Catherine, as part of the Kingston Metropolitan Transport Region.

16. It is also clear that prior to the amendment of the Public Passenger Transport (Corporate Area) Act, the Minister was empowered to grant an exclusive licence for operation (a) within and (b) throughout the Corporate Area. Section 3(1) of the Public Passenger Transport (Corporate Area) Act states as follows:

> "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."

(emphasis supplied)

17. The word "exclusive" has not been defined in the statute but some assistance can be had from the dictionary. In Collins English Dictionary 6th Edition, "exclusive means "belonging to a particular individual or groups and to no other; not shared". It has also been defined in "The Oxford Reference Dictionary" to mean "excluding all others". What is meant by the term "within and throughout"? Again, there is no definition of this term in the Public Passenger Transport (Corporate Area) Act. In The Oxford Dictionary the word "within" means inter alia, "not beyond"; "not outside of" and "throughout" means inter alia, "right through" and "in every part."

18. "Corporate Area" is defined in section 2(1) of the Public Passenger Transport (Corporate Area) Act to mean an area defined in the Kingston and St. Andrew Corporation Act ("the KSAC Act") and section 7(1) of the KSAC Act states inter alia:

> "... the parishes of Kingston and St. Andrew shall include all the lands and houses and buildings within the boundaries set forth in the First Schedule and therein described as the Corporate Area."

19. Clearly, Portmore does not form a part of the Corporate Area. It would therefore mean that, if an exclusive licence is granted to the Appellant to operate bus services within the Corporate Area and Portmore that licence would be illegal, null and void on the face of it. It would also mean that any Franchise Agreement to which the parties agreed to the issue of these licences, would also be illegal, null and void.

20. Lord Gifford, Q.C., for the Appellant was firmly of the view that the Minister could legally issue a plurality of exclusive licences each one being exclusive to operate within and throughout the area prescribed by the statute. He argued that section 4(b) of the Interpretation Act ought to have been applied in construing section 3(1) (supra). Section 4(b) provides inter alia:

> "(4) In this Act and in all Acts, regulations and other instruments of a public character relating to the Island now in force or hereafter to be made, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided –
>
> (a) ...; and
>
> (b) words in the singular include the plural, and words in the plural include the singular."
>
> (emphasis supplied)

21. Mr. Mahfood, Q.C., for the Respondent submitted however, that the Minister's power under section 3(1) of the Public Passenger Transport (Corporate

Area) Act was expressly limited to the granting of a licence that was (a) exclusive; and (b) operated within and throughout the Corporate Area. Learned Queen's Counsel submitted that the words "within and throughout" meant that no segmentation of the region could take place. He argued that the powers given to the Minister under section 3(1) were quite unlike those given to the Minister under the Public Passenger Transport (Rural Area) Act where exclusive licences are granted for respective zones. Sections 3(1) (a) and (b) of this Act provide as follows:

> "3-(1) (a) Subject to the provisions of this Act, the Minister may in his discretion grant to any person upon an application made in writing an exclusive licence on such conditions and with effect from such date as may be specified therein to provide public passenger transport services by means of stage carriages or express carriages or both within and throughout the licensed Area:
>
> Provided that no application for an exclusive licence may be considered by the Minister except in relation to an area the limits of which were defined in an order under paragraph (b) prior to the making of application.
>
> (b) The Minister may by order published in the *Gazette* -
>
> (i) define the limits of any area (being part of the Rural Area) in relation to which applications for exclusive licences may be made; and
>
> (ii) in like manner, at any time, whether before or after the grant of an exclusive licence in relation to any such area alter the limits of that area."

22. Learned Queen's Counsel also submitted that the Interpretation Act is merely a drafting convenience and that it was not expected that it would be used to change the character of legislation.

23. The question whether a 'contrary intention' appears in an Act of Parliament so as to exclude the Interpretation Act was considered in ***Blue Metal Industries Ltd v R W Dilley*** [1969] 3 All ER 437. Lord Morris of Borth-y-Gest, delivering the judgment of the Board, said at 442:

> "It would seem unlikely that the legislature would solely depend on the provisions of the Interpretation Act if there was an intention to legislate with such important consequences as to give powers of compulsory acquisition not to a single acquiring company but to a group of companies. The Interpretation Act is a drafting convenience. It is not to be expected that it would be used so as to change the character of legislation. Acquisition of shares by two or more companies is not merely the plural of acquisition by one. It is quite a different kind of acquisition with different consequences. It would presuppose a different legislative policy."

24. The ***Blue Metal*** case (supra) was concerned with the interpretation of section 185(5) of the New South Wales Companies Act and it states as follows:

> "Where a notice has been given by the transferee company under subsection (1) of this section and the Court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, after the expiration of one month after the date on which the notice has been given or, if an application to the Court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company together with an instrument of transfer executed, on behalf of the shareholder by any person appointed by the transferee

> company, and on its own behalf by the transferee company, and pay allot or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares."

Lord Morris said at page 440:

> "The substantial issue in the appeal is whether the provisions of s. 185 apply to a take-over offer made by two companies jointly or whether they only apply in the case of such an offer when made by one company. If the provisions apply to a take-over offer made by two companies jointly then they would apply to a take-over offer made by a number of companies jointly. So the problem must be approached by considering whether it was the intention of the legislature to enact that the compulsive powers given by s. 185 could operate so that against the will of certain shareholders their shares may be transferred not to one transferee company but to a number of companies acting jointly. The powers given by s. 185 if used may not only deprive a shareholder of shares which he had wished to retain but may do so on terms of which he disapproved. If, however, a substantial majority of his fellow shareholders have been content with the terms of the offer made to them then pursuant to the policy approved by the legislature his personal wishes may (unless the court otherwise orders) be overborne. If nine-tenths of the shareholders approve of a plan which involves that they part with their shares to a transferee company then there may be advantages in providing means whereby the transferee company can acquire the remaining tenth. The legislature has thought it desirable to give the transferee company such a power. But would the legislature wish to give such a power not to a single transferee company but to a group of companies? Is there a significant difference between a situation in which one company becomes the holder of all the shares in another company and a situation in which a number of

> companies by concerted action secure the joint ownership of all the shares in another company?"

25. The Board, upholding the decisions of the courts below, held that the references to a 'transferor company' in the section, could only, in the light of the policy of the Act, refer to a single entity.

26. It is a well known canon of construction that words in the singular shall include the plural unless the contrary intention appears. But in considering whether a contrary intention appears, one must look at the substance and tenor of the legislation as a whole. See ***Sin Poh Amalgamated (HK) Ltd v A-G of Hong Kong*** [1965] 1 All ER 225 where Lord Pearce states at p 227 -228:

> "To discover whether a contrary intention is implied one must, I think, look, not at the form of particular expressions, but at the substance and tenor of the legislation as a whole."

27. The question which arises now for consideration is whether section 4(b) of the Interpretation Act ought to be used in construing the provisions of section 3(1) of Public Passenger Transport (Corporate Area) Act. Two points should be noted. First, the language of section 3(1) is phrased in the singular when it speaks of the grant of an "exclusive licence". Second, the words "exclusive licence" must be read together with the other words: "To provide public passenger transport services within and throughout the Corporate Area".

28. If, one were to say that the word 'licence' referred to in section 3(1), should be interpreted to include the word 'licences', this construction would in my view, be in contravention of the express language used in section 3(1). It is

therefore my considered view that the Minister is only empowered to issue a single "exclusive licence" to an individual or body to provide transport services within and throughout the Corporate Area. The Minister would therefore be acting contrary to law if he were to grant a plurality of exclusive licences for a part of or parts of the Corporate Area. Brooks, J. was of the view that if Portmore was incorrectly included in the exclusive licence, this ought not to have been a basis for setting aside the award of the Arbitrators since it was not pleaded and argued before them. It is my view however, that the learned judge had fallen into error when he failed to uphold the submissions made by Counsel for the Respondent on this issue.

29. If the Franchise Agreement is found to be tainted with illegality, it would mean that the Appellant would have been operating its buses illegally since it would not be in possession of a valid "exclusive licence" or road licence to provide bus service within the designated zones.

30. It is now necessary to determine whether it was unjust and/or contrary to public policy, for the Respondent to have argued that the Franchise Agreement was illegal for the reasons stated above.

31. Lord Gifford, Q.C., found it "remarkable" that the Government of Jamaica should seek to rely on the submission of 'illegality' at the eleventh hour. He submitted (a) that the nature of the supposed illegality in this case did not require the invalidation of contractual obligations; and (b) that the court would in

appropriate cases enforce a party's rights under a compromise of an illegal agreement. Learned Queen's Counsel submitted that:

> "(1) The Government had signed the Franchise Agreements intending them to embody 'binding contractual obligations' for a ten year period.
>
> (2) The franchises had been operated in good faith by the franchise holders over many years, including the payment by the franchise holders of substantial franchise fees.
>
> (3) Heads of Agreement asserting the Franchise Agreements had been signed on 7th March 2001.
>
> (4) The suit brought by the Appellant alleging breaches of the Franchise Agreements was referred to arbitration, by way of a compromise agreement embodied in those Heads of Agreement.
>
> (5) The Ministry on behalf of the Government had abandoned 'any and all claims, damages, remedies or entitlements which may now exist or hereinafter arise under the Franchise Agreement against the Society'.
>
> (6) Compensation had been agreed and paid for 'the unexpired portion of the Franchise Agreements.'
>
> (7) Points of Defence had been submitted in which no issue of illegality had been raised."

32. Lord Gifford, Q.C., further submitted that the whole contract need not be invalidated and relied upon the authorities of ***R v Panel on Take-overs*** [1987] 1 All ER 564 and ***Binder v Alachouzos*** [1972] 2 All ER 189.

33. However, Mr. Mahfood, Q.C., submitted that there is a fundamental rule of public policy, which says that a contract to do a thing that cannot be performed without a violation of the law, is void whether the parties knew the

law or not. He referred to "Chitty on Contracts" (1999) Vol. 1 para. 17-012; ***Miller v Karlingski*** (1945) 62 TLR 85; ***Waugh v Morris*** (1873) LR 8 QB 202; ***Holman v Johnson*** 1775-1802 All ER Reprint 98 and ***Soleimany v Soleimany*** (1999) 3 All ER 847.

34. Learned Queen's Counsel submitted that it was not because the parties had entered into a compromise to settle their differences at arbitration that the Respondent had waived its rights to oppose the Appellant's claim. He argued that since the contract was illegal, the Arbitrators would have been in a similar position as a court of law and would be precluded by fundamental public policy from enforcing the contract and awarding damages.

35. In ***Scott v Brown, Doering, McNab & Co.*** [1982] 2 QB 724 at page 728, Lindley LJ said:

> "No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in ***Holman v Johnson*** (1775) 1 Cowp 341 at page 343."

36. In ***Re Mahmoud and Ispahani's Arbitration*** [1921] All ER Rep 217, Scrutton LJ opined:

> "In my view the court is bound, once it knows that the contract is illegal, itself to take the objection and to refuse to enforce the contract, whether its knowledge comes

> from the statement of the party who was guilty of the illegality, or whether its knowledge comes from outside sources. The court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the court refuses to enforce such a contract."

37. ***Soleimany v Soleimany*** [1999] 3 All E.R 847 has also decided that an award by an arbitrator founded on a contract that is illegal will be set aside on the ground of misconduct. Waller LJ delivering the judgment in the Court of Appeal said inter alia at pages 858 - 859:

> "... It follows that an award, whether domestic or foreign, will not be enforced by an English court if enforcement would be contrary to the public policy of this country.
>
> It is clear that it is contrary to public policy for an English award (ie an award following an arbitration conducted in accordance with English law) to be enforced if it is based on an English contract which was illegal when made ...
> ....
>
> The reason, in our judgment, is plain enough. The court declines to enforce an illegal contract, as Lord Mansfield said in ***Holman v Johnson*** (1775) 1 Cowp 341, [1775-1802] All ER Rep 98 not for the sake of the defendant, nor (if it comes to the point) for the sake of the plaintiff. The court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it ..."

38. Lord Gifford, Q.C., had referred to, and relied on the authority of ***Binder v Alachouzos*** [1972] 2 All ER 189 but that case can be distinguished from the instant case. In ***Binder*** (supra) a contract recited that the parties had been advised by solicitors and counsel that the Moneylenders Acts did not apply to

transactions which were the subject of legal proceedings between them, and went on to provide for a compromise. Lord Denning MR said at 192:

> "In my judgment, a bona fide agreement of compromise such as we have in the present case (where the dispute is whether the plaintiff is a moneylender or not) is binding. It cannot be re-opened unless there is evidence that the lender has taken undue advantage of the situation of the borrower. In this case no undue advantage was taken. Both sides were advised by competent lawyers on each side. There was a fair arguable case for each. The agreement they reached was fair and reasonable. It should not be re-opened. I agree with the judge below that this agreement of compromise was binding and I would dismiss the appeal."

39. We were also referred to dicta from ***R v Panel on Take-overs*** (supra) but that was a case dealing with special procedural rules. In my view, those rules and the associated dicta, are wholly inapplicable to a situation such as the present case where a party is seeking the assistance of the Court to obtain damages for breach of a contract which could not be performed without a violation of the law.

40. ***Mercantile Credit Co Ltd v Hamblin*** [1964] 1 All ER 680 was an action filed by the plaintiffs, Mercantile Credit Co Ltd on an alleged hire-purchase agreement, consisting of a printed form with details added in manuscript. The defendant denied the alleged agreement. At a late stage of the hearing counsel for the defendant raised by way of defence that the agreement was, illegal, because it contravened the provisions of the Hire Purchase and Credit Sales Agreements Order (Control), 1960 (SI 1960 No 762). This defence had not been

pleaded. Counsel on behalf of the plaintiffs, submitted that, if illegality were to be relied on, it should have been pleaded, and that counsel ought not to draw the attention of the court to unpleaded illegality without the point being taken by the court itself. Counsel for the defendant, submitted that the proper course was adopted in the circumstances, and asked that leave to amend the defence should be granted. John Stephenson J., refused leave to amend and, finding for the defendant on other grounds, said that, in his view, counsel was not acting improperly in inviting the court to consider the possible illegality of the transaction. On the contrary, it was counsel's duty, however embarrassing, to prevent the court from enforcing illegal transactions.

41. In my judgment, it was Counsel's duty, however embarrassing, to bring the issue of illegality to the attention of the Arbitrators and Brooks J., even though it was not pleaded. Scrutton L.J had opined in ***Re Mahmoud and Ispahani's Arbitration*** (supra)

> " ... the court is bound, once it knows that the contract is illegal, itself to take the objection and to refuse to enforce the contract, whether its knowledge comes from the statement of the party who was guilty of the illegality, or whether its knowledge comes from outside sources. The court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the court refuses to enforce such a contract."

42. It was also said in ***Scott v Brown et al*** (supra) that it matters not whether the party who is relying on the illegality has pleaded it or is himself implicated in the illegality. Once the evidence adduced proves the illegality, the court ought not to assist any of the parties. It is also my view that the

Respondent in the instant case would not have waived its right to advance a valid defence in law even though the parties had agreed to refer the matter to Arbitrators. Once it was established that the Franchise Agreement was illegal both the Arbitrators and Brooks J should have upheld the submissions of the Respondent. In these circumstances, the Arbitrators would be precluded by public policy from enforcing the contract and awarding damages in favour of the Appellant.

43. In my view, grounds of appeal (a) and (b) fail.

Issue (c) - The Amendment Issue

44. In deciding this issue it is necessary to consider whether the learned judge was in error when he held that the Heads of Agreement, between the parties, had the effect of amending the Franchise Agreement so as to relieve the Respondent from its obligations under the franchise. Clause 32 of the Franchise Agreement entitled "FARE STRUCTURE AND FARE ADJUSTMENT" plays an important role in the determination of this issue. It states inter alia:

> "32 FARE STRUCTURE AND FARE ADJUSTMENT
>
> (a) The first fare table to apply with effect from March 1, 1995 will be table identified herein as Appendix D. The fares in that table are those in existence at February 28, 1995. The parties appreciate the inadequacy of those fares, even after taking into consideration a subsidy of $10 Million which is to be provided for each franchise for the three months ending May 31, 1995. Therefore a new fare table (hereinafter called the Second Fare Table) will be made available not later that April 30, 1995 to apply with effect from June 1, 1995.

> (b) Fares in the Second Fare Table will be determined:
> (i) to yield a rate of return on capital employed of 15% and adjusted for inflation point to point February 94-95 using the Jamaica all groups Consumer Price Index.
> (ii) to recognize in full all operating and administrative costs.
> ....
>
> The parties agree that bus fares shall be adjusted in accordance with the general provisions set forth below and as more particularly described in Appendix B to reflect increases in the cost of operations required by the Franchise Agreement and to ensure that the Franchise Holder can achieve a fair and reasonable profit from public transport operations. The parties also agree that the Office of Utilities Regulation (OUR) or such other office that may be established for the purpose will administer the fare adjustment mechanism. Until the OUR is established a joint commission will be set up to review the fare adjustment mechanism ..."

45. Clauses 7 and 9 in the Heads of Agreement executed on April 18, 1996 will also have to be examined. Clause 7 states as follows:

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

> 1. the concessions and assistance being provided by Government in areas which based on the existing Franchise Agreement are the responsibilities of the Franchise Holders, and
>
> 2. increases in costs which have taken place since the recommendations of the Shirley Committee.
>
> (iii) It is agreed that the new fare table would be implemented after the necessary improvements have been effected in the transportation system in the KMTR, specifically with respect to:
> 1. The implementation and maintenance of schedules which would be possible with establishment and operations of new depots.
>
> 2. The putting into service of additional buses.
> 3. Improvements in the conduct and decorum of bus crews which will be achieved through the implementation of training programmes."

46. Clause 9 states as follows:

> "9 FRANCHISE AGREEMENT
>
> It is agreed that the Franchise Agreement between the Government and National Transport Co-operative Society Limited require amendments, those amendments are to be discussed and agreed by June 1, 1996."

47. What has to be determined now, is whether the provisions in Clause 32 constitute binding contractual obligations between the parties and whether or not they were amended by Clause 7(b)(iii). Some background facts need to be examined at this point.

48. The parties understood that the first fare table of March 9, 1995 was inadequate and even though a subsidy of $10,000,000.00 was granted to the Appellant, the second fare table was still considered crucial to the operation of the buses by the Appellant. June 1, 1995 was the prescribed date fixed for the implementation of the second fare table, and this had caused the Arbitrators to conclude that time was of the essence. A Commission called the "Shirley Commission" was established and it recommended a scale to Government for the introduction of the second fare table. However, these recommendations were never implemented.

49. The Arbitrators held that the Government had breached the agreement thereby entitling the Appellant to elect to treat the Franchise Agreement as continuing or to accept the breach and treat itself as discharged. The Arbitrators found that the Appellant had elected to treat the Franchise Agreement as continuing and that by signing the 1996 Heads of Agreement the Appellant had confirmed its affirmation of the Franchise Agreements. Brooks J., held otherwise and agreed with the Respondent that the Franchise Agreement was amended so as to relieve the Respondent of its obligations under them.

50. Lord Gifford, Q.C., argued in this Court that clause 9 (supra) had provided the need for discussion and to agree on any amendment by June 1, 1996. He argued that where there is a mere agreement to discuss the variation of a contract this could not in law be a valid variation. He submitted that the Franchise Agreement was still binding on the parties and since Government had

failed to provide the second fare table, the Appellant was entitled to terminate the Franchise Agreement.

51. Lord Gifford Q.C referred to ***Courtney & Fairburn Ltd. v Tolaini Brothers (Hotels) Ltd and Another*** [1975] 1 All ER 716. That case held inter alia, that certain letters passing between the parties did not give rise to an enforceable contract because:

> "(i)Price was a matter which was fundamental to the contract. Accordingly there could be no binding contract unless the price had been agreed, or there was an agreed method of ascertaining the price which was not dependent on negotiations between the parties. The letters did not contain any agreement on the price, nor did they provide for any method for ascertaining the price; they amounted to no more than an agreement to negotiate fair and reasonable contract sums.
>
> (ii) A contract to negotiate even though supported by consideration was not a contract known to the law since it was too uncertain to have any binding force and no court could estimate the damages for breach of such an agreement."

52. One of the questions the learned judge had to decide in the instant case was whether there was a conditional connection between clause 9 and the other clauses. Mr. Michael Hylton, Q.C., the learned Solicitor General, submitted that the learned judge was correct when he found that there was no connection between clause 9 and the other clauses. The learned judge said:

> "It is my finding that clause 9 represents an independent concord between the parties. The clause makes no reference to any of the other

> clauses. There is no conditional connection between it and the others. In my view it reflects recognition by the parties that factors which have intervened, required that amendments be made to the Franchise Agreement. I find that the concession by the Society mentioned above, results in an admission that there was an amendment to the Franchise Agreement".

53. The concession which Brooks J spoke of, is found at page 10 of his judgment and he stated:

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

And at page 12 he continues:

> "It is my finding that the deadline included in Clause 9 did not expressly or impliedly convey that the other clauses in the document were dependent on that deadline being met."

54. It was rather surprising that the Arbitrators found that Clause 7(b)(iii) did not refer to the second fare table. They also found that Clause 9 of the 1996 Heads of Agreement had made it clear that the document was not meant to be an amendment of the Franchise Agreement.

55. In my view, the Arbitrators were clearly in error when they held that the second fare table was not referred to in Clause 7(b)(iii). Lord Gifford, Q.C., had conceded that reference was made to it and this was quite commendable on his part. The question is, what effect if any, would the concession have on this issue?

56. The evidence which the Arbitrators had to consider revealed that there was a decline in the overall quality of bus service. There was considerable inconvenience and frustration to the public. These problems had existed prior to the execution of the 1995 Franchise Agreement and subsequent to the signing there was still the need for improvement by the Appellant.

57. With this background in mind, I would agree with the learned Solicitor General when he submitted that "it was perfectly rational and logical to conclude that the parties intended to vary the terms of their original agreement to provide that the implementation of the second fare table would be put on hold until the Appellant took certain steps to improve its bus service".

58. I would also agree with the learned judge when he stated that clause 9 represented an independent concord between the parties and that there was no conditional connection between it and the other clauses in the Heads of Agreement.

59. Finally, it is necessary to consider Clause 43 of the Franchise Agreement. Lord Gifford, Q.C., was of the view that if there was any inconsistency between other documents and the Franchise Agreement then the latter would prevail. Clause 43 provides as follows:

> "43 FRANCHISE AGREEMENT DOCUMENTS
>
> The complete Franchise Agreement documents consist of the Franchise Agreement, including all Appendices attached hereto and made a part hereof, the Statement of Pre-Qualifications, the Invitation to Apply for an Exclusive Licence and Franchise Bids, the Application and Franchise Bids,

> all Addenda issued prior to and all changes issued after execution of the Franchise Agreement. These form the complete Franchise Agreement, and all are as fully a part of the said Franchise Agreement as if attached hereto or repeated herein. The Franchise Agreement shall take precedence in the event of a discrepancy or inconsistency between the Franchise Agreement and any other document referred to in this section."

Brooks, J. had little or no difficulty in disposing of Lord Gifford's submissions on this point. The learned judge said at page 13 of his judgment:

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

60. I am in full agreement with the learned trial judge. Clause 7(b)(iii) provided satisfactory proof that there was an intention by the parties to amend the Franchise Agreement. It is crystal clear that the new fare table referred to in clause 7(b)(iii) would not be implemented unless the Appellant carried out the necessary improvement in the bus service that it provided.

61. In my view, the Arbitrators had committed an act of misconduct when they misconstrued Clause 7(b)(iii) of the Heads of Agreement and this amounted to an error on the face of the record. Ground of appeal (c) would also fail in my view.

Issue (d) - The Mitigation Issue

62. This issue would only arise if the appellant had succeeded on the other grounds. It is my view that there is no need for me to discuss the matter in any detailed manner except to say that had the Appellant succeeded in respect of the other grounds of appeal, it ought to have mitigated its losses. It is clear from the authorities of ***British Westinghouse Co. v Underground R v*** [1912] A.C. 673, H.L and ***Sotiros Shipping Inc & Sameiet Solholt*** (***The "Solholt"***) [1983] 1 Lloyd's Rep. 605 (C.A.) that an innocent party will not be allowed to elect to keep a contract alive, and to recover all its loses from the other party where the continuation of the contract would be wholly unreasonable.

Conclusion

63. For my part, I would dismiss the appeal, and allow the cross appeal with costs to the Respondent.

HARRIS, J.A.

This is an appeal by the appellant, from the decision of Brooks, J. on November 29, 2004, in which he set aside an Arbitration Award made in favour of the appellant on October 2, 2003. A counter notice of appeal seeking to uphold the judgment of Brooks, J. was filed by the respondent.

The facts giving birth to this appeal are that in 1994 the Ministry of Transport and Works initiated a programme designated the Kingston Bus Rationalization Project (KBR Project) to reorganize the public transportation

services in the Kingston and Metropolitan Transport Region which had been in disarray due primarily to the fragmentation of the licensing system.

The KBR project provided for the division of the Kingston Metropolitan Transport Region into five (5) franchise areas, namely: Northern, Portmore, Spanish Town, Papine and Eastern zones. In pursuance of the rationalization project, the government of Jamaica sought to extract from operators of public passenger vehicles, by way of bidding process, expressions of interest for licenses to operate public passenger vehicles within the five (5) zones. This bidding process comprised two (2) stages, (a) submission of statements of prequalification (b) invitations for applications for exclusive licences and franchises. Attached to each invitation to bid for the licence and franchise, was a draft Franchise Agreement.

On March, 1995, a Franchise Agreement was entered into between the appellant and the Government. Under the Agreement, exclusive licences were granted to the appellant for operation in two (2) zones, namely, the Northern Zone which comprised certain areas in Kingston, Saint Andrew and Portmore Zones, for ten years commencing March 1, 1995, subject to certain terms and conditions stipulated in the Agreements. Three additional exclusive licences were granted to other transport operators.

Clause 32 of the Franchise Agreement included a term that fares for a second table of fares which was slated to become effective on June 1, 1995, would be calculated to yield a rate of return of 15% on the capital used. This second fare table was never implemented.

On February 14, 1995, prior to the execution of the Agreement between the Government and the appellant, the parties entered into an Memorandum of Understanding by virtue of which the Government gave an undertaking to subsidize each franchise to the extent of ten million dollars from March 1 to May 31, 1995. It was also agreed that no fare increases would be imposed for the period during which the subsidy related.

In 1996 the Government and the appellant, entered into a Heads of Agreement. This Agreement was executed by the appellant on February 23, 1996 and by the Government on April 18, 1996. Clause 9 of the Agreement provided for the amendments to the Franchise Agreement which were to be discussed and agreed by June 1, 1996.

The Government, on September 7, 1998, unilaterally terminated the Franchise Agreement with the appellant and granted an exclusive licence to the Jamaica Urban Transport Company Ltd. (JUTC), a government owned company which commenced operating the public passenger bus service in all five (5)

zones. The exclusive licence incorporated those two zones for which the licences were granted to the appellant.

On August 24, 2000, the appellant commenced an action, suit CL 2000/N212, against the Government, claiming damages consequent upon the government's failure to implement the Second Fare Table. To this suit, the government filed defence and counterclaim, claiming the sum of $8,342,023,277.00 as damages.

On March 7, 2001, the parties entered a Heads of Agreement under which it was agreed, inter alia:

1. Under clause 9, the parties would settle the dispute in relation to breaches of the Franchise Agreement, occurring before the termination of the agreement and the appellant would accept a sum of $314.7m as compensation in the event of a premature termination of its two Franchise Agreements.

2. By clause 11.1 the appellant would release and discharge the government and its relevant agencies from any and all liabilities arising from breaches of the said Franchise Agreement save and except alleged breaches covered by suit CL 2000/N212.

3. By clause 11.3 all claims made by the appellant in suit # CL2000/N212 together with any related claims which were not settled under the 2001 Heads of Agreement would be referred to Arbitration and the appellant would agree not to take any further steps in the prosecution of the suit. Clause 11.3 is subject to 11.2. Clause 11.2 provides that the appellant shall not be entitled to recover losses subsequent to the termination of the Franchise Agreement.

4. Under clause 11.6 provision is made for the abandonment by the government of any claims and remedies it would have against the appellant under the Franchise Agreement.

Clauses 11 and 12 of the Franchise Agreement make provision as to the terms and conditions under which the agreement may be terminated, namely:

1. If the franchise holder failed to operate public passenger transport within the terms of the Agreement.
2. If the franchise holder became insolvent.
3. If the franchise holder was faced with a judgment of more than ten million dollars which remained undischarged for ninety days.
4. If the Society (the appellant) failed to operate a franchise area for ten days.

5. The negligence of the franchise holder in its operation.

A panel of arbitrators comprising the Honourable Mr. Justice Ira Rowe, The Honourable Mr. Justice Boyd Carey and Mrs. Angella Hudson Phillips was nominated. Their terms of reference were in accordance with clauses 11.3 of the 2001 Heads of Agreement. On the appointed date of hearing the arbitral panel heard a preliminary application by the government challenging the validity of the Franchise Agreement on the ground that the exclusive licenses granted by the Minister of Public Utilities and Transport were *ultra vires* and void. The application was dismissed. The Arbitrators conducted a hearing under the terms of reference and on October 2, 2003 awarded the appellant damages in the sum of $4,544,764,113.00 with interest thereon to be calculated at the rate attracted by treasury bill, with costs incurred by the appellant in suit CL 2000/N212 as well as costs of the arbitration.

On October 27, 2003 the respondent commenced action to set aside the arbitral award. To this action, the appellant filed a defence and counterclaim. On November 24, 2004, Brooks, J. made the following order:

> "1. There shall be judgment for the Claimant on the claim and the counterclaim.
>
> 2. The award of the arbitrators be and is hereby set aside.
>
> 3. The Defendant do pay the costs of the claim and of the Arbitration Proceedings."

Ground 1 of Appeal

"A) the Learned Judge erred in holding that the arbitrators misconducted themselves in ruling against the Respondent on the preliminary issue, namely that the Franchise Agreements were invalid, and in particular:

1. He erred in law in holding that the grant by the Minister of Public Utilities and Transport of licenses by zone was *ultra vires* and void;

2. He erred in Law in not applying section 4(b) of the Interpretation Act so as to hold that the said Minister was entitled to grant a plurality of licences in the exercise of his powers under section 3(1) of Public Passenger Transport (Corporate Area) Act."

Counter Notice of Appeal:

Grounds

"Having found correctly (at pages 26-27 of the written judgment) that the licence which the Minister purported to grant to the Appellant under the "Portmore Zone" Franchise Agreement was ultra vires the provisions of the Public Passenger Transport (Corporate Area) Act, his Lordship should have proceeded to:

(a) Set aside the Award for error of law on the face of the award and/or misconduct of the arbitrators pursuant to Section 12 (2) of the Arbitration Act and/or the inherent jurisdiction of the Supreme Court; and/or

(b) Dismiss the Appellant's counterclaim to enforce the award as being based on an illegal contract."

Supplemental Grounds

"Having found correctly, that the licence which the Minister purported to grant to the Appellant under the "Portmore Zone" Franchise Agreement was ultra vires the provisions of the Public Passenger Transport (Corporate Area) Act, his Lordship should have proceeded to:

(a) set aside the award for error of law on the face of the award and/or misconduct of the arbitrators pursuant to Section 12(2) of the Arbitration Act and/or the inherent jurisdiction of the Supreme Court; and/or

(b) dismiss the Appellant's counterclaim to enforce the award, as being based on an illegal contract."

The respondent's claim was upheld by the learned trial judge on the ground that the findings of the Arbitrators constituted misconduct within the meaning of The Arbitration Act. He held that the Arbitrators fell into error in their dismissal of the preliminary application in which the Government sought a declaration that the 1995 Franchise Agreement was invalid. He found that they ought to have accepted that the licences granted were ultra vires and void.

Clause 11.5 of the Heads of Agreement of March 7, 2001 provides that "the award of the Arbitrators shall be binding on the parties". Notwithstanding this stipulation, the Court is empowered to set aside an Arbitrator's award wholly or partially where the Arbitrator has misconducted himself. Section 12

(2) of the Arbitration Act confers on the court the authority so to do. Section 12 (2) reads:

> "(2) Where an Arbitrator or Umpire has misconducted himself or an arbitration or award has been improperly procured, the court may set the award aside."

As a general rule, a court may only set aside an arbitrator's award on an error of law, on the face of it, if there is some legal issue on which it is grounded which is erroneous. Normally, the court is not authorized to set aside an award even if it is of the opinion that it would have arrived at a conclusion contrary to that of the Arbitrator. No definitive description can be given to acts which amount to arbitral misconduct. Such misconduct does not necessarily relate to impropriety on the part of the Arbitrator. It generally involves an error of law on the face of the proceedings, or, mistake as to the scope of the authority conferred by the agreement. The nature of misconduct and the circumstances which would warrant the setting aside of an arbitrator's award were recognized by the learned authors of Halsbury's Laws, Volume 2, 3rd Edition page 60, paragraph 127 in the following context:

> "In order to be a ground for setting aside the award, an error in law on the face of the award must be such that there can be found in the award, or in a document actually incorporated therewith, some legal proposition which is the basis of the award and which is erroneous.
>
> If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set

> aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the decision of the arbitrator cannot be set aside only because the Court would itself have come to a different conclusion; but if the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award."

The jurisdiction of the court to set aside an award for an error, on the face of it, was considered in great detail by Mustil, J. as he then was, in the case of **Finelvet AG v Vinava Shipping Co Ltd,** The Chrysalis [1983] 2 All ER 658. At page 663 (a) and (b) he said:

> "Starting therefore with the proposition that the court is concerned to decide, on the hearing of the appeal, whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as the present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages. (1) The arbitrator ascertains the facts. This process includes the making on findings of any facts which are in dispute. (2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached. (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision."

He went on to state at 663 (d):

> "In some cases, an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is,

> however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another; and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct: for the court is then driven to assume that he did not properly understand the principles which he had stated."

Lord Gifford, Q.C. argued that the Minister was empowered to issue a plurality of licences to a plurality of licencees and each licence was exclusive within the area serviced, with the exception of certain provisions as to common area and areas which overlapped. These exceptions, he submitted, did not detract from the exclusivity of each licence, as the intent was to avoid unseemly competition. Section 3(1) of the Public Passenger Transport Act, he contended, must be construed within the context of section 4 of the Interpretation Act.

Mr. Mahfood, Q.C. argued that the Minister's power was specifically restricted to the granting of a licence which was exclusive to the appellant operating within and throughout the Corporate area, as prescribed by section 3 (1) of the Public Passenger Transport (Corporate Area) Act. He further argued that, as a consequence, the Corporate Area could not be segmented.

Five (5) exclusive licences were issued by the Minister of Works. Two of these exclusive licences were granted to the appellant by the Minister

under clause 5 of the 1995 Franchise Agreement. The issue of the licences would have the effect of according the licencees the exclusive right to provide public transportation services within the area prescribed in such licences. Were these licences legally granted?

In answering this question it will be necessary to make reference to two statutory instruments governing the licensing, regulation and operation of public passenger vehicles which were in force at the relevant time. These were the Public Passenger Transport (Corporate Area) Act 1947, the Public Passenger Transport (Rural Area) Act 1970.

Section 2 (1) of the Public Passenger Transport (Corporate Area) Act, gives the following definition for the Corporate Area:

> In this Act—
>
> "Corporate Area means the Corporate Area as defined in the Kingston and St. Andrew Corporation Act."

Section 7 (i) of the Kingston and Saint Andrew Corporation Act states:

> "For the purposes of this Act the parishes of Kingston and Saint Andrew shall include all the lands, houses and buildings within the boundaries set forth in the First Schedule and therein described as the Corporate Area."

The geographical region encompassing the Corporate Area described in the First Schedule of Kingston and Saint Andrew Corporation Act, to which

reference had been made in the Public Passenger Transport (Corporate Area) Act, did not include the area known as Portmore at the material time. Portmore however, has since been included as forming a part of the Corporate Area in the First Schedule of the Kingston and Saint Andrew Corporation Act as provided for in the Public Passenger Transport (Kingston and Metropolitan Transport Regions) Act.

Section 2 of the Public Passenger Transport (Rural Area) Act, defines the "Rural Area", as meaning that part of Jamaica outside the Corporate Area.

I will first deal with the issue of the five (5) exclusive licences and thereafter with the Portmore licence. The question as to the validity of the exclusive licence essentially revolves around the construction of section 3 (1) of the Public Passenger Transport (Corporate Area) Act, which permits the Minister to issue an exclusive licence for stage and express carriages within and throughout the corporate area. It is therefore necessary to examine the statutory provision to ascertain whether the Minister was empowered by section 3(1) of the Act to issue more than one exclusive licence.

The operative words of section 3 (1) are "exclusive", "within" and "throughout." It is therefore of absolute importance that the meaning of these words, be explored in order to determine their use as prescribed by

the Act. A cardinal rule of construction is that words should be given their literal and ordinary meaning. A Court, in determining the meaning of words may be aided by recourse to an authoritative dictionary. The Oxford English dictionary defines the word "exclusive" as meaning "excluding, not admitting other things, excluding all but what is specified, restricted to the person, group or area concerned." "Within" is defined as meaning "inside, inside the range of, inside the bounds set by" and the word "throughout" is described as meaning "all the way through"

Mr. Mahfood, Q.C. brought to our attention the Australian case of **Gartland v Kalamunda Shire** 1973 W.A.R 37 in which the meaning of the word "throughout" was explored. At page 39 Hale, J. said:

> "It is an ordinary English word with a well—established meaning. The Oxford English Dictionary (1919) gives the following meanings: as a preposition, "completely or right through (a place)" "through the whole of (a region)"; and as an adverb, "right through," "through the whole of (a region)", "in every part," "everywhere": and the shorter Oxford Dictionary (1967) does not suggest that the word has acquired any different or more limited meaning. It is not possible to hold that an unknown number of individual allotments scattered about a district answer the description of "rateable land throughout the whole of" that district."

Under section 3 (1) (a) of the Public Passenger Transport (Rural Area) Act the Minister has a discretion to grant exclusive licences. That Act gives him power to subdivide the rural areas into licensed areas and he may thereby grant exclusive licences in each area. This is in direct contradistinction to the provisions of section 3 (1) of the Public Passenger Transport (Corporate Area) Act which is silent as to the empowerment of the Minister to effect any subdivision of the Corporate Area.

In bolstering his submission that it was permissible for the Minister to have issued a plurality of exclusive licences, Lord Gifford, Q.C. placed great reliance on section (4) (b) of the Interpretation Act. It was submitted by him that the Interpretation Act is applicable in construing section 3 (1) of the Public Passenger Transport (Corporate Area) Act, as the Interpretation Act enabled the Minister to issue several exclusive licences.

Section 4 (b) of the Act provides:

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

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

In considering the question of the applicability of the foregoing section in relation to section 3 (1) of the Public Passenger Transport (Corporate Area) Act, the learned trial judge held "that the section [section 3 (1) of the Public Passenger Transport (Corporate Area) Act] makes it clear that the interchange of singular and plural must not be repugnant to the context of the particular legislation being construed."

In dealing with the effect of an Interpretation Act in construing a statute, Lord Morris of Borth-Y-Gest in **Blue Metal Industries Ltd. v. Dilley** [1970] AC 827 at page 846 (E), delivering the advice of the Privy Council said:

> "By section 21 of the Interpretation Act, 1899 (N.S.W.), it is enacted that in all Acts, unless the contrary intention appears, words in the singular *shall* include the plural and words in the plural *shall* include the singular. Such a provision is of manifest advantage. It assists the legislature to avoid cumbersome and over-elaborate wording. *Prima facie* it can be assumed that in the processes which lead to an enactment both draughtsman and legislators have such a provision in mind. It follows that the mere fact that the reading of words in a section suggests an emphasis on singularity as opposed to plurality is not enough to exclude plurality. Words in the singular will include the plural unless the contrary intention appears. But in considering whether a contrary intention

> appears there need be no confinement of attention to any one particular section of an Act. It must be appropriate to consider the section in its setting in the legislation and furthermore to consider the substance and tenor of the legislation as a whole. (See Sin Poh Amalgamated (H.K.) Ltd. v. Attorney-General of Hong Kong [1965] 1 W.L.R. 62.) In that case a test was indicated which often may be helpful. In the judgment of the board delivered by Lord Pearce it was said, at p. 67:
>
> "The Interpretation Ordinance was intended to avoid multiplicity of verbiage and to make the plural cover the singular except in such cases as one finds in the context of the legislation reason to suppose that the legislature, if offered such amendment to the bill, would have rejected it."

The fact that section 3 (1) Public Passenger Transport (Corporate Area) Act makes reference to an exclusive licence, does not in itself exclude the application of the Interpretation Act. In order to determine whether a contrary intention should be implied, one has to look to the spirit and the intendment of the Public Passenger Transport (Corporate Area) Act.

Under section 3 (1) of the Public Passenger Transport (Corporate Area) Act the Minister is empowered to grant an exclusive licence to provide public transport service within and throughout the Corporate Area. The section reads:

> "3(1) 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."

Under Section 3 (2) no person may be granted an exclusive licence for use of stage or express carriage while an exclusive licence for operation of stage or express carriage in the corporate area is in force. Notwithstanding this provision, section 3 (3) (d) enables the holder of an exclusive licence to be granted a road licence for transportation service within the corporate area. The section reads:

"3(3) Nothing in subsection (2) shall prevent –

(a) ...

(b) ...

(c) ...

(d) the grant or holding of a road licence authorizing the operation of any stage carriage service or express carriage service on any route wholly within the Corporate Area or the carriage of passengers on any service operated under and in accordance with such licence if the licensee shall have consented in writing to the grant or

holding of that licence, and for the avoidance of doubt it is expressly declared that—

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

By section 3 (2) of the Public Passenger Transport (Corporate Area) Act no person can be granted a road licence for stage and express carriage during the currency of an exclusive licence. However, under section 3 (3) (d) the grant of a road licence for operation of Public Passenger Transport within the Corporate Area is only permissible with the consent of the holder of an exclusive licence. The fact that the consent of the exclusive licensee is required for operation of a public passenger vehicle within the Corporate Area is significant. It must have been the contemplation of Parliament that a right to operate public passenger transport inside and all the way through the Corporate Area or in every part of the Corporate Area must reside in one individual or a single entity.

Section 3 (5) states:

> "Every road licence in force at the date of the coming into force after the 31st day of May, 1953, of any exclusive licence granted under subsection (1) which authorizes the operation of any stage carriage service or express carriage service on any route partly within the Corporate Area shall be deemed to be subject to the condition referred to in subsection (4) and have effect in all respects as if that condition had been attached to the road licence."

Section 3 (6) provides:

> "No licence granted under subsection (1) shall take effect until the Minister is satisfied that the licensee—
>
> (a) either has made reasonable arrangements for the acquisition of the interests of every other person holding a road licence within the Corporate Area in respect of any stage or express carriage who at the time of such arrangements is operating exclusively within such Area and who will be prejudicially affected by the grant of a licence under subsection (1), in which event the licence shall take effect from such date as the Minister may by order declare; or
>
> (b) has offered to make such reasonable arrangements and that such other person has unreasonably refused to accept such offer or has failed to accept such offer within a reasonable time and that such offer was

made prior to two months before the expiration of the road licence held by such other person; and

(c) will, in the absence of circumstances beyond the control of the licensee and arising subsequent to the date upon which the Minister is satisfied as to the matters referred to in paragraph (a) or paragraph (b), be in a position within six months of the date upon which the licence comes into effect, to operate a service which is not less adequate to the needs of the community than are all public passenger transport services in operation in the Corporate Area by stage or express carriages under the Road Traffic Act, immediately before the date upon which the licence is granted."

Section 3 (7) reads:

"So soon as the licensee has complied with the requirements of subsection (6) the Minister may by order declare that the licence shall take effect from a date specified in such order."

Under the foregoing sections, provision is made for the compulsory acquisition, by the holder of an exclusive licence granted under section 3 (1) of the Act, of all road licences which were in existence in the Corporate Area prior to the date on which the Act came into operation. It is obvious that the legislative intent was that the right to operate public passenger vehicles in the Corporate Area should reside in only one entity or one person. The

language of section 3 (1) of the Public Passenger Transport (Corporate Area) Act does not favour a construction pluralizing the grant of an exclusive licence by the Minister for the purposes of the Interpretation Act. The statutory scheme under which the licence was granted does not allow for a construction contrary to section 4 of the Interpretation Act. It follows therefore that section 4 of the Interpretation Act cannot be imported into section 3 (1) of the Public Passenger Transport (Corporate Area) Act. The learned trial Judge was correct in finding that the Interpretation Act does not permit the construction as contended for by the appellant.

If the framers of the statutory provision had intended to confer on the Minister the power to grant plurality of licences this would have been expressly stated. It had been the intention of parliament to limit the power of the Minister to grant only one exclusive licence for the Corporate Area. Section 3 (1) of the Public Passenger Transport (Corporate Area) Act must mean that the Minister may grant a single exclusive licence for the operation of stage and hackney carriages inside and throughout the entire Corporate Area.

On a proper construction of section 3(1) of the Public Passenger Transport (Corporate Area) Act the Minister could not have been authorized to subdivide the Corporate Area into five zones under the 1995 Franchise

Agreement. This action in issuing exclusive licences in respect of each zone was in excess of his jurisdiction. It was *ultra vires* thus rendering the licences null and void.

In further contending that the issuance of more than one licence could be construed as a single licence, Lord Gifford, Q.C argued that the Public Passenger Transport (Corporate Area) Act should be interpreted to give the Minister flexibility to issue licences. The interpretation of the legislation, he submitted, should be such as to allow the Minister the flexibility to issue one or more licences, "depending on his view of what would be efficient".

The legislative intent of the Public Passenger Transport (Corporate Area) Act is explicit and clear. There is nothing in the Act which would permit the Minister the flexibility to issue more than one licence "depending on his view of what would be efficient"

I will now address the question of the Portmore Franchise. The learned trial judge found that Portmore was not within the Corporate Area and that a licence granted under the Public Passenger Transport (Corporate Area) Act which purported to include Portmore Zone was *ultra vires.*

On the date of entry into the Franchise Agreement by the parties, Portmore was not a part of the Corporate Area. The Portmore zone was

incorporated into the Corporate Area, subsequent to the Agreement, by virtue of law 9 of 1998, the Public Passenger Transport (Corporate Area) (Change of Name and Amendment) Act and the Public Passenger Transport Act (Kingston Metropolitan Transport Region) Act. The geographical region to which the exclusive licence applied would therefore have been the Corporate Area only. Portmore for which a franchise was given to the appellant was at the time of the Franchise Agreement, as the learned trial judge found, clearly outside the Corporate Area region. The licence granted therefor was *ultra vires*. The Minister's granting of the exclusive licences for Portmore was *ultra vires* and unquestionably illegal.

The learned trial judge was correct in finding that the exclusive licence granted was *ultra vires* the Minister's powers. He however, erroneously concluded that the Arbitrators' omission to find that the grant of the exclusive licence for Portmore was *ultra vires* was not misconduct for the reason that the omission had not been pleaded in the case. The failure of the Arbitrators to find that the Minister had no power to have granted the exclusive licences amounted to an error of law. A point of law can be raised at any time. It does not have to be pleaded for consideration to be given notwithstanding that it had not been raised in the particulars of claim. A court, may at any time, on its own motion consider a point of law, although not pleaded.

This ground is unsustainable:

Ground of Appeal B

> "The Learned Judge erred in law in not holding that, if the Franchise Agreements were *ultra vires* the Minister of Public Utilities and Works, the Appellant and the Respondent had entered into a binding compromise by the Heads of Agreement signed on March 7, 2001 and had in making the said compromise affirmed the validity of the Franchise Agreements, so that it would be unjust and/or contrary to public policy to permit the Respondent to contend thereafter before the Arbitrators and the Court that the Agreements were illegal."

Supplemental Ground of Appeal

> "The learned judge erred in law in holding that the alleged illegality of the licence required the arbitrators to reject the Appellant's claim, when the Appellant had entered into the Franchise Agreements in good faith on the basis of a licence issue by the Minister pursuant to statute and not quashed or declared to be void by any court of law, so that it would be contrary to public policy and/or good administration for the Respondent to be permitted to escape from its obligations under the Agreements by claiming many years afterwards that the said agreements were ultra vires and void."

Lord Gifford, Q.C. argued that even if the grant of licences was ultra vires, the Franchise Agreement having been executed by the parties were intended to include binding contractual obligation by them for ten years. He contended that the appellant operated the Franchise Agreement in good faith and that even if section 3 (1) of the Public Passenger Transport (Corporate

Area) Act does not permit a plurality of licences, the law would accord the appellant some remedy, as, it would be unjust and or contrary to public policy to find otherwise. He further argued that there is in place, a binding compromise agreement which validated the Franchise Agreement.

The first question arising is whether the appellant can obtain relief notwithstanding the illegality of the Franchise Agreement. It cannot be denied that the Franchise Agreement was executed by the parties and that a Heads of Agreement of 2001 was made pursuant to the Agreement. Nor can it be disputed that the Heads of Agreement was effectively a compromise of the Franchise Agreement.

In the matter under review, the Road Traffic Act becomes relevant in determining whether the illegality is such that a court could be persuaded to lend its sympathy to the appellant. The Road Traffic Act provides for the classification regulation and operation of public passenger vehicles. It classifies public passenger vehicles as stage, express, contract and hackney carriages. The "exclusive licences" granted to the appellant related to stage and hackney carriages. It is necessary to outline certain sections of the Act.

Section 61 (1) states:

> "... no person shall use or cause or permit a motor vehicle to he used on any road as a public passenger vehicle unless he is the holder of a

> licence (in this Act referred to as a "road licence" or "an emergency road licence") to use it as a vehicle of that class in accordance with the provisions of this Part"

Section 61 (5) reads:

> "If any person uses or causes or permits a vehicle to be used in contravention of this section, he shall be guilty of an offence and shall be liable on conviction thereof to a penalty not exceeding twenty-five thousand dollars and the vehicle shall be liable to be seized and, subject to subsection (7) (b), kept in the possession of the Police until the licence required by this Part has been obtained and produced."

Section 62 specifies the classes of vehicles for which a road licence may be issued. These include, among others, stage and express carriages.

Section 10 of the Public Passenger Transport (Corporate Area) Act excludes the applicability of sections 61, 62, 63 and 68 of the Road Traffic Act with respect to transportation services granted under section 3 of the Act. It provides:-

> "Section 61, 62, 63 and 68 of the Road Traffic Act (which relate to road licences for public passenger vehicles) shall not apply to any services provided under or by virtue of any exclusive licence granted under section 3..."

Although section 10 (1) of the Public Passenger Transport (Corporate Area) Act, speaks to the exclusion of the provisions of sections 61, 62, 63 and 68 of the Road Traffic Act from section 3 of the Public Passenger Transport (Corporate Area) Act, the appellant, however, could not seek sanctuary under this section. The Franchise Agreement was illegal. The operation of stage and express carriages in the absence of a valid road licence carries criminal sanction under section 61 (5) of the Road Traffic Act. It follows that the appellant's operation of the public passenger vehicles under the licence granted amounted to a violation of that Act and accordingly an illegality.

Illegal contracts are null and void. As a general rule, a court will not entertain a contract which is anchored on illegality. Where a transaction is tainted by illegality a party would not be entitled to pursue a right of action based on such transaction. See **Eisen v. McCabe** [1920] 57 Sc. L.R. 534, H.L. A claim founded on an illegal contract is rendered nugatory and therefore unenforceable See **Dennis and Company Limited v. Munn** (1949) 1 All ER 616. *"No* court will lend its aid to a man who founds his cause of action on an immoral or illegal act" per Mansfield, C.J in **Holman v Johnson** All ER reprint [1775 – 1802] 98 at 99.

A court will not enforce an arbitral award having its genesis in an illegal contract and will set it aside on the ground of misconduct. See **Harbour**

Assurance Company v Kansa [1993] 3 All ER 897 and **Soleimany v Soleimany** [1999] 3 All ER 847. It follows that a breach of an illegal contract cannot be a basis for an award of damages.

There is no doubt that the appellant was unaware of the illegality of the Franchise Agreement. This however, would not avail it. The appellant was a party to the Agreements. A claimant who is a party to an illegal contract cannot pray in aid ignorance of the law. In **Waugh v Morris** (1873) L.R. 8 Q.B. 202 at 208 Blackburn J, said:

> "... where a contract is to do a thing that cannot be performed without a violation of the law it is void, whether the parties knew the law or not"

Although public policy favours the enforcement of compromises of disputes to which parties agree a court would not normally enforce a compromise agreement founded on an unlawful contract. This proposition was propounded by the learned authors of Chitty on Contract 1999, 28th Edition at 17-013 in the following terms:

> "Compromises result in a saving of public resources and probably produce an optimum result from the disputants' point of view in that they have agreed to one, and that this has not been imposed by a third-party mediator. However, to enforce compromises of illegal contracts would have the effect of undermining the public policy underlying the illegality doctrine: it would be paradoxical, to say the least, to permit a party to enforce the compromise of an illegal contract but not the

> illegal contract itself. Whether the compromise of an illegal transaction is itself enforceable depends on the question of whether the court must give effect to the broad social policy underlying the illegality despite any private arrangement between the parties. Normally this will mean that the compromise, like the illegal contract, is not enforceable."

The grant of exclusive licences by the Minster rendered the Franchise Agreement illegal. The entry of the parties into a compromise agreement by virtue of the Heads of Agreement could not validate the Franchise agreement. The Franchise contracts were incapable of lawful performance. It follows therefore, that the appellant could not rely on the compromise agreement, it being unenforceable, nor could the agreement be a foundation upon which damages could be awarded.

There may, however, be exceptional cases where, in the interest of justice, the court may countenance an illegal contract and make an award thereon. This would be dependent on the circumstances on which the illegality is grounded.

A court may enforce an illegal contract on the ground of public policy as in the case of **Binder v. Alachouzos** [1972] 2 All ER 189 cited by Lord Gifford, Q.C. In that case the parties were borrower and lender. The complaint of the borrower was that the transaction was in breach of the Money Lending Act. The borrower defaulted subsequent to the parties

arrival at a compromise. The compromise was upheld by the court for the reason that the compromise was a dispute as to whether the contract was in fact illegal under the Money Lending Act.

The enforcement of an illegal contract will not be upheld if to do so would endanger members of society or would be inimical to public interest. In the case under review, the appellant commenced operation under the Franchise Agreement contrary to the Public Passenger Transport Act. It continued operation in contravention of the Road Traffic Act. The transportation of persons in a public passenger vehicle in breach of the Road Traffic Act would not only be inimical to the interest of the public but also unenforceable.

This ground fails:

Grounds of Appeal C and D

> "C. The Learned judge failed to take account of the finding of fact made by the Arbitrators, namely that the Respondent had failed in breach of the 1996 Heads of Agreement to allocate a bus site to the Appellant, and that therefore the condition precedent relied on by the Respondent was itself subject to a condition precedent which had failed.
>
> D. The Learned Judge failed to take account of the finding of fact made by the

> Arbitrators, namely that the Respondent had failed in breach of the 1996 Heads of Agreement to allocate a bus site to the Appellant, and that therefore the condition precedent relied on by the Respondent was it self subject to a condition precedent which had failed."

Lord Gifford, Q.C. argued that it was not the intention of the parties to amend the 1995 Franchise Agreement but if there was such an intention, the government, under the 1996 Heads of Agreement was obliged to fix a new fare table and if there was an intention to relieve the Government from its obligation this was subject to a condition which had not been fulfilled. He further argued that clause 9 of the 1996 Heads of Agreement was not in accordance with any proposition that the parties intended to amend the Franchise Agreement as, it was conditional on improvements which where never effected.

Mr. Mahfood, Q.C. submitted the 1996 Heads of Agreement effectively varied the obligations of the parties under the 1995 Franchise Agreement. He argued that under the 1996 Heads of Agreement a new fare table would have had to be deferred pending the implementation of requisite improvements by the appellant which had not been carried out.

The learned trial judge found that the Arbitrators were in error when they held that the 1996 Heads of Agreement did not vary or amend

the Franchise Agreement and that it was an error on the face of the award. It was also his finding that the Arbitrators having found that clause 9 was not a condition precedent to the other clauses in the Heads of Agreement of 1996, had erred as there was no conditional connection between these clauses He further found that they misconstrued clause 7 (iii) (b) of the 1996 Heads of Agreement.

In light of the foregoing, the question now arising is what was the intention of the parties when they executed the 1996 Agreement? In exploring the intent of the parties one has to look at clause 32 of the 1995 Franchise Agreement and clauses 7 (iii) (b) and 9 of the Heads of Agreement.

Clause 32 of the Franchise Agreement, so far as relevant for the purposes of this appeal, provides;

> **"FARE STRUCTURE AND FARE ADJUSTMENT**
>
> a) The first fare table to apply with effect from March 1, 1995 will be table identified herein as Appendix D. The fares in that table are those in existence at February 28, 1995. The parties appreciate the inadequacy of those fares, even after taking into consideration as subsidy of $10 Million which is to be provided for each franchise for the three months ending May 31, 1995. Therefore a new fare table (hereinafter called the Second Fare Table) will be made available not later than April 30, 1995 to apply with effect from June 1, 1995.
>
> b) Fares in the Second Fare Table will be determined:-

(i) to yield a rate of return on capital employed of 15% and adjusted for inflation point to point February 94- 95 using the Jamaica all groups Consumer Price Index;

(ii) to recognize in full all operating and administrative costs;

c) For purposes of the second paragraph the following are hereby agreed:-

Capital Employed will comprise the cost of the fixed assets as listed at Appendix E plus working capital (exclusive of bank overdraft)

Average number of seats per bus = 29

Average passenger load factor = 80%.

d) Fare structure will have a mechanism to take into account non-revenue earning seat miles (along Nelson Mandela Highway) in Spanish Town and Portmore routes and effect of concessionary fares.

The parties agree that bus fares shall be adjusted in accordance with the general provisions set forth below and as more particularly described in Appendix B to reflect increases in the cost of operations required by the Franchise Agreement and to ensure that the Franchise Holder can achieve a fair and reasonable profit from public transport operations. The parties also agree that the Office of Utilities Regulation (OUR) or such other office that may be established for the purpose will administer the fare adjustment mechanism. Until the OUR is established a joint commission will be set up to review the fare adjustment mechanism. The commission will consist of three individuals: one selected by the Government; one selected by the Franchise Holder and both commissioners will select the third who shall be Chairman. The commission shall dispose of all applications within thirty days."

Clause 7 (iii) (b) of the Heads of Agreement states:

(b) New Fare Table

"It is agreed that the proposed new fare table will be reviewed and that the computations revised to reflect:

1. the concessions and assistance being provided by Government in areas which based on the existing Franchise Agreement are the responsibilities of the Franchise Holders, and

2. increases in costs which have taken place since the recommendations of the Shirley Committee."

Clause 9 states:

FRANCHISE AGREEMENT

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

Lord Gifford, Q.C. placed great reliance on clause 9 of the Heads of Agreement as being fundamental in determining the intention of the parties. He argued that the Agreement of 1996 was not a contract by which the parties could be bound, it was merely an agreement to negotiate. Unless and until the Franchise Agreements were varied, he submitted, the parties were bound by them. He sought to rely on the case

of ***Courtney and Fairbairn v Tolaini*** [1975]1 All ER 716.

Courtney and Fairbairn v Tolaini (supra) underpins the principle that a contract to negotiate is unknown to law. The question arising in the case under review is whether the 1996 Heads of Agreement was an agreement between the parties to negotiate or a contract. The parties entered into a Franchise Agreement in 1995. It was a requirement of clause 1 of that Agreement that the holder of the franchise adhered to certain practices and standards in the operation of the transportation services. That agreement was made essentially for the improvement of the transportation system. Subsequent to this the parties entered into a Heads of Agreement in 1996. By clauses 1 to 8 of that Agreement, they agreed to certain provisions with respect to subsidy, buses, depots, school bus service, general training programmes, fares, fare tables and to the introduction of a cashless system. These were inextricably bound up with terms and conditions provided for in the 1995 Agreements. At the time of execution of the 1996 Agreement, it is clear that such an agreement would not have been brokered unless the practices and standards adopted by the appellant in providing the transportation service had fully accorded with those prescribed by clause 1 of the 1995 Agreement. It is obvious that the parties having reviewed that Agreement were cognizant of the fact that it required modification.

It cannot be denied that the terms of the 1996 Heads of Agreement would

have to some extent altered the parties' rights and obligations under the 1995 Agreement. By clauses 1- 8, the parties had agreed terms which varied their rights and obligations under the 1995 Agreement which essentially compelled amendment of that 1995 Agreement. Clauses 1- 8 of the Heads of Agreement must be construed as a variation of the 1995 Franchise Agreement. Clause 9 was included as a safety net to ensure that any term or condition which the parties omitted to include in their quest to modify the Franchise Agreement would be discussed and agreed upon by June 1, 1996. On a true interpretation, clause 9 is an agreement to further discuss amendments to the 1995 Franchise Agreement.

By Clause 7 (iii) of the 1996 Heads of Agreement the parties agreed that a new fare table would be implemented, conditional on improvements in the transportation system. It is obvious from the terms and conditions of the Franchise Agreement, that there was need for improvement in the transportation system in 1996 when the Heads of Agreement was executed. It is also clear that a new fare table would not be put into operation until the appellant had effected the requisite improvements including, implementation and maintenance of Schedules, placing additional buses in service, and the improvement of the conduct of bus crews, as outlined in the 1995 Franchise Agreement. It was also a term of the Heads of Agreement that the Government would give assistance by doing, among other things, providing subsidy of $26.4 million.

It is clear that in 1996, on the execution of the Heads of Agreement both parties were aware that there were inadequacies in the transportation system and it was agreed that any fare increases would be deferred until these deficiencies were remedied. It is obvious that the intention of the parties was to vary the terms of the 1995 Franchise Agreement to include a provision to suspend the implementation of the Second Fare Table until the requisite improvements were put in place by the appellant.

It was a further submission of Lord Gifford, Q.C., that if it were the parties' intention that the 1996 Agreement should be an amending agreement, express reference would have been made to a "second fare table" therein. The implementation of a "second fare table" were the operative words in clause 32 of the 1995 Franchise Agreement, he contended.

The fact that the 1996 Heads of Agreement alludes to "proposed new fare table" and not "Second Fare Table" and that it did not expressly specify amending clause 32 of the 1995 Franchise Agreement does not in any way impact upon the effect of the agreement of 1996. That Agreement was an enforceable contract varying the 1995 Agreements.

It is also of significance that on May 11, 1995 an Interim Commission chaired by Professor Shirley was established. On September 1, 1995 it made recommendation to the Government for a scale for introduction of the second fare table. It follows that the proposed new fare table mentioned in the 1996 Heads of Agreement is with reference to the second fare table. The learned trial judge found that the arbitrators had erred in finding that the new fare table did not relate to the second fare table provided for in the Franchise Agreement of 1995. He was correct in so finding.

It was also submitted by Lord Gifford, Q.C. that if the Heads of Agreement was not a variation of the Franchise Agreement, then, clause 43 of the Franchise Agreement was included to give that Agreement precedence in the event of any inconsistency existing between the Franchise Agreement and any other document. The Franchise Agreement, he submitted, made provision for a second fare table to apply with effect from June 1, 1995, but the Heads of Agreement provided for the implementation of a new fare table to be implemented after necessary improvements were effected. These, he contended, were obvious discrepancies and inconsistencies existing in respect of both Agreements. This submission lacks merit.

Clause 43 reads:

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

The purpose and intent of the Heads of Agreement was to seek to alter or amend the Franchise Agreement. There was an obvious necessity for the amendment. The Heads of Agreement proposed to alter the Franchise Agreement which preceded it and would obviously be inconsistent with the Franchise Agreement.

It was also the contention of Lord Gifford Q. C that, in failing to provide a new bus depot, a condition for effecting the improvements, the Government is attempting to benefit from its breaches. The Government, he argued, having not provided a depot could not be released from the obligation to provide a second fare table.

This submission is unsustainable as there is nothing in1996 Heads of Agreement to demonstrate that the provision of depot should precede improvement of the bus service. The Agreement specifically provided for the

improvement of service and the second fare table would not have come into effect until that condition had been fulfilled. This ground also fails.

Grounds E and F:

> E. The learned Judge erred in law in holding that the Arbitrators had erred by failing to hold that the Appellant failed to take reasonable steps to mitigate its losses.
>
> F. The Learned Judge erred in finding that the [sic] after the anticipatory breach of contract on the part of the Respondent, the Appellant had a duty to mitigate its losses by ceasing to carry out its obligation under the contract."

These two grounds are with reference to the question of damages. In light of the decision that the learned trial judge was correct in setting aside the award of the Arbitrators it becomes unnecessary to give consideration to these two grounds as the contract upon which the arbitrators made the award was in fact void and unenforceable.

I would dismiss the appeal and allow the counter notice of appeal with costs to the respondent to be agreed or taxed.

PANTON P.

ORDER:

The appeal is dismissed. The order of Mr. Justice Brooks, J., is affirmed. Costs to the respondent to be agreed or taxed.