[2011] JMCA Civ 34

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 117/2004

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

BETWEEN NATIONAL TRANSPORT CO-OPERATIVE SOCIETY LTD APPELLANT

AND THE ATTORNEY GENERAL OF JAMAICA RESPONDENT

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

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

28, 29, 30, 31 March, 1 April and 30 September 2011

MORRISON JA

Introduction

[1] As I indicated in my judgment, delivered on 20 December 2010, on a preliminary issue which arose in this appeal ([2010] JMCA Civ 48, para. [8]), the matter has a long history, which has been fully described in judgments previously delivered by Brooks J in the Supreme Court, by Panton JA (as he then was), Harrison and Harris JJA in this court and, most recently, by the Judicial Committee of the Privy Council, in a judgment

delivered by Lord Neuberger of Abbotsbury, on 26 November 2009. I will therefore not rehearse that history, save as may be necessary for the purposes of the issues with which the court is now concerned.

[2] For nearly eight years now, the appellant ('NTCS') has been trying to recover from the Government of Jamaica ('GOJ') the fruits of an award handed down in its favour ('the award') on 2 October 2003 by arbitrators ('the arbitrators') appointed by the parties pursuant to an arbitration agreement between them. By this award, GOJ was ordered to pay NTCS damages in the total amount of $4,544,764,113.00, with interest and costs, by way of compensation for losses claimed by NTCS in respect of the six year period 1996–2001 for the breach by GOJ of two franchise agreements dated 1 March 1995. Under the terms of those agreements, NTCS had been given exclusive licences by GOJ to operate public passenger transport services in the Northern and Portmore zones of the Kingston Metropolitan Transport Region ('KMTR'), for a 10 year period commencing 1 March 1995.

[3] GOJ's challenge to the award by proceedings in the Supreme Court was upheld by Brooks J and the Court of Appeal (in judgments delivered on 29 November 2004 and 6 June 2008 respectively). Both courts accepted GOJ's contention that the franchise agreements were illegal and/or void, because the Minister of Transport and Works ('the Minister'), who had granted the licences, had acted contrary to the provisions of section 3 of the Public Passenger Transport (Kingston Metropolitan Transport Region (KMTR))

Act ('the PPT Act'), by which the Minister only had the authority to issue a single licence in respect of the KMTR.

[4] However, NTCS prevailed again in its appeal to the Judicial Committee of the Privy Council. In a judgment delivered on 26 November 2009 ([2009] UKPC 48), it was held, in agreement with the courts below, that the franchise agreements were not in compliance with the PPT Act, and were therefore illegal and ineffective. However, the Board considered that, despite this, the franchise agreements were able to satisfy the provisions of Part III, in particular, section 63 of the Road Traffic Act ('the RT Act'), under which the Transport Authority was empowered to grant a road licence in respect of the classes of vehicle covered by the franchise agreements, for a period of three years from the date of issue of such licence. On this basis, the Board accordingly held that the franchise agreements, although not having been validly granted, nevertheless took effect as valid road licences granted pursuant to section 63 of the RT Act.

[5] In the result, the Board allowed NTCS' appeal and ordered that the case should be remitted to this court, "in order to consider the consequences, in the light of the fact that the duration of the Franchise Agreements was only three, not ten, years, and in the light of other issues relating to quantum (and in particular the relevance of the duty to mitigate) which the Board has not had to consider" (per Lord Neuberger, who delivered the judgment of the Board, at para. 79).

[6] This decision immediately gave rise to a further dispute between the parties as to the exact scope of the referral of the matter to this court. The court therefore heard

arguments from both sides on this issue in September 2010 and, by our decision given on 20 December 2010, it was determined that this court was required by the judgment of the Board to consider (a) the effect on the award of the arbitrators of the reduced period of the franchises, as a result of the Board's ruling on the illegality issue and (b) the question of mitigation of damages. This judgment is accordingly concerned with these issues, the court having heard further evidence and submissions from both parties on the matter between 28 March and 1 April 2011.

The reduced period of the franchises

[7] The franchise agreements between GOJ and NTCS took effect from 1 March 1995, for a period of 10 years. It is now common ground that GOJ unilaterally purported to terminate the agreements on 7 September 1998, when it granted an exclusive licence to Jamaica Urban Transit Company Ltd ('JUTC'), a company wholly owned by it, to operate bus services throughout the KMTR. NTCS refused to accept this termination and continued to operate its two franchises until 7 March 2001, when, pursuant to a compromise agreement arrived at between the parties, it gave up the franchises. The arbitrators' award in respect of NTCS' losses for the six year period 1 March 1995-7 March 2001 was broken down as follows:

> "For the year 1995 - 1996 the sum of - $52,886,561.00
> For the year 1996 - 1997 the sum of - $635,530,827.00
> For the year 1997 - 1998 the sum of - $692,998,537.00
> For the year 1998 - 1999 the sum of - $1,028,162,434.00
> For the year 1999 - 2000 the sum of - $1,220,274,092.00
> For the year 2000 - 2001 the sum of - $914,910,662.00."

[8] The arbitrators also awarded interest on the award, to be "calculated from the end of each accounting year in which damage was suffered until the date of the award herein calculated at the average of the Treasury Bill rate and the Commercial Bank lending rate".

[9] The result of the Board's decision is that, given that the licences issued to NTCS would have been effective for three years only, that is, 1 March 1995 to 28 February 1998, the damages awarded by the arbitrators in respect of the subsequent period, 1 March 1998 – 7 March 2001, are now wholly irrecoverable.

[10] After the conclusion of the evidence before Brooks J, the parties arrived at an agreement set out in their joint letter to the Registrar of the Supreme Court dated 17 June 2004. This agreement was described by GOJ in its written case in the Privy Council appeal as "an agreement entered into by the parties to settle the financial results of the action by reference to the issues raised in the Particulars of Claim" (the full extract from GOJ's case is set out at para. [22] of my judgment on the scope of the referral - [2010] JMCA Civ 48). By this agreement, which was based on calculations done by counsel for GOJ and embodied in a letter to NTCS' attorneys-at-law dated 16 June 2004, the parties sought to adjust the award of the arbitrators to take into account certain concessions made by NTCS in the light of the challenge to the award, as well as to indicate the total due to NTCS after the addition of interest calculated in accordance with the formula set out in the award. In our judgment delivered on 20 December 2010, it was accepted that, as had been submitted by Lord Gifford QC on

behalf of NTCS, the agreement reflected in the 17 June 2004 letter remained binding on the parties.

[11] In an affidavit sworn to on 16 July 2010, Mr Patrick Bailey, attorney-at-law of the firm of attorneys-at-law on the record for NTCS, set out a detailed calculation of the amount due to NTCS, based on the letter of 16 June 2004 written by GOJ's counsel, the joint letter to the Registrar dated 17 June 2004 and the judgment of the Board. In this affidavit, Mr Bailey took as his base Table 3 of the 16 June 2004 letter, in which GOJ's counsel had set out the total award for the years 1995 - 6, 1996 - 7 and 1997 - 8, after adjustment to reflect the concessions made by NTCS and the impact of interest, as follows:

(i) March to June 1995 - nil
(ii) July 1995 - June 1996 - $112,783,148.29
(iii) July 1996 - June 1997 - $836,772,228.49
(iv) July 1997 - June 1998 - $1,353,924,953.43

[12] In order to take into account the decision of the Board that the licences fell to be regarded as having expired on 28 February 1998, Mr Bailey then further adjusted the total for the period 1997 – 1998 (at (iv) above) by reducing it by one third ($451,308,317.81), so as to exclude that part of the total attributable to the months of March, April, May and June 1998, thus yielding a total for the period July 1997 to February 1998 of $902,616,635.62. When this amount is added to the amounts awarded for 1995 - 1996 and 1996 - 1997 (at (ii) and (iii) above), it produces a total of $1,852,172,012.07, which, NTCS submitted, subject to any further reduction that may be ordered by reason of a failure on its part to mitigate these losses (which is the

question with which this appeal is primarily concerned), is the amount in which the society is entitled to judgment.

[13] Mr Mahfood QC for GOJ did not challenge Mr Bailey's methodology or his conclusions on this point, although he did submit forcefully that, had NTCS mitigated its losses as it was obliged to, it would be entitled to a much lesser sum by way of compensation. Mr Mahfood also suggested in his closing arguments in the appeal that NTCS was entitled to no more than $52 million, plus interest, representing a figure which equates roughly to NTCS' original capital investment. Subject to the issue of mitigation, I consider that Mr Bailey's approach, which takes as its starting point the amounts actually awarded by the arbitrators after consideration of the evidence adduced on both sides at the arbitration, is an acceptable one in the circumstances, bearing in mind that the option of remitting the matter to the arbitrators to carry out a detailed month by month assessment of NTCS' losses for the period 1 July 1997 to 28 February 1998 is no longer available.

Mitigation

The issue

[14] One of the grounds upon which Brooks J had allowed GOJ's challenge to the award of the arbitrators was that they ought to have considered whether, and found that, NTCS had been under a duty to take reasonable steps to mitigate its losses, once it accepted GOJ's repudiation of the franchise agreements. However, although in its grounds of appeal from that judgment NTCS had specifically challenged the judge's

findings on this point, this court considered that, in the light of its agreement with Brooks J on the illegality point, it was unnecessary to deal with the issue. But Harrison JA did express the view (at para. 62 of his judgment) that, had the result of the appeal been different, NTCS "ought to have mitigated its losses". It is against this background that the Board remitted the relevance of the duty to mitigate to this court as a specific issue for its consideration.

[15] GOJ's original position in its pleaded case before Brooks J was that NTCS ought to have taken steps to mitigate its losses as of 7 September 1998, which was the date on which GOJ had clearly indicated its intention to repudiate the franchise agreements by granting an exclusive licence to JUTC to operate bus services in the KMTR region. Against this background, NTCS submitted that the issue of mitigation no longer arose in the light of the Board's ruling that the licences were effective for three years only. However, GOJ then sought and was granted permission to amend its particulars of claim to contend that "the arbitrators erred by failing to hold that [NTCS] failed to take any reasonable steps to mitigate its losses".

[16] NTCS contends that at no point between July 1995 and 28 February 1998 could it be said to have acted unreasonably by continuing to operate the franchises in accordance with the agreements, notwithstanding GOJ's clear breach of those agreements. GOJ contends, on the other hand, that NTCS ought to have taken steps to mitigate its losses from the moment it became clear that GOJ did not intend to

implement the recommendations of the Shirley Commission, which was, "at latest", December 1995.

The facts revisited

[17] In order to appreciate the submissions that were made to us on both sides on this issue, it is necessary to rehearse briefly the relevant aspects of the factual background. In addition, it will be necessary to consider the evidence which was received at the hearing before this court (pursuant to permission granted by the court), from Mr Ezroy Milwood, on behalf of NTCS, and Dr Alton Fletcher, on behalf of GOJ.

[18] NTCS claimed and the arbitrators found that, in breach of clause 32A of the franchise agreements (which had acknowledged "the inadequacy" of the fares provided for in the agreements), GOJ had failed to provide and implement a new table of the fares that it was permissible to charge for public passenger carriage ('the second fare table') by 30 April 1995, to apply with effect from 1 June 1995. Clause 32A(b)(ii) provided that the fares in the second fare table would be determined to provide to NTCS a rate of return on capital employed of 15% and "to recognise in full all operating and administrative costs [minus GOJ's contribution]". GOJ failed to provide a second fare table meeting these criteria despite the recommendations (delivered on 1 September 1995) of the team of experts chaired by Professor Gordon Shirley ("the Shirley Commission"), which had been asked to consider the matter. Notwithstanding this breach by GOJ, NTCS continued to operate the bus services pursuant to the franchise agreements and continued to do so until 7 March 2001, when a

compromise was arrived at between the parties, which paved the way for the arbitration proceedings to settle the outstanding matters between them.

[19] In the interim, however, further discussions and negotiations between the parties had resulted in an agreement, documented in a Heads of Agreement ('the 1996 HOA') signed on behalf of NTCS on 23 February 1996 and by the Minister on behalf of GOJ on 18 April 1996. This document, to which I shall have to return in greater detail later in this judgment (see para. [37] – [38] below), set out extensively the basis upon which it was proposed by the parties that GOJ and NTCS should continue in their joint venture for the provision of bus services to the public in the KMTR in the future.

Mr Milwood's evidence

[22] In his affidavit sworn to on 29 September 2010, Mr Milwood, who is and was at all material times the president and chief executive officer of NTCS, outlined the size and composition of the membership of NTCS. During the relevant period, NTCS comprised some 350 members, who were owners and operators of 450 buses and, in addition to its members, in excess of 1500 persons were employed by NTCS as drivers, conductors, inspectors, washers, mechanics, caretakers, clerical and administrative staff. Based on the expected duration of the franchise agreements and the provision for a 15% return on capital employed, "members of the NTCS had taken out Bank Loans (sometimes using, among other things, their residences as part of the collateral security for the said loans)".

[23] Mr Milwood then went on to discuss the basis upon which NTCS' members had been induced to invest in the transportation sector in 1995, pointing out that, "…prior to entering into the Franchise Agreements, the then prevailing economic conditions were so dire that the NTCS, through its members, would not have made investments in the transportation sector, but for the provision for a 15% return referred to in the Franchise Agreements and the start-up subsidy of Thirty Million Dollars ($30,000,000.00) provided by the GOJ to NTCS as a further inducement to have the NTCS operate in the designated Franchise Zones".

[24] When the promised second fare table was not implemented, he went on to say, "numerous meetings were held between the NTCS and the GOJ in an effort to have the Fare Table implemented". In his examination in chief before us, Mr Milwood stated that while he could not remember how many meetings were in fact held, there were a number of them, at which GOJ was represented by a team led, firstly (in 1995) by Minister Robert Pickersgill and subsequently by Minister Peter Phillips, along with other officials, including Dr Fletcher. At those meetings the representatives of GOJ continued to promise to implement the second fare table as soon as possible and he recalled that Minister Pickersgill in particular was "most positive", speaking of having a "big fanfare" to introduce the new fare table and forming a committee to make the necessary arrangements. Various meetings were planned for June, July, August and September 1995 "to celebrate clean buses, people in uniform and to announce the new fare table". However, even after the signing of the 1996 HOA in February 1996, and despite further meetings between representatives of NTCS and GOJ, no new fare

table was issued, although GOJ's position continued to be that, despite the problems, they would be resolved and the new fare table would be introduced "soon".

[25] In his affidavit, Mr Milwood went on to speak to the question of whether it would have been practical for NTCS to have discontinued the provision of the bus service in the KMTR in June 1995 or at any time before March 2001:

> "It was not practical to discontinue the services in June 1995 or anytime before the actual discontinuance of the services in March 2001 for the following reasons:-
>
> (a) Despite the inadequate income, the Bank Loans aforesaid had to be serviced from such income as was generated by operating the buses.
>
> (b) Many households depended on the income from the buses for their "*bread and butter",* and consideration had to be given to the many children whose school fees and educational expenses were solely dependent on the buses.
>
> (c) The transportation system would have collapsed and been thrown into chaos as the commuting public depended heavily on the service provided by the NTCS.
>
> (d) There was no market for the purchase of the fleet of buses in the event the NTCS had terminated the services and withdrawn the buses, thereby leaving the NTCS with a large stock of idle buses.
>
> (e) Many workers would have been thrown into unemployment with little or no hope to sustain themselves, family and in particular, children in school.
>
> (f) The NTCS was in no position to meet the redundancies to which staff members would have been entitled as a consequence of terminating the services."

[26] As was to be expected, Mr Milwood was vigorously cross examined. In answer to Mr Mahfood, he described himself as an experienced businessman, with an

appreciation for whether a business venture is profitable or not. He accepted that implementation of the recommendations of the Shirley Commission in 1995 with regard to the second fare table would have resulted in a "huge increase" of 98% in fares, but considered that this was necessary to make NTCS' operation viable and agreed, as was suggested to him by Mr Mahfood, that this was "a matter of the greatest importance to me and my members". Mr Mahfood then drew Mr Milwood's attention specifically to the statutory declaration, sworn to by him on 26 April 2002, which had been tendered in the proceedings before the arbitrators (and which became exhibit 1 in the hearing before us). He accepted that, as he had stated then, the franchise agreements had "explicitly recognised that the fares prevailing as at 28th February 1995 were inadequate" (para. 13) and, further, that as a consequence of the fact that the second fare table was not introduced before 30 April 1995 or at any time during that year, NTCS' operations "were doomed to run at a loss from the outset" (para. 14). Thus, Mr Milwood said, "I fully understood that from the outset the business was operating at a loss…every day we operated, we were losing money", from April through December 1995, notwithstanding a substantial subsidy from GOJ.

[27] Turning to the numerous meetings which were said to have taken place after the failure to implement the second fare table in June 1995, Mr Milwood described the objective of these meetings from NTCS' point of view as having been to secure the implementation of the second fare table, "because we wanted to continue operations on a basis that was profitable", although he did observe that, in his experience, "nobody in Jamaica has ever run a profitable bus company". As a result of this

situation, subsidies for such a service had always been the reality. While he was worried about the losses, he said further, he did not consider them enough to cause NTCS to close down its operations, as he considered responsibility for NTCS' substantial losses to be GOJ's responsibility. When it was then suggested to him by Mr Mahfood that, "At all times you intended to hold [GOJ] liable for the substantial losses you were suffering", Mr Milwood's response was that, as a businessman, that was indeed his position between 1995 and 1997, and that in due course NTCS did file action to recover those losses, though he disagreed with the further suggestion that he was "comfortable in thinking that GOJ could afford to pay for these losses".

[28] Mr Milwood had made the point in his affidavit, (at para. 9), which he reiterated in his evidence before us, that "Any responsible withdrawal of service would have to be done in an orderly manner." However, in answer to Mr Mahfood, he accepted that, prior to the issue of an exclusive licence to JUTC, he had not initiated any discussion with GOJ with a view to achieving such a withdrawal. This was because, he maintained, NTCS had continued to operate in good faith, based on GOJ's promises during the months of negotiation. In continuing to provide the service, Mr Milwood said, he considered that NTCS was performing a civic duty, as GOJ did not have enough buses to continue to operate without making reasonable arrangements to take over NTCS' buses. As far as he was concerned, he had an agreement with the Minister which he had every intention of honouring. When JUTC did take over, not many workers were thrown into unemployment and issues of redundancy and the like were in fact dealt with as part of a smooth transition. Finally, Mr Milwood agreed with Mr

Mahfood's suggestion that "chaos would occur only if there had been a sudden suspension of service without replacement, as opposed to an orderly transition from one operator to another".

[29] Re-examined briefly by Lord Gifford, Mr Milwood confirmed that he adhered to the following statement in his statutory declaration (exhibit 1, para. 21) in the arbitration proceedings:

> "By the beginning of 1996 the position was that [NTCS] had been operating for seven months (June to December) with no Second Fare Table and with no further subsidy or other assistance. [NTCS] was suffering severe losses and I made it known that [NTCS] could not continue to operate the franchises. The Ministry…responded by offering a further subsidy, but in the form of buses to be leased to [NTCS] on concessionary terms. The buses were to be dedicated to the School Bus Service during specified hours on school days, which meant that during those hours the fares obtainable by the operators would be severely reduced. The Heads of Agreement…reflect the agreement which was reached in relation to these buses."

Dr Fletcher's evidence

[30] Between 1994 and 2005, Dr Fletcher served as transport consultant to the Ministry of Works and he was the task manager for the Public Passenger Transport Rationalisation Programme, which was introduced in 1995. He was also the principal adviser to GOJ on transport matters and, in this capacity, attended meetings of the cabinet from time to time when transport matters were under discussion. He was responsible for the design of the GOJ project to introduce a rationalised bus service for the KMTR and his role was to implement, manage and co-ordinate the project.

[31] On 7 January 2011, Dr Fletcher swore to an affidavit in response to Mr Milwood's affidavit dated 29 September 2010. He disagreed with Mr Milwood's assertion that the transportation system would have collapsed and would have been thrown into chaos if NTCS had suspended its operations. Chaos would occur only if there had been a sudden suspension of service without replacement, as opposed to an orderly transition from one operator to another, and in fact GOJ and NTCS did hold discussions for close to a year before the termination of the agreement with a view to achieving such an orderly transition. As regards the question whether there would have been any market for the buses, GOJ, through the Transport Authority, was willing to purchase the buses from franchise holders and, as a matter of fact, did purchase the buses from the eastern franchise holder, Metro, as part of the taking over of that franchise. The intention was to compensate the owners for the loss of income as well as to prevent having the buses operate illegally in the eastern or any other franchise. At the same time, the franchise holder was granted a sub-licence to operate an "executive bus service".

[32] While it is true that the workers would have lost their jobs with NTCS, Dr Fletcher stated, they would have gained employment with JUTC, the GOJ owned operation, as indeed many NTCS workers, especially drivers and conductors, subsequently did. Thus, any period of unemployment would have been, at worst, short and temporary. GOJ was willing to arrive at a settlement with all the franchise holders who were willing to consider redundancy payments, which is what actually happened with Conurban, the

franchise holder for Papine and Spanish Town. But in the case of Metro this did not happen, because all its workers were employed by JUTC.

[33] Dr Fletcher's evidence was that, although GOJ did not have the capacity to operate the bus service adequately itself between 1995 and 1997, it could have mobilised resources to prevent collapse in the Portmore and Northern Franchises and that, after 1997, its capacity to do so within Portmore and the Northern Zone was enhanced by the building of depots and the purchasing of more buses from overseas. In 1998, when GOJ did take steps to take over public transport, it proposed a public-private partnership through a holding company to implement the takeover. As could be seen from the takeover in 1998 onward, GOJ could have entered into arrangements with NTCS with its co-operation at any time, so that the termination would not cause dislocation to the travelling public. One option would have been for GOJ to purchase buses and have NTCS operate as a sub-licencee. Chaos and dislocation were therefore not relevant to the decision by NTCS to terminate its operations. It was rather a matter of how one went about the termination and NTCS did not at any time after it commenced its operation seek to terminate it by a government takeover.

[34] Dr Fletcher pointed out finally in this affidavit that GOJ had bought all buses from other operators when it took over the Eastern Franchise, so that there was a precedent for the purchase of buses. GOJ had also settled the unused portion of the franchise with the various operators. NTCS, however, which was the only operator to

file suit against GOJ, claimed for past losses and filed an action in court which went to arbitration.

[35] Dr Fletcher was also extensively cross examined by Lord Gifford on his affidavit. Taken directly to the Shirley Commission report, he agreed that after it was issued there were discussions, which included NTCS, on the extent of the recommended increases over the fares then prevailing, as a result of which GOJ had invited the stakeholders to meet with it. He was himself present at some of the subsequent meetings that led up to the 1996 HOA and would also have had a report of what took place at those meetings which he did not attend personally. The position of the franchise holders in those meetings was that they wished to see the recommendations of the Shirley Commission implemented, while GOJ wanted to implement parts of it, as an alternative to implementing it in full. GOJ's objective in these meetings, Dr Fletcher told us, was to find a way of honouring its obligations to the franchise holders, but in a manner that would be less onerous to the public. An additional concern, shared by both parties, was that the travelling public might not find fares set at the economic rate, that is, the rate recommended by the Shirley Commission, affordable and that this could lead to reduced demand for bus services. (In fact, Dr Fletcher said, NTCS did not want the Shirley Commission's recommendations to be published because of potential public impact.) GOJ's thinking was that, by the provision of concessions to the franchise holders, it could reduce the required increase to a level that would be more acceptable to the travelling public (given that clause 32A(b)(ii) of the franchise agreements specifically provided that fares in the second fare table should be

determined "to recognise in full all operating and administrative costs"). GOJ also had concerns about issues such as the quality of the service provided to the public as well as the question of scheduling.

[36] Dr Fletcher described NTCS as "very keen" that GOJ's commitment to implement the second fare table should be honoured and agreed that NTCS co-operated fully in the discussions leading up to the 1996 HOA, which they indeed signed. The 1996 HOA was an attempt to address some of the problems, albeit on a temporary basis, and the expectation was that at some time in the future GOJ would be able to honour its promise.

[37] The provision in the 1996 HOA for buses to be made available to NTCS at concessionary rates, which was in fact done, was described by Dr Fletcher as "a key part of the agreement". The provision of a depot was also regarded by both sides as important to the carrying out of the franchises, as it would facilitate "a better scheduling system" and GOJ was at the time of the 1996 HOA looking for a suitable site on which to build a depot, which, Dr Fletcher estimated, if all went well, would probably take 18 months to be completed. In addition to providing for the school bus service, which was also a matter of importance to GOJ at this time, the 1996 HOA also contemplated the provision, at GOJ's expense, of training programmes for drivers and conductors, in respect of which it was agreed that (as in fact happened), GOJ and NTCS would co-operate with each other. It was expected, Dr Fletcher said, that increased training would lead to better conduct on the part of crews. The 1996 HOA also

provided for an immediate fare adjustment to take into account increased operational costs.

[38] Clause 9 of the 1996 HOA recorded the parties' agreement that "the Franchise Agreement[s] between [GOJ] and [NTCS] require amendments, these amendments are to be discussed and agreed by June 1, 1996". Dr Fletcher's evidence was that the expectation was that the amendments to be negotiated and agreed would have been factored into a new agreement. He was not able to recall whether the parties in their discussions leading up to the 1996 HOA had a "time line" for completion of a new agreement, but neither party wished to leave the matter open ended, hence the cut-off date in clause 9 of 1 June 1996. While he was not sure that that was a realistic date, Dr Fletcher said that it was the intention of the parties to complete the process by that date and that, taking in to account all that had to be done to achieve this, he considered that there was a reasonable chance that a renegotiated franchise agreement could have been signed by 1 June 1996, or within a reasonable time thereafter.

[39] However, as it turned out, Dr Fletcher said, no formal amendments to the franchise agreements were made and, after the 1996 HOA was signed, meetings between GOJ and NTCS (at which he was present) continued between 1996 and 1998 with a view to bringing into effect the second fare table. The then minister (Minister Pickersgill) was also in attendance at some of these meetings. During this period, the franchise holders were running the buses on fares which were recognised by the Ministry to be inadequate, but although the Ministry, which was anxious to resolve the

problem, did not take the position that it would never implement any increase, it also held the view that the bus service was not being properly operated. The parties continued to hold discussions and Dr Fletcher initially thought that, after the signing of the 1996 HOA, there was still a reasonable chance that agreement could have been reached on amendments to the franchise agreements with which both parties could work. There was no breakdown of relations and these discussions continued in a co-operative manner, with the parties meeting many times, in the effort to find a solution.

[40] In January 1998, Dr Fletcher testified, the Honourable Peter Phillips took over from Minister Pickersgill as Minister of Transport. Shortly after this, there were some discussions about the franchise holders and GOJ coming together to operate the bus services, but the franchise holders were concerned about "broken promises". In May 1998, the Ministry issued a new proposal for the reconstruction of the transport system, the essence of which was that the existing franchises would be brought to an end and that bus services in the Corporate Area would thereafter be operated by a company owned by GOJ, the JUTC. One ingredient of this proposal was that negotiations should take place with the franchise holders on an "orderly transfer" of the operations to JUTC and in June 1998 negotiations were commenced with NTCS and the other franchise holders with regard to early termination of the franchise agreements, compensation, purchase of buses and re-employment of crews. As a result of these negotiations, a settlement was in due course reached with two of the franchise holders, Conurban and Metro.

[41] Lord Gifford then suggested to Dr Fletcher that, "If NTCS at some point before 1998 had said to GOJ, 'we can't carry on', it would have taken about a year to negotiate an orderly transfer". Dr Fletcher's response to this suggestion was that, while it would have been easy for them to give up the franchises, the issue of compensation would have been a difficult one. So too would have been the question of the actual operation of the bus service, given that JUTC was not formed until 1998. Dr Fletcher considered that it would have been necessary for NTCS to give notice and that, in his view, taking into account all that would have needed to be done during the notice period, one year's notice would have been reasonable. In actual fact, termination of the franchises did take about a year of negotiations with NTCS "and it was close to that in the other cases."

[42] After this period of negotiation, Dr Phillips' new initiative ended in agreement between GOJ and NTCS on various issues. These were in due course captured in the Heads of Agreement dated 7 March 2001, in which it was also agreed that the outstanding matters would be referred to arbitration.

The submissions

[43] We have had the benefit of detailed written submissions as well as full oral argument from counsel on both sides in this matter and for the purposes of this judgment, I will attempt no more than a summary of their respective positions. As already indicated, NTCS' initial position after the decision of the Board became known was that the issue of mitigation no longer arose in the light of the ruling that the

licences were effective for three years only and would therefore have come to an end on 28 February 1998, that is, before NTCS' franchises were effectively terminated by the issue of exclusive licences to JUTC in September 1998. Because GOJ's position had always been that NTCS ought to have taken steps in mitigation after September 1998, Lord Gifford submitted, the Board's decision that the franchises ended on 28 February 1998 effectively meant that no claim could be maintained by NTCS in respect of any losses suffered after that date. GOJ's mitigation point ought necessarily to have fallen away as a result. Accordingly, GOJ's revised position that NTCS ought to have taken steps in mitigation from at latest December 1995 was an afterthought and, in any event, a bad point, only taken at the end of the day with a view to seeking to avoid payment to NTCS.

[44] Lord Gifford submitted that what the court is now required to do is to determine the reasonableness of NTCS' conduct in the post 1995 period and that it is only if the court were to find that NTCS acted wholly unreasonably in continuing to operate the franchises during that period that the damages recoverable could be subject to reduction as a result of a failure to mitigate. On the facts, it was not unreasonable for NTCS to have elected to continue, notwithstanding GOJ's breach in not providing the second fare table by June 1995 as it had contracted to do, given the long term partnership between GOJ and NTCS, involving a substantial investment on NTCS' part, for the provision of a public passenger transport service that the franchise agreements represented. In any event, GOJ had at no time prior to September 1998 repudiated the

agreements totally, but on the contrary, had encouraged NTCS to continue, by meetings (involving participation at the ministerial level), by the provision of subsidies, by the acceptance of payment of franchise fees and by promises to implement the new fare table at some time in the future. The February 1996 HOA was of particular significance in this regard, demonstrating that the parties were co-operatively seeking a way out of the real dilemma created by the need for increased fares, on the one hand and questions of affordability to the travelling public, on the other, and were both trying to make the franchise agreements work in the future by laying out plans that would take some time to come to fruition.

[45] After reviewing the facts and the relevant authorities, Lord Gifford submitted that (a) the cases when an innocent party who affirms the contract will be prevented from recovering full damages against the contract breaker are very limited; (b) even in a case of total repudiation, it must be wholly unreasonable for the innocent party to continue the contract; (c) the authorities all concern an unequivocal repudiation of the whole contract and not delay in performing a term of the contract; (d) the burden is on the contract breaker to prove that the innocent party had no legitimate interest in continuing the contract; and (e) there is no basis for holding NTCS' conduct to have been unreasonable, let alone wholly unreasonable, at any time during the period 1 July 1995 to 28 February 1998.

[46] Mr Mahfood challenged Lord Gifford's characterisation of GOJ's current position on mitigation as an afterthought, pointing out that it was the same position that it had

taken in the proceedings before Brooks J, this court and its written case before the Board. Taking as his starting point the arbitrators' acceptance of NTCS' submission before them that the provision of the second fare table by 1 June 1995 "was considered fundamental by the parties" (para. 15 of the arbitrators' Reasons for Award), Mr Mahfood submitted that NTCS had a duty to mitigate its losses as soon as GOJ was in breach of its duty to implement that fare table on 1 June 1995. Since it was clear at that time or soon thereafter that GOJ had no intention of implementing the second fare table unless NTCS improved its services, which NTCS had no intention of doing, NTCS "should then have mitigated its loss instead of continuing to incur massive losses which it could only recover by bringing an action in Court". The question in this case, it was accordingly submitted, is therefore whether NTCS' conduct was wholly unreasonable or whether NTCS had a legitimate interest in continuing to operate its buses from the date of GOJ's breach in failing to implement the second fare table on 1 June 1995 or, at the very latest, December 1995.

[47] On the facts, Mr Mahfood submitted that this case provides a textbook example of a failure to mitigate and that NTCS' behaviour in the face of massive losses was the "absolute antithesis of the duty to mitigate". It would have been apparent to NTCS from June, and certainly by December 1995, that it was unlikely that the second fare table would be implemented and the 1996 HOA was a reaffirmation of GOJ's position that it was a condition precedent to such implementation that certain steps be taken by NTCS to improve its service. Nevertheless, NTCS continued to accumulate losses, without attempting to initiate with GOJ any discussion on the subject of terminating the

arrangements, because it intended to sue GOJ to recover its losses, thus making this a classic case of an innocent party trying to penalise the wrongdoer. As regards the issue of repudiation of the franchise agreements, it was clear that the fundamental repudiation of the agreement by GOJ was in its failure to implement the second fare table by 1 June 1995 and any apparent co-operation between GOJ and NTCS after that date, including the 1996 HOA, was merely attributable to GOJ's efforts to keep the system operational and did not relieve NTCS of its duty to mitigate.

[48] In all the circumstances, Mr Mahfood submitted that NTCS acted wholly unreasonably in continuing to operate the franchises at a loss, with a view to seeking to recover its loss from GOJ at the end of the day, even after it became "crystal clear" that GOJ had no intention of implementing the second fare table. In the result, NTCS had no legitimate interest in continued performance of the franchise agreements, a legitimate interest for this purpose meaning that the innocent party must not only have reasonable grounds for continuing the contract, but must also take into account the interests of the wrongdoer. NTCS was therefore under a clear duty to take reasonable steps to mitigate its losses by terminating the agreements, pursuant to the right granted to it by clause 13(c) of the franchise agreements. It having failed to do so, NTCS should, even if it has established a claim for damages, be awarded nominal damages only because of its failure to take reasonable steps to mitigate its losses.

Discussion – some legal issues

[49] There is no controversy as to what the mitigation rules require. Both parties referred us to the usually cited statement of the basic rule by Viscount Haldane LC in ***British Westinghouse Electric and Manufacturing Company Ltd v Underground Electric Railways Company of London Ltd*** [1912] AC 673, 689:

> "…I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to
> supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.
>
> The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage
> which is due to his neglect to take such steps. In the words of James L.J. in ***Dunkirk Colliery Co v Lever*** (1), 'The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business.'
>
> As James L.J. indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act."

[50] The innocent party must therefore take all reasonable steps to mitigate the loss flowing from the defendant's wrong and he will not be allowed to recover damages in respect of any part of his loss which is really due not to the breach, but to his own

failure to behave reasonably after the breach (Anson's Law of Contract, 28th edn, page 614). The governing criterion is reasonableness, which is a question of fact dependent upon the particular circumstances of each case, not of law, and the burden of proving that a claimant failed to take reasonable steps in mitigation rests upon the defendant (***Payzu Ltd v Saunders*** [1919] 2 KB 581). This burden, as Professor Furmston puts it (in Cheshire, Fifoot and Furmston's Law of Contract, 15th edn, page 780), "is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame".

[51] A considerable amount of time was also devoted on both sides during the argument to the well known, if not universally liked, decision of the House of Lords in ***White & Carter (Councils) Ltd v McGregor*** [1961] 3 All ER 1178, which was a case on the rights of the innocent party to a contract in the face of a breach amounting to a repudiation of the contract by the other party. The appellants in that case were advertising contractors who had contracted with the respondent, a garage proprietor, to display advertisements over a period of three years. On the day when the contract was actually concluded, the respondent wrote to the appellants to advise that there had been a mistake and required the appellants to cancel the contract. The appellants refused and began the display of advertisements some five months later. The respondent then refused to pay and the appellants then sued him for the whole sum due under the contract, as they were entitled to do if the contract was still alive. The respondent contended that the appellants were not entitled to treat the contract as

remaining in force after he had required it to be cancelled, but only to sue for such damages as they might be able to establish.

[52] In the view of the majority of their Lordships this contention failed and the appellants succeeded. Lord Reid said this (at page 1181):

> "The general rule cannot be in doubt…If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party, has an option. He may accept that repudiation and sue for damages for breach of contract whether or not the time for performance has come; or he may if he chooses disregard or refuse to accept it and then the contract remains in full effect."

[53] Lord Hodson, with whom Lord Tucker agreed, also accepted that the innocent party in these circumstances had an unfettered right to elect to keep the contract alive against the party in repudiation. Lord Hodson considered it (at pages 1192 - 3) to be "settled as a fundamental rule of the law of contract that repudiation by one of the parties to a contract does not itself discharge it", citing in support dicta of Scrutton LJ in ***Golding v London and Edinburgh Insurance Co. Ltd*** (1932) 43 Lloyd's LR 487, 488 ("I have never been able to understand what effect repudiation by one party has unless the other party accepts [the repudiation]."), and Asquith LJ in ***Howard v Pickford Tool Co. Ltd*** [1951] 1 KB 417, 421 ("An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind."). As a result, where the innocent party does not accept the repudiation, as was the case in ***White & Carter***, the contract survives, there being "no duty laid on a party

to a subsisting contract to vary it at the behest of the other party so as to deprive himself of the benefit given to him by the contract".

[54] However, Lord Reid, alone on this point, offered a qualification to the principle (at page 1183):

> "It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. If a party has no interest to enforce a stipulation he cannot in general enforce it: so it might be said that if a party has no interest to insist on a particular remedy he ought not to be allowed to insist on it. And just as a party is not allowed to enforce a penalty, so he ought not to be allowed to penalise the other party by taking one course when another is equally advantageous to him."

[55] Mr Mahfood also referred us to a number of subsequent cases in which ***White & Carter*** was discussed and the true meaning and scope of Lord Reid's qualification were explored and described. In ***Attica Sea Carriers Corporation v Ferrostaal Poseidon Bulk Reederei G.M.B.H.*** [1976] 1 Lloyd's LR 250, a case concerned with the repudiation of a charterparty, Lord Denning MR (with whom Browne LJ agreed) showed no enthusiasm at all for ***White & Carter*** (referring with obvious approval to the comment in Cheshire & Fifoot's Law of Contract, 7th edn, page 560, that the result of the case was "grotesque"). The case was therefore distinguished (at page 255), on the basis that it had "no application whatever in a case where the plaintiff ought, in all reason, to accept the repudiation and sue for damages – provided that damages would provide an adequate remedy for any loss suffered by him". Orr LJ also considered (at page 256) that ***White & Carter*** could be distinguished on the basis that it could not be

said in that case "that the [innocent party] could fulfil the contract without any co-operation from [the other party] and also because in this case [the other party has] set out to prove that the [innocent party] has no legitimate interest in claiming the charter hire rather than claiming damages".

[56] In ***Gator Shipping Corporation v Trans-Asiatic Oil Ltd S.A. and Occidental Shipping*** [1978] 2 Lloyd's LR 357, again a case concerned with the repudiation of a charterparty, Kerr J took the view (at page 374), after considering the speeches in ***White & Carter*** and the decision of the Court of Appeal in ***Attica Sea Carriers***, that "any fetter on the innocent party's right of election whether or not to accept a repudiation will only be applied in extreme cases, viz, where damages would be an adequate remedy *and* where an election to keep the contract alive would be wholly unreasonable".

[57] In ***Clea Shipping Corp v Bulk Oil International Ltd, The Alaskan Trader*** [1984] 1 All ER 129, yet another case concerned with repudiation of a charterparty, Lloyd J, after a full review of the earlier cases, concluded (at page 136) that, notwithstanding the innocent party's unfettered right of election whether or not to affirm the contract after it has been repudiated, "there comes a point at which the court will cease, on general equitable principles, to allow the innocent party to enforce his contract according to its strict legal terms". Although acknowledging (at page 137) that the definition of the point at which the innocent party's right would become subject to a fetter "is obviously a matter of some difficulty", Lloyd J considered that it was safest to

use Lord Reid's language, that is, that the innocent party might well be unable to enforce his contractual remedy if "he had no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages".

[58] Finally in the line of cases to which we were referred by Mr Mahfood on this point is ***Stocznia Gdanska S.A. v Latvian Shipping Co.***, ***Latreefers Inc. and Others*** [1996] 2 Lloyd's LR 132, which was a case involving a shipbuilding contract. One of the issues for decision by the Court of Appeal in that case was formulated by Staughton LJ, with whose judgment the other members of the court (Rose and Hutchison LJJ) agreed, as is there "a doctrine that the innocent party is bound to treat a contract as repudiated forthwith, if he has no legitimate interest in keeping it open for future performance?" (page 136). After referring to ***White & Carter***, ***Attica Sea Carriers*** and ***The Alaskan Trader***, Staughton LJ concluded without further discussion (at page 138) that "I can readily accept that there is such a doctrine". As regards the further question whether the innocent party did in fact have such a legitimate interest on that case, the learned judge went on to say this (at pages 138 – 9):

> "If the [innocent party] were entitled to consult only their own interests, plainly they did have such an interest…But that cannot be the right test. To be a legitimate interest, the innocent party must have reasonable grounds for keeping the contract open bearing in mind also the interests of the wrongdoer."

[59] ***Stocznia Gdanska*** went on appeal to the House of Lords, but their Lordships did not find it necessary to consider the ***White & Carter*** issue, in the light of the court's view of the other issues in the case ([1998] 1 WLR 574, 581, per Lord Goff of

Chieveley). However, in ***Ocean Marine Navigation Ltd v Koch Carbon Inc, (The Dynamic)*** [2003] EWHC 1936 Com (which was brought to our attention by Lord Gifford), after a full and careful review of the cases discussed above, Simon J concluded that the cases established an exception to the general rule that the innocent party has an option whether or not to accept a repudiation, as follows (para. 23):

> "(i) The burden is on the contract breaker to show that the innocent party has no legitimate interest in performing the contract rather than claiming damages.
>
> (ii) This burden is not discharged merely by showing that the benefit to the other party is small in comparison to the loss to the contract breaker.
>
> (iii) The exception to the general rule applies only in extreme cases where damages would be an adequate remedy and where an election to keep the contract alive would be unreasonable."

(For a statement to similar effect, to which we were also referred by Lord Gifford, see ***Reichman v Beveridge and Another*** [2007] Bus LR 412, per Lloyd LJ at para. 17.)

[60] In the light of this unbroken chain of authority since the decision in ***White & Carter*** in 1961, I readily accept that there is a limited category of cases in which the innocent party to a contract may be precluded from exercising his otherwise unfettered right of election either to accept a repudiation of the contract and to sue for damages or to affirm the contract and insist on performance in accordance with its terms. That limited category will, in particular, include cases in which the innocent party can be shown by the wrongdoer to have no legitimate interest, taking into account his own interests and, perhaps, the interest of the wrongdoer, in electing to have the contract performed. This is the basis of Mr Mahfood's submission that in the instant case NTCS

had no legitimate interest in continuing the contract after, at latest, December 1995, taking into account its own interests as well as those of GOJ, the wrongdoer in this case.

[61] It seems to me to be clear that the doctrine that emerges from the ***White & Carter*** line of cases is one which operates in the context of the right of the innocent party to a contract to accept repudiation or to affirm the contract in the face of a breach (indeed, it will be seen that all the cases cited, including ***White & Carter*** itself, were cases directly concerned with this issue). In the instant case, that issue was squarely before the arbitrators, who were required to consider the effect of GOJ's breach of the franchise agreements by not implementing the second fare table by 1 June 1995. Their conclusion on the point was as follows (Reasons, para. 29):

> "The legal position upon the failure of [GOJ] to implement the Second Fare Table by June 1, 1995 was a breach of the Franchise Agreements which entitled [NTCS] to elect to treat the Franchise Agreements as continuing…By signing the 1996 Heads of Agreement the Society was, as Lord Gifford submitted, confirming its affirmation of the Franchise Agreements."

[62] GOJ did not challenge this finding by the arbitrators and, indeed, maintained all the way to the Privy Council that the terms of the franchise agreements were varied and in effect suspended by virtue of the 1996 HOA (see para. 59 of the judgment of the Privy Council). I am therefore inclined to doubt that any question relating to whether NTCS acted within its rights in affirming the franchise agreements can now arise. GOJ's approach to this aspect of the matter seems to me to conflate (as did the approach of Lords Morton and Keith, dissenting, in ***White & Carter***) the issue of the innocent

party's right to elect which of two remedies he will choose when faced with a breach amounting to repudiation (in respect of which no question of mitigation arises) and the requirement that the innocent party should mitigate his losses, which is what is directly in issue in the current proceedings. In this regard, I think that Sir John Donaldson MR's caution in ***Sotiros Shipping Inc and Aeco Maritime S.A. v Solholt*** [1983] 1 Lloyd's LR 605, 609 (cited by Mr Mahfood), against confusing "the proposition that in deciding whether to rescind or affirm a contract the innocent party need have no regard to considerations of mitigation of loss with the proposition that, having made such an election, he will be able to recover such loss as was unavoidable following that election and that in some, perhaps exceptional, circumstances it may be reasonable at a stage after the decision to rescind or affirm the contract to adopt a course of action which will nullify the effect of that decision", is apposite.

[63] It therefore seems to me that the correct approach to the problem with which the court is faced in this case is to consider whether in all the circumstances it has been established that NTCS failed to take reasonable steps in mitigation of its losses. In the context of mitigation, I am not aware of any rule, or gloss on the mitigation rules, which requires the court to determine whether the innocent party had a legitimate interest in insisting on continued performance of the contract by the wrongdoer, or that the innocent party was under an obligation to have regard to the interests of the wrongdoer in determining what steps he should take in mitigation. Having said that, however, it seems to me that there is a significant area of overlap between the approaches prescribed by the traditional mitigation rules and the ***White & Carter*** line

of cases, particularly as regards their emphasis on reasonableness as the touchstone for assessment of the innocent party's conduct and their unequivocal allocation of the burden of proving unreasonableness to the wrongdoer (see, for instance Simon J's formulation in ***The Dynamic***, which is set out at para. [59] above).

Did NTCS act unreasonably in all the circumstances of this case?

[64] The duration of the franchise agreements was intended by the parties to be 10 years initially, with effect from 1 March 1995, with the prospect of an extension for a further five years. Mr Milwood's unchallenged evidence was that NTCS comprised some 350 members, who owned and operated 450 buses and employed in excess of 1500 persons and had incurred substantial debt liabilities for the purpose of operating the franchises. It was a large operation by any measure and the agreed amount of capital employed by NTCS over the relevant period was $54,560,000. It appears to me that the scope of the operation, both from the financial and the human resource perspective, must be kept firmly in mind in determining the reasonableness of NTCS' conduct in the face of the non-implementation by GOJ of the second fare table by 1 June 1995, which resulted in NTCS being, as Mr Milwood frankly accepted, "doomed to run at a loss from the outset".

[65] The period under consideration naturally divides itself; it seems to me, into two segments, viz., 1 March 1995 to 28 February 1996 and 1 March 1996 to 28 February 1998, taking as the dividing line between the two periods, the 1996 HOA.

1 March 1995 – 28 February 1996

[66] As has been seen, despite GOJ's failure to implement the second fare table on 1 June 1995, NTCS elected, as it was entitled to do, to affirm the agreements. In considering whether and when NTCS ought reasonably thereafter to have mitigated its losses at any time during 1995, it is important to bear in mind that the Shirley Commission's findings, on the basis of which the second fare table was to have been constructed, were not delivered until 1 September 1995. In the light of this fact, I consider Mr Mahfood's submission that NTCS ought to have mitigated as of the breach date of 1 June 1995 or, "at latest", December 1995, to be wholly unrealistic.

[67] As both Mr Milwood and Dr Fletcher testified, the numerous meetings between the parties during this period, in which the Minister himself played an active part (Minister Pickersgill was, Mr Milwood testified, "most positive"), took place in the mutual search for solutions to the acknowledged problem of inadequate fares. In the light of this evidence, I do not think that it can seriously be maintained that NTCS acted unreasonably in continuing to operate the franchises, despite the mounting losses, up to February 1996. In my view, NTCS was entitled to assume that GOJ and its representatives were sincere in their stated objective of seeking to find the desired solutions in a co-operative manner, and NTCS was surely vindicated in this assumption by the fact that the parties were able to agree on and enter into the 1996 HOA in February 1996.

[68] Mr Milwood's evidence was that, by the beginning of 1996, NTCS, which had been operating for seven months on the inadequate fares and without the second fare or any further subsidy, was "suffering severe losses". GOJ's response to his making it known that NTCS could not continue to operate the franchises in these circumstances was in due course reflected in the very first clause of the 1996 HOA, which provided for the provision of a further subsidy by GOJ to NTCS in the agreed amount of $26.4 million, to be liquidated by the provision to NTCS of buses acquired by GOJ on concessionary terms. In this period, Dr Fletcher told us, GOJ was "very keen" to honour its commitment to implement the second fare table and he regarded the 1996 HOA as a joint attempt to address some of the problems, albeit on a temporary basis.

[69] It appears to me to be clear from the evidence of both Mr Milwood and Dr Fletcher, as well as from a reading of the document itself, that the 1996 HOA was intended by GOJ to be, and was accepted by NTCS as, a reaffirmation of its commitment to working with NTCS to achieve, on the one hand, GOJ's objective of providing bus services to the public in the KMTR at affordable rates and, on the other hand, NTCS' objective of operating the franchises as a viable economic venture. I accordingly accept that NTCS acted entirely reasonably in the period that ended with the formulation and execution of the 1996 HOA.

Beyond the 1996 HOA

[70] While the 1996 HOA did recognise to some extent the losses suffered by NTCS in the preceding year, its main thrust was prospective, as can be seen from its explicit

contemplation that the parties would have been able to discuss and agree on amendments to the franchise agreements by 1 June 1996. This was, in Dr Fletcher's view, a realisable objective.

[71] Several clauses in the agreement projected a continued relationship between the parties beyond June 1996 and well into the future. Thus, provision was made for some 15 Mercedes Benz buses to be leased to NTCS for a period of five years, with an option to purchase, while three Volvo City buses and one Volvo articulated bus were to be leased for 10 years. Under the heading "Depots", Ministry of Public Utilities and Transport and Metropolitan Management Transport Holdings Ltd ('MMTH') agreed to allocate a depot at Portmore to NTCS, with the costs of preparation of the site and of any environmental assessments required to be borne by MPUT "as part of [GOJ's] contribution to achieving improvements in the KMTR" (clause 4(c)). (However, as at the date of the 1996 HOA, the site for the depot had not yet been identified and, on Dr Fletcher's evidence, once a suitable site was identified, the depot could have taken 18 months for completion.)

[72] Importantly, the 1996 HOA recorded the agreement of the parties for a special school bus service to be provided by NTCS, dedicated to the transportation of school children and teachers to and from school during specified periods each school day, at a special concessionary fare capped at $2.00 and increased to $5.00, "Until the New Fare Table becomes effective" (clause 5(e)). The provision of the buses to NTCS on concessionary terms was intended to provide compensation to NTCS for the operation of a school bus service (clause 2(b)(ii)), although Mr Milwood's comment on this

arrangement in evidence was that it meant that during the specified hours on school days "the fares obtainable by the operators would be severely reduced".

[73] Of equal importance, the 1996 HOA provided that, at GOJ's expense, GOJ, NTCS and other agencies would "co-operate in the design and scheduling of appropriate training programmes for drivers and conductors in the KMTR" (clause 6) .

[74] As regards the critical question of fares, the 1996 HOA again recorded the parties' agreement that "based on the increases in costs which have taken place since a fare adjustment was made in July 1994, an upward adjustment in fares need [sic] to be considered urgently" (clause 7(a)(i)). Under the rubric, "New Fare Table", clause 7(b) recorded the agreement of the parties that the proposed new fare table should be reviewed and the computations revised to reflect the concessions and assistance being provided by GOJ "in areas which based on the existing Franchise Agreement are the responsibilities of the Franchise Holders", as well as increases in costs which had taken place since the recommendations of the Shirley Committee. Clause 7(b)(iii) stated as follows:

> "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 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."

[75] It is, of course, common ground that, although some training programmes were organised for NTCS crews, much of the remainder of what the parties had agreed in the 1996 HOA did not become reality. No agreement on amendments to the franchise agreements was reached by 1 June 1996 or at all, no depot was ever allocated to NTCS and the oft promised new fare table never materialised. However, it seems to me that, given the relatively long term nature of many of the commitments that had been confirmed by and renewed on both sides in the 1996 HOA, it cannot be said that it was wholly unreasonable for NTCS to have continued to operate the franchises, certainly for the remainder of 1996, in the hope that the long outstanding upward revision in fares would have come to pass. Mr Milwood's evidence was that during this period GOJ's position continued to be that, although there were problems, they would be resolved and the new fare table would be introduced "soon". Dr Fletcher confirmed that the parties continued to meet to discuss the problems between 1996 and 1998 with a view to bringing the new fare table into effect and that there was at no time a breakdown in relations between them. (Although there remained a, perhaps faint, echo in Mr Mahfood's submissions before us of GOJ's position before the arbitrators that improvement of service to the public was a condition precedent of the implementation of the new fare table, it should be recorded that the arbitrators had expressly rejected the contention that the 1996 HOA "provided that a Second Fare Table pursuant to

clause 32(b) of the [franchise agreements] would only be implemented when the standard of service in KMTR had improved".)

[76] By the beginning of 1997, NTCS had been operating the franchises for close to two years on the basis of fares that all parties had acknowledged to be woefully inadequate from the very outset of the arrangements (it will be recalled that in 1995 the Shirley Commission had considered that the provision of an adequate rate of return to the franchisees after all expenses were covered would have required an increase of the order of 98%). By June 1997, the society's aggregate losses, on the basis of the evidence which the arbitrators subsequently accepted, were approaching the $1 billion mark (see para. [11] above). The option to terminate the arrangements by reason of GOJ's failure to implement the second fare table no later than 1 June 1995, which was given to NTCS by virtue of clause 13(c) of the franchise agreements, no longer had any relevance since, as the arbitrators found it was entitled to do, NTCS had elected to affirm the agreements, as evidenced by its signing of the 1996 HOA. If, as I consider to be the case, it cannot be said that NTCS acted unreasonably in not seeking to cut its losses at any point before the end of 1996, the question which then arises is whether there was ever a point during the remainder of the period ending 28 February 1998 when NTCS ought to have done so in mitigation of further losses.

[77] Both sides accept that, from a practical point of view, what such a step would have entailed was the cessation by NTCS of the provision of bus services, including school bus services, in the KMTR. Mr Milwood's position was always that it was not

practical for NTCS to have taken such a step at any time between June 1995 and March 2001. In addition to potentially catastrophic economic dislocation for the society and its members, there was also the consideration that the transportation system "would have collapsed and been thrown into chaos as the commuting public depended heavily on the services provided by the NTCS" (see para. [25] above). Such a result would only have been avoidable, he maintained, by an orderly withdrawal of service, enabling a smooth transition from one operator to another.

[78] Dr Fletcher initially expressed disagreement with Mr Milwood's assertion that the transportation system would have collapsed into chaos if NTCS suspended its services. As it turned out, however, his position was not too far different from Mr Milwood's on the point, as he too considered that what would have been necessary to avoid such a result was an available replacement provider (a point which Mr Milwood had also made) and an orderly transition from one operator to another, both of which could have taken up to a year to achieve, which is also about the time it did actually take to negotiate and achieve a partial settlement with NTCS in 2001.

[79] On the basis of the evidence of Mr Milwood and Dr Fletcher, who both testified before us with candour and obvious sincerity, I am therefore prepared to accept Dr Fletcher's view that, realistically, the orderly transition of which both gentlemen spoke would only have been achievable by a minimum of one year's notice from NTCS to GOJ of its intention to cease operating the franchises. In the light of this evidence, I accordingly consider that, even assuming (without deciding) that it ought reasonably to

have occurred to NTCS at some point in 1997 that it might be best for it to mitigate its losses by ceasing to operate the franchises, it would not have been possible to achieve that objective in under a year, particularly given the absence of any obvious alternative to NTCS providing bus services, including school bus services for both students and teachers, in the KMTR at that time.

[80] It follows from all of this that I do not think that GOJ has made good its contention that NTCS acted wholly unreasonably in not mitigating its losses by ceasing to operate the franchises at any time before 28 February 1998, which was the imputed date of their termination by effluxion of time as a result of the Privy Council's ruling. I would only add that, in my view, the same result would inevitably flow from the application of the ***White & Carter*** analysis to the facts of this case. In the first place, it seems to me that it has not been established on the evidence that NTCS would not have had a legitimate interest in performing the contract rather than claiming damages. I have in mind in this regard particularly GOJ's constant encouragement and obvious dependence on the bus services provided by NTCS, as well as the extreme economic dislocation to the society and its members that appeared likely to be the result of a unilateral decision by NTCS to withdraw the services of its members. I accordingly consider that an election to keep the franchise agreements alive would not have been unreasonable in all the circumstances. And secondly, even assuming that the law is, as Staughton LJ considered it to be in ***Stocznia Gdanska***, that NTCS as the innocent party was obliged in coming to its decision to keep the agreements alive, to have regard also to the interests of the GOJ, the wrongdoer, it is clear that, as Lord Gifford

pertinently observed, GOJ would have been highly prejudiced by a decision by NTCS to terminate its services at any time before the incorporation of JUTC in 1998, given the absence of any viable alternative for the provision of public transportation, including the school bus services, in the KMTR during that period.

[81] I would therefore conclude on this aspect of the matter that NTCS is entitled to judgment in the sum of $1,852,172,012.07, calculated as set out at para. [12] above.

Interest

[82] By agreement between the parties, interest on the arbitrators' award had been suspended from the date of the award to the date of Brooks J's judgment in the Supreme Court proceedings, which was given on 29 November 2004. However, the impact of the interest awarded by the arbitrators on their award had been agreed by the parties and embodied by them in their joint letter to the Registrar of the Supreme Court dated 17 June 2004 (see para. [10] above). NTCS now seeks interest at 6% per annum from 29 November 2004 to the date of this judgment, on the basis that this corresponds with the statutory rate of interest on judgment debts (pursuant to section 51(1) of the Judicature (Supreme Court) Act), which would have applied if Brooks J had found for NTCS on liability. GOJ, on the other hand, maintains that NTCS cannot recover interest for any period before the quantification of the amount due to it by this court and the entry of judgment for that amount.

[83] Dealing firstly with the easier question of the appropriate rate of interest, GOJ made no complaint before us as regards the rate of 6% proposed by NTCS. I consider that to be an entirely reasonable rate in any event, and that is the rate at which I would therefore order that interest be paid by GOJ to NTCS on the amount of the judgment.

[84] The question of the period for which interest should be ordered is more problematic. It seems to me that is certainly arguable that NTCS is entitled to interest on the basis claimed by it, that is, at 6% per annum, from 29 November 2004 to the date of this judgment, on the following basis: the parties by their 17 June 2004 joint letter to the Registrar having agreed the amount which would have been payable to NTCS in the event that Brooks J had given judgment for NTCS in the Supreme Court proceedings, NTCS must be regarded as having been kept out of the money agreed by the parties (in the 17 June 2004 joint letter) to be due to it by virtue of the arbitrators' award, from the date on which, had Brooks J come to the correct conclusion on liability, he would have ordered that that sum be paid to NTCS. However, I am mindful of the fact that this can hardly be regarded as a straightforward case of this court now determining that Brooks J came to the wrong conclusion on the basis of the material that was before him. Indeed, to the contrary, both this court and the Board considered that Brooks J had correctly found that the franchise agreements were illegal and ineffective as a result of their non-compliance with the PPT Act.

[85] In these circumstances, the issue of liability having ultimately been resolved by the decision of the Board on a basis not previously contemplated (or advanced) by NTCS, it appears to me that it is also arguable that it would not be entirely fair to GOJ to deal with the question of interest on the standard basis. But I would regard it as equally unfair to NTCS to deprive it entirely of any interest on the amount found by the arbitrators to be due to it, representing losses actually incurred in the operation of the franchises, for the full period of almost seven years that have elapsed since the date of Brooks J's judgment. I therefore consider that, in all the circumstances, it would be appropriate to make an award to NTCS of 50% of the interest calculated at 6% per annum on the principal amount of $1,852,172,012.07, from 29 November 2004 to the date of this judgment.

Conclusion on damages

[86] My conclusion is therefore that GOJ is to pay to the appellant the sum of $1,852,172,012.07, together with 50% of the interest calculated at 6% *per annum* on that amount, from 29 November 2004 until the date of this judgment.

DUKHARAN JA

[87] I have read in draft the judgment of my brother Morrison JA. I agree entirely and have nothing to add.

PHILLIPS JA

[88] I too have read in draft the judgment of my brother Morrison JA. I agree with his reasons and his conclusions and there is nothing that I can usefully add.

MORRISON JA

ORDER:

(i) The respondent is to pay to the appellant the sum of $1,852,172,012.07, together with 50% of the interest calculated at 6% *per annum* on that amount, from 29 November 2004 to 30 September 2011.

(ii) On the application of counsel for the respondent, the question of costs is reserved, pending receipt of further submissions from the parties.