[2003–04 Gib LR 177]

ATTORNEY-GENERAL and MINISTER FOR TOURISM AND TRANSPORT v. M.H. BLAND AND COMPANY LIMITED

COURT OF APPEAL (Glidewell, P., Neill and Stuart-Smith, JJ.A.): May 23rd, 2003

Administrative Law—judicial review—legitimate expectation—legitimate expectation basis for review if alters complainant's rights/obligations enforceable in private law, or deprives of benefit which (i) had in past and could legitimately expect to continue; or (ii) had been assured not to be withdrawn without consultation—Government's breach of contract or equivalent reviewable as a matter of public law

Land Law—easements—enforceability against Crown—easement in Crown lease not binding on Crown, as Conveyancing Act 1881, s.6 not binding on Crown

Land Law—licences—revocability—agreement to allow cable car passengers to alight at specified point on Rock without charge mere revocable licence granted by Government and not easement granted to cable car company

The respondent applied to the Supreme Court for judicial review of the Government's decision to charge for entry to the Upper Rock Nature Reserve by people who travelled there by the respondent's cable car.

In 1966, the upper part of the Rock of Gibraltar ("the Upper Rock") was transferred to the Government of Gibraltar, and a cable car service was set up by a Bland company, carrying passengers to different stations on the Upper Rock. In 1968, the Government granted a lease to the Bland company, in which rent and royalty payments were specified. The royalty was set as a percentage of the takings of the cable car fares, which could be altered every five years, but was never to exceed 10%. The Bland company covenanted to charge fares which were to be agreed once a year. At some later date, the benefit of the lease was transferred to the respondent company. From 1966 until 1991 a charge was made by the Government for entry to two tourist sites, but no other part of the Upper Rock.

In 1991, under the new Nature Protection Ordinance, the Governor designated the Upper Rock as a conservation area, and made regulations

which charged fees for admission to the various entrances to the Upper Rock. In 1992 and again in 1993, these regulations were altered and the places of admission were also changed, which meant that cable car passengers were barred from entering the Upper Rock Nature Reserve from two of the stations. An agreement was reached with the respondent whereby the Government would permit entry to the Nature Reserve by passengers disembarking at the two stations and would charge fees reflected in an agreed fare structure, any change in which was to be after consultation. The Government waived the right to charge royalty, which it had been entitled to charge under the lease, and authorized the respondent to charge appropriate fares.

In 2000, a new agreement was made, whereby cable car passengers were given the option of paying a varying charge depending on which areas they were accessing. This agreement was made, but was never actually executed in a formal document. In 2001, the Government circularized all companies involved in transporting people to the Nature Reserve, including the respondent, informing them that the fee structure was being altered so that visitors to the reserve had to pay a greater environmental levy. The respondent applied for an interim injunction and judicial review of the Government's decision, as being in breach of the lease and both the 1993 and the 2000 agreements. Before any proceedings were commenced, however, the Nature Protection Ordinance was amended in 2001 to add s.24A, which enabled the Minister to set any fees/terms and conditions of entry to any conservation area. This was then used to enact the Upper Rock Nature Reserve (Admission Fees) Regulations 2001, of which reg. 2(e) set the fees as set out in the circular.

The respondent re-formulated its application for judicial review, seeking, *inter alia*, (a) a declaration that the original lease contained implied covenants; (b) a declaration that the Government's decision in 2001 to impose a levy was unlawful and/or unreasonable; (c) an order quashing the decision to impose a levy; (d) a declaration that reg. 2(e) of the 2001 Fees Regulations was unlawful and/or unreasonable; (e) a declaration that the levy set out in the circular and reg. 2(e) was *ultra vires* the Nature Protection Ordinance; (f) a declaration that the Government was estopped from implementing the levy and reg. 2(e); and (g) an injunction restraining the Government from implementing the levy and reg. 2(e). The Supreme Court (Pizzarello, A.J.) found that there was an implied covenant in the lease that passengers to the non-tourist site would be permitted entry without paying a fee, but this did not affect the proceedings as the Conveyancing Act 1881, which gave effect to the alleged implied covenants, did not bind the Crown. The court also found that the decision of the Minister in 2001 was void as *ultra vires*, the circular was *Wednesbury* unreasonable and offended against the legitimate expectation of the respondent, and that reg. 2(e) was unlawful and void in so far as it applied to entry to the non-tourist site.

On appeal, the appellants submitted that (a) there was no implied

covenant in the lease; (b) if there were, however, a right to alight from the cable car in order to gain access to the non-tourist site and not be charged entry, then the court was right to find that it had no relevance since the Conveyancing Act 1881 did not bind the Crown; (c) the legitimate expectation that the respondent's passengers would continue to have free access to the non-tourist site did not in fact exist, as there was no covenant in the lease giving them this right but merely a revocable licence; (d) the 2001 Fees Regulations were not *Wednesbury* unreasonable; (e) nor were they void as infringing the legitimate expectation of the respondent, because by the date when the Regulations were made, both parties had treated the agreement establishing the legitimate expectation as no longer being in force; and (f) the making of the 2001 Fees Regulations was within the powers of s.24A of the Nature Protection Ordinance as, by enacting them, the Minister was doing precisely what the section permitted him to do—and in order to find that there was an ulterior motive behind this, the court would have to find that the decision was *Wednesbury* unreasonable, which it was not.

The respondent, in reply, submitted that (a) the lease contained implied terms that the Government would not levy an entry fee, which would, when coupled with the royalty, exceed 10% of the gross takings of the cable car, or at least that the Government would not levy such a fee without consultation; (b) the lease contained an implied term that the cable car passengers had a right to alight from the cable car to travel to and from the non-tourist area free of any charge by the Government; (c) the Supreme Court was wrong to find that s.6 of the Conveyancing Act 1881 did not bind the Crown; (d) the 1993/2000 agreement gave rise to a legitimate expectation that the respondent would be consulted before any further change was made in the fees for access to the Nature Reserve; (e) it should be able to enforce the legitimate expectation in public law; (f) the circular was *Wednesbury* unreasonable and the Fees Regulations 2001 could also be struck down because of the implied term in the lease; (g) if, as was submitted, the circular infringed the respondent's legitimate expectation, then so did the Fees Regulations 2001; and (h) the Fees Regulations 2001 were not made within the powers under s.24A of the Nature Protection Ordinance, as they were made for reasons other than the statute had intended, *i.e.* for business purposes, not to protect the environment.

Held, allowing the appeal, and dismissing the cross-appeal:

(1) There was no covenant implied in the lease that the Government would not levy a fee, as there was no necessary connection between the maximum royalty of 10% payable by the respondent and the fees which the Government charged. For the court to imply a covenant in any contract it would have to have been reasonable and equitable to do so, the contract would have to have been ineffective without it and would have been so obvious that "it goes without saying." It was more difficult to imply a covenant when the parties had entered a lengthy and carefully

drafted contract, and the court should be wary not to use the benefit of hindsight, which the parties would not have had when drafting the contract (paras. 36–37).

(2) Nor was there an implied term in the lease that there was a right to alight from the cable car to travel to and from the non-tourist site free of any charge. This right was merely a revocable licence granted to the cable car passengers and not an easement granted to the respondent company. Even if it had been an easement, it would not have been binding on the Crown under s.6 of the Conveyancing Act 1881 since that Act did not bind the Crown—there was neither an express provision stating that it did, nor a strong basis for implying it, so as to displace the general rule that a statute does not bind the Crown (paras. 39–40; para. 45).

(3) There was, however, a clear legitimate expectation arising from the 1993/2000 agreements that the respondent should be consulted before any changes were made to the fees. For a legitimate expectation to exist, there must have been consequences which affected some other person by altering their rights or obligations that were enforceable in private law; or depriving them of a benefit which either they (i) had in the past and could have legitimately expected to continue until some rational grounds for rescinding it were communicated; or (ii) had received assurance that it would not be withdrawn without being given an opportunity of advancing reasons for contending that it should be withdrawn. If an authority is guilty of a breach of contract or its equivalent then they are liable to judicial review as a matter of public law, therefore it was possible to enforce the respondent's legitimate expectation in public law, and if the judicial review application had been heard immediately, the respondent could have obtained relief requiring the Government to consult, but so much time had passed that this would no longer be of any use (paras. 47–48; para. 50).

(4) Nor could the Fees Regulations 2001 be challenged on judicial review as *Wednesbury* unreasonable, since there was no implied term in the lease that the Government would not levy fees. For a decision to be *Wednesbury* unreasonable, it should be "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it," which this was not (para. 51; para. 53).

(5) By the time the Fees Regulations 2001 were made, both parties treated the agreement as no longer in force, and because the Government's circular did not accord with the respondent's legitimate expectation did not mean that neither did the Fees Regulations. In fact, s.24A of the Nature Protection Ordinance meant that the Fees Regulations were not contrary to the respondent's legitimate expectation (paras. 55–57).

(6) Section 24A of the Nature Protection Ordinance permitted the Minister to charge fees in exactly the way he had done in the Fees Regulations 2001. For an ulterior motive to make the Fees Regulations

2001 *ultra vires* the powers granted under s.24A, therefore, it would have to have been *Wednesbury* unreasonable to have made the Regulations, which it was not (para. 62).

Cases cited:

(1) *Council of Civil Service Unions* v. *Minister for Civil Service*, [1985] A.C. 374; [1984] 3 All E.R. 935; [1984] 1 W.L.R. 1174; [1985] I.C.R. 14; (1984), 128 Sol. Jo. 837; *sub nom. R.* v. *Foreign & Commonwealth Secy.*, *ex p. Council of Civil Service Unions*, [1985] I.R.L.R. 28, followed.
(2) *Iceland Foods P.L.C.* v. *Dangoor*, [2002] 2 E.G.L.R. 5, followed.
(3) *Padfield* v. *Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997; [1968] 1 All E.R. 694, considered.
(4) *R.* v. *Environment Secy.*, *ex p. Spath Holme Ltd.*, [2001] 2 A.C. 349; [2001] 1 All E.R. 195; (2001), 33 H.L.R. 31; [2001] 1 E.G.L.R. 129, considered.
(5) *R.* v. *Inland Rev. Commrs., ex p. Preston*, [1985] 1 A.C. 835; [1985] 2 All E.R. 327; [1985] S.T.C. 282, considered.

Legislation construed:

Nature Conservation Area (Fees and Admission) Regulations 1991: The relevant terms of these regulations are set out at para. 10.

Nature Conservation Area (Fees and Admission) (Amendment) Regulations 1992: The relevant terms of these regulations are summarized at para. 10.

Nature Conservation Area (Upper Rock Nature Reserve) (Fees and Admission) Regulations 1993: The relevant terms of these regulations are summarized at para. 12.

Nature Protection Ordinance 1991, Long title: The long title is set out at para. 59.
s.18(1): The relevant terms of this sub-section are set out at para. 8.
s.24: The relevant terms of this section are set out at para. 8.
s.24A: The relevant terms of this section are set out at para. 20.

Upper Rock Nature Reserve (Admission Fees) Regulations 2001: The relevant terms of these regulations are set out at para. 21.

Conveyancing and Law of Property Act 1881, s.6(1): The relevant terms of this sub-section are set out at para. 41.

Law of Property Act 1925, s.62: The relevant terms of this section are set out at para. 42.
s.208(3): "Subject as aforesaid the provisions of this Act bind the Crown."

J.J. Neish, Q.C. and *D. Bossino* for the appellants;
D. Feetham and *E. Phillips* for the respondent.

1 **GLIDEWELL, P.:**

Introduction

This appeal is the culmination of a long running dispute between M.H. Bland & Co. Ltd. ("M.H. Bland") and the Government of Gibraltar as to whether the Government had and has the right to charge a fee for, or impose a levy upon, entry to the Upper Rock Nature Reserve by people who have travelled to the reserve in the cable car.

The background facts

2 The upper part of the Rock of Gibraltar ("the Upper Rock") was formerly in the possession and under the control of the Ministry of Defence in right of Her Majesty the Queen. There was then no public access to it. In 1966 the Upper Rock was transferred to the Government of Gibraltar. The area so transferred included the tourist sites at St. Michael's Cave, the Upper Galleries and the Apes Den, which was not considered a "tourist site." The Government was already operating, and charging fees for entrance to, the two tourist sites.

3 Some time before 1966 another Bland company, Bland Aerial Ropeway Ltd., conceived a scheme for constructing a cable car service from the Grand Parade up the west face of the Rock. The Government agreed and granted the necessary licences. The cable car system was constructed and first carried passengers on April 1st, 1966. At that date no lease had been executed.

4 The cable car system comprises parallel cables supported by pylons secured into the face of the Rock at intervals. There are two cars suspended from the cables. There are three stations: on St. Michael's Road near the top of the Rock, in the Grand Parade at the bottom, and at an intermediate point on Old Queen's Road, near the Apes Den. The top cable car station is within a relatively short distance of St. Michael's Cave, and rather further from the Upper Galleries. The middle station gives easy access to the Apes Den. The pedestrian access to the middle station is by steps leading from Old Queen's Road.

5 Since 1966, there have thus been five different means by which people can gain access to the Upper Rock, namely by the cable car, by taxi (mostly on inclusive rock tours), by tourist coach, by private vehicle and on foot.

The lease

6 It was not until April 2nd, 1968 that a lease was executed between the Government of Gibraltar and Bland Aerial Ropeway Ltd. of the land upon which the cable car system had been constructed. By it, the

Government demised to Bland Aerial Ropeway Ltd. for the term of 150 years from October 1st, 1966, five plots of land, on which the buildings of the stations and the support pylons had been constructed, which were identified on the plan attached to the lease, together with a licence for the company to "erect, use, maintain, [and] repair . . ." the cable car system. There was also a provision entitling the company to enter on a defined area of land under the cable car track for the maintenance or repair of the cable system and a further strip of land in order to maintain and repair a drain which had also been constructed. The rent reserved by the lease was in two parts, namely, £1,300 per annum payable in advance quarterly, together with a royalty. This royalty was defined in the following terms:

> "(i) The royalty shall be a percentage of the gross takings from the operation of the aerial ropeway.
>
> (ii) The rate of the royalty may be increased or reduced by the landlord (after consultation with the tenants) at the end of each period of five years commencing at the beginning of the term but shall not exceed 10 per cent per annum of the gross takings.
>
> (iii) Until altered by the landlord, the rate of royalty shall be five per cent per annum of the gross takings."

The expression "gross takings" was then defined. The tenant's covenants included the following provision:

> "(ii) To charge only such fares for the use of the aerial ropeway as may be agreed between the landlord and the tenants at the commencement of this demise and annually thereafter on the first day of April in each year as being such as will produce a reasonable return to the tenant having regard to the nature of the enterprise and the capital involved, or, in the event of disagreement, as may be determined by arbitration in accordance with the Arbitration Ordinance for the time being in force."

Pizzarello, A.J. found that the fare structure in 1974, which he assumed was also the structure of the fares from the beginning of the lease, was as follows: single sector fare 20p; return fare 70p; children under the age of 12 years half fare. A single sector meant the distance between two adjacent stations, bottom station to middle or middle to top. At some later date the benefit of the lease was transferred to the claimant company, M.H. Bland.

Entry to the Upper Rock

7 From 1966 until 1991 a charge was made by the Government for entry to St. Michael's Cave and the Upper Galleries (the tourist sites), but there was no charge for persons entering any other part of the Upper Rock.

The Nature Protection legislation

8 In 1991 the House of Assembly enacted the Nature Protection Ordinance 1991, which took effect on May 9th, 1991. By s.18(1) of the Ordinance as originally enacted—

> "where the Governor is of the opinion after consultation with the Nature Conservancy Council that an area of land . . . is of special interest—
>
> (a) by reason of any of its flora, fauna or geological or physiographical features;
>
> (b) by reason of being the habitat of [or for securing the survival in Gibraltar of] any wild bird, wild animal . . . or wild plant . . .
>
> he may by order designate that area to be a nature conservation area."

By s.24 of the Ordinance—

> "the Governor may, after consultation with the Nature Conservancy Council, make regulations for carrying into effect the provisions of this Ordinance and without prejudice to the generality of the foregoing such regulations may provide for—
>
> (a) fees or charges payable in respect of any application, licence or other document under this Ordinance, or any other matter in the administration of this Ordinance . . ."

9 Acting under the powers conferred by s.18(1) of the Ordinance, on June 20th, 1991, the Governor designated the area described in the schedule to the order as the "Upper Rock Nature Conservation Area." That area, which was delineated on a map attached to the order, was that part of the Upper Rock immediately to the south of but not including the land under the cable car route or the middle cable car station. The area did, however, include the Apes Den.

10 On June 20th, 1991, the Governor, in exercise of the powers conferred on him by s.24 of the Ordinance, also made the Nature Conservation Area (Fees and Admission) Regulations 1991 ("the Fees Regulations"). The scheme of these Regulations was that admission to the Upper Rock Nature Conservation Area should only be permitted at three points, namely Jews' Gate, St. Michael's Road, and the north entrance to the Apes Den. Fees for such admission were to be charged to persons other than residents of Gibraltar at the rate set out in the Regulations, which were initially "per person £2, children under 12 years per child £1, vehicles other than public service vehicles but including motor cycles, per vehicle £1.50." In 1992, the Regulations were amended to define more

clearly the point of entry at St. Michael's Road and, more importantly, to increase the entrance fees to £3 for an adult and £1.50 for a child.

The beginnings of the dispute

11 M.H. Bland objected to the fees being charged for admission to the conservation area, though not to the fees charged for admission to the tourist sites. This dispute with the Government continued until, on May 12th, 1993, the parties entered into a written agreement.

12 During the two years between the making of the 1991 Fees Regulations and the agreement of May 12th, 1993—

(a) the Fees Regulations were amended in April 1992 as I have already described;

(b) in April 1993, a new Nature Conservation Area, to be known as the Upper Rock Nature Reserve, was designated by order by the Governor. This covered a much larger area than that designated in 1991, extending both south and north of the cable car line and effectively including the whole of the Upper Rock;

(c) also in April 1993, new Fees and Admission Regulations were made. The 1991 Regulations were revoked by the Nature Conservation Area (Upper Rock Nature Reserve) (Fees and Admission) Regulations 1993. The fees for admission to the Nature Reserve were contained in a schedule which divided the Reserve into two zones: zone A comprising St. Michael's Cave and the Apes Den; and zone B the Great Siege Tunnels, the Upper Galleries and the Moorish Castle. The charge for admission for adults to zone A was £3, to zone B £2.50, and to all zones £4.50. Children were half price, and vehicles other than public service vehicles remained at £1.50. The places of admission to the Upper Rock Nature Reserve were specified as Jews' Gate and Willis's Road. It will be noted that this latter provision apparently prohibited passengers on the cable car from entering the Nature Reserve from either the upper or middle stations on the cable car route.

The agreement of May 12th, 1993

13 The recitals in this document included the following paragraphs:

> "(4) M. H. B. claims to be aggrieved by the limitation as aforesaid of the points of admission to the Upper Rock Nature Conservation Area and by the requirement of the payment of fees to secure entry thereto as contravening the rights enjoyed by M. H. B. pursuant to s.6 of the Conveyance and Law of Property Act 1881 . . .
>
> (5) The Government disputes M. H. B.'s contention that its rights have been infringed.

(6) M. H. B. and the Government are desirous of avoiding litigation on the matter in issue between them and to that end entered into the agreement 'for the purpose of securing mutual benefits to both parties.'"

I note that in the recital, M.H. Bland were apparently not making the point that the Fees Regulations were made outside the powers granted to the Governor by the 1991 Ordinance. The relevant part of the agreement itself was in the following terms:

"(1) The Government shall permit entry into the Upper Rock Nature Conservation Area for those passengers carried by M. H. B. on its cable cars, wishing to disembark at the intermediate station or having disembarked at the top station wishing to enter the Upper Rock Nature Conservation Area through the existing breach at Charles V wall on St. Michael's Road, and in consideration thereof shall be entitled to charge the entrance fees reflected in the fare structure agreed between M. H. B. and the Government and operational since April 1st, 1992, particulars whereof are contained in annex 1 hereof.

(2) The said fare structure shall be subject to review from time to time and M. H. B. and the Government hereby agree to cooperate and consult with each other to the fullest extent with a view to agreeing upon fares which are in the best interest of both parties. In the event of the parties being unable to agree upon a fare structure either party may terminate this agreement as hereinafter provided.

. . .

(11) M. H. B. and the Government hereby expressly agree and acknowledge that this agreement is entered into by each of them without prejudice to their respective rights and remedies of law on the issues referred to in recitals 4 and 5 hereof.

(12) Either M. H. B. or the Government may terminate this agreement upon giving to the other not less than three months' notice in writing to that effect and upon the expiry of the said period of three months all the parties hereto shall be freed and discharged from all obligations hereunder without prejudice however to any right or remedy subsisting at the date of termination. For the avoidance of doubt the parties hereto hereby acknowledge that upon the termination of this agreement each of the parties shall save as the aforesaid revert to the rights and obligations enjoyed and to which it was subject prior to April 1st, 1992.

. . .

(14) In consideration and for the duration of the agreement hereby entered into between M. H. B. and the Government, the landlord

hereby waives the royalty to which he is entitled pursuant to clause 1 of the lease and the landlord further authorizes M. H. B. to charge such fares as it may, in its commercial judgment, deem appropriate for the carriage of passengers on its cable cars."

The annex set the entrance fees referred to above as £1 for adults, 50p for children under 12 but over 5, with no fee for children under 5.

14 Thereafter for over seven years, matters proceeded in accordance with the terms of the agreement of May 12th, 1993. Late in the year 2000, there were discussions between M.H. Bland and the Government about the fees to be charged for admission to the Upper Rock Nature Reserve. There was an exchange of correspondence culminating in a letter from the Minister for Tourism and Transport of December 6th, 2000, a reply dated December 12th, 2000 from Mr. George Gaggero, the Deputy Chairman of M.H. Bland, and a letter in confirmation from the Minister of December 13th, 2000. In his letter, Mr. Gaggero said in relation to fees:

> "(7) On the issue of introducing a new structure for entrance into the nature reserve, passengers travelling on the cable car will have the option of accepting one or other of the following options:
>
> (a) Payment of a 50p royalty included in the price of the cable car ticket for access to the Nature Reserve to include access to the Apes Den but without access to the other tourist sites;
>
> (b) Payment of an additional £3 in lieu of the 50p royalty fee that will include access to all tourist sites.
>
> (8) In order to ensure a degree of certainty for the future, the payment of the royalty will be linked at 10.2 per cent of the total price of the cable car element of the fare with a 50p minimum."

In his letter of December 13th, 2000 the Minister said:

> "I thank you for your letter of December 12th, 2000. I have read closely the way in which you have interpreted the terms of my letter of December 6th, 2000, and am happy to confirm that they substantially reflect the conditions which I set out. There are only minor modifications, which I would wish to see incorporated in the way in which you have set out the points of agreement, as follows:
>
> '. . .
>
> (7) (a) The 50p royalty will include access to the Upper Rock.
>
> (b) The £3 additional fee will allow access to all tourist sites situated within the Upper Rock. For the avoidance of

> doubt, Apes Den and seeing apes on the Upper Rock are not considered a tourist site for which an admission charge is made.'"

The parties envisaged that the agreement so made should be reflected in a formal supplemental agreement to the earlier agreement of May 12th, 1993. M.H. Bland's solicitors sent the Minister a draft of such a document which he later accepted set out what had been discussed between them. However, this was not in fact executed. Nevertheless the exchange of correspondence clearly constituted a binding agreement amending the earlier agreement of May 1993. M.H. Bland introduced, in January 2001, a fare structure for the cable car which reflected what was set out in the exchange of correspondence.

The dispute is revived

15 The Minister did not respond in writing to M.H. Bland's solicitors' draft. Instead, on March 20th, 2001, the Minister sent a letter in identical terms addressed to M.H. Bland Ltd., to the Gibraltar Taxi Association, and to five companies which operated coaches on the Upper Rock. So far as M.H. Bland were concerned, there had been no previous consultation or discussion about the content of this letter. It started: "I wish to set out, for the avoidance of doubt, the regime which will apply in respect of Upper Rock admissions on and after April 1st, 2001." The contents of the letter were then divided into sections, the first of which covered "visitors paying the full rate," who were for the most part those who entered the Upper Rock in their own vehicles. The next section dealt with "visitors paying the tour operator concessionary rate," which meant visitors who travelled to the Upper Rock on a public service vehicle or by cable car; for these persons it said that the admission fee to the tourist sites would be £3. The next section is that which is of importance in the present case. It said:

> "**Special conditions which will apply in the case of the cable car**
>
> A cable car client may elect to travel to the top of the Rock and return to the ground station without leaving the premises demised to M.H. Bland in their lease. In such a case, the client will only pay the royalty, as set out in the lease. This at present would be 40p, unless the company opt to increase the cable car fare.
>
> If a cable car client wishes to visit the Upper Rock, he will need to elect to either (a) enter as a walker; or (b) enter as a visitor to tourist sites. If a person enters as a walker, he will be required to pay a £2 environmental levy on accessing the Upper Rock at the G.T.B. (Gibraltar Tourist Board) ticket booth situated at Apes Den or adjacent to the top cable car station. If a person enters as a visitor to a tourist site he may be charged whatever fee (being not less than £3)

> that the operators of the cable car may determine, and the cable car operators will then be asked to pay the G.T.B. £3 for each person so accessing the Upper Rock . . . If the £2 environmental levy is paid, or the £3 fee to visit sites by cable car clients, this will be considered to be inclusive of royalty otherwise payable by cable car clients."

The environmental levy was a new concept, and it will be seen that the levy of £2 differed completely from the fee for access to the Upper Rock which had been agreed in December 2000.

16 On March 22nd, 2001 M.H. Bland's solicitors wrote to the Minister saying:

> "Your letter, issued by circular of March 20th, 2001, is in breach of the terms of our lease, the terms of the 1993 agreement and the terms of the agreement reached in December 2000, and consequently we do not accept and reject outright the suggestions contained in the circular in so far as they relate to the cable car."

17 By letter of March 27th, 2001, in reply, the Minister said:

> "I concur in your view that the basis of the relationship between the Government and M.H. Bland Ltd. in relation to all matters which impact on the cable car is the original lease. The Government, however, does not agree that any of the terms of the deed of lease dated April 2nd, 1968, entered into between the Governor and Bland Aerial Ropeway Ltd., have been breached by the new regime which is to be put in place on April 1st, 2001. It will be helpful if you would indicate what leads you to this conclusion.
>
> You further aver that the agreements of May 12th, 1993 and December 2000 have been breached. I do not agree. I concur that, consequent on negotiations, agreement was reached on the basic structure which will apply in respect of fees for admission to the Upper Rock. Indeed, at the time, you indicated that you would wish to have the position which was negotiated confirmed in the form of a written agreement, to which I have no objection. You went further and sent me a draft document to peruse, and agree that it set out the position as discussed with your clients. What my circular letter of March 20th, 2001 did was to finesse the arrangement which had already been discussed and agreed with them. This letter needs to be construed as an extension of the agreed position as at December 2000. There is therefore no question of a breach of the 1993 agreement or the additional agreement, which had not in any case been executed.
>
> I am always ready to explain the rationale behind the new system, as finessed, to your clients. I believe that it properly sets out and clarifies an area which the Government considers had not been

> adequately covered by the discussions held in December 2000. That is why my letter of March 20th, 2001 gave notice that there will be a totally distinct system, whereby there are two types of fees charged, *viz.* a fee for admission to sites and an environmental levy. In cases where a fee for admission to sites is paid, the Government has decided that this fee will include the environmental levy for the time being. This position may, of course, change in the future.
>
> It is intended, as your clients are aware, to introduce the complete new regime as from April 1st, 2001. I would therefore be grateful if, as a matter of urgency, you would supply me with the information sought above re the alleged breach by the Government of the terms of the original deed of lease."

To describe the circular letter of March 20th, 2001 as "finessing" the agreement of 1993 as amended in December 2000 was disingenuous at the least.

The proceedings

18 On March 31st, 2001, the solicitors for M.H. Bland applied *ex parte* on notice to the Supreme Court for an interim injunction to restrain the defendants "from implementing the environmental levy detailed in the Government of Gibraltar circular dated March 20th, 2001." This was granted with liberty to apply to discharge or vary the order on 48 hours' notice and with a return date of April 9th, 2001. On April 3rd, 2001, M.H. Bland's solicitors applied for leave to move for judicial review of the decision indicated in the letter of March 20th, 2001, seeking an order quashing that decision and a declaration that the environmental levy "is unlawful or *ultra vires* on the grounds set out herein."

19 Also on April 3rd, 2001, M.H. Bland issued a claim in the Supreme Court against H.M. Attorney-General, asking for—

> "a declaration that the defendants are in breach of the terms of their lease dated April 2nd, 1968, a declaration that the defendants are not entitled to charge an environmental levy as being contrary to the terms of the lease and to law, an injunction restraining the defendants from implementing same, damages for breach of contract and further or other relief."

Pending the resolution of the judicial review proceedings, no steps have been taken in that action, which has not proceeded.

Further legislation

20 In November 2001, the House of Assembly amended the Nature Protection Ordinance 1991 by adding to it a new s.24A in the following terms:

"The Minister with responsibility for the environment may by order published in the Gazette set—

(a) the terms and conditions of entry, including times and dates; and

(b) the fees for entry,

to the nature conservation area or tourist or other sites within or comprising that area in respect of different classes of persons and vehicles."

21 On November 8th, 2001, acting under the power contained in that new section, the Minister for the Environment made the Upper Rock Nature Reserve (Admission Fees) Regulations 2001. These provided as follows:

"**Admission Fees**

2. Subject to regulation 3, fees for admission to the Upper Rock Nature Reserve shall be as follows—

(a) £7.00 for each person aged 12 and over and £4.00 for each child aged from 5 to 11 inclusive for entry at Jews' Gate and Willis's Road for persons visiting tourist sites;

(b) £1.50 for each private vehicle;

(c) £3.00 for each person for entry from the cable car middle or top stations for the purposes of visiting any tourist site if the admission ticket is pre-purchased at the cable car bottom station;

(d) £3.00 for each person for entry at Jews' Gate as part of a tour group with a tour operator or in a taxi on an inclusive 'Rock Tour';

(e) £2.00 for each person for entry at Jews' Gate, Moorish Castle or the cable car top or middle stations if that person is not visiting any tourist site but simply walking in the area of the Upper Rock . . .

Free Admission

3. (1) A person holding a valid Gibraltar identity card relating to that person may enter all tourist sites within the Upper Rock Nature Reserve without paying a fee on production of the card.

(2) Gibraltar registered vehicles shall be exempted from payment of the fee in regulation 2(b) . . . "

Regulation 4 revoked the 1993 Fees Regulations and provided that "these regulations supersede all other arrangements relating to admission fees in the Upper Rock Nature Reserve."

As Mr. Feetham for M.H. Bland has submitted, the fees set out in this document were more clearly expressed than those referred to in the circular letter of March 20th, 2001 and did not use the phrase "an environmental levy," but nevertheless contained the same fees as the circular letter.

Termination of the agreement of May 12th, 1993

22 As a matter of history, by letter dated April 10th, 2002, the Chief Secretary to the Government wrote to M.H. Bland referring to the agreement of May 12th, 1993 and saying:

> "I hereby terminate the above agreement with effect from July 10th, 2002.
>
> This is without prejudice to the Government's contention that this agreement has already been terminated by the events which have happened and the operation of law."

The relief claimed

23 After the publication of the Fees Regulations 2001, on February 22nd, 2002, the Chief Justice gave leave to M.H. Bland to re-formulate its application for judicial review. After some further amendment, the relief claimed was as follows:

> "(1) A declaration that the lease contains the implied covenants pleaded at paras. (39) and (40) above herein.
>
> (2) A declaration that the decision of March 20th, 2001, imposing an environmental levy, was unlawful and/or unreasonable.
>
> (3) An order quashing the decision of March 20th, 2001 as far as the environmental levy is concerned.
>
> (4) A declaration that regulation 2, para. (e) of the 2001 Regulations is unreasonable and unlawful.
>
> (5) A declaration that the environmental levy and/or the 2001 Regulations infringe art. 12 (ex art. 6) of the Treaty of Rome.
>
> (6) A declaration that the environmental levy and/or 2001 Regulations are *ultra vires* the Nature Protection Ordinance.
>
> (7) A declaration that the defendants are estopped from implementing the environmental levy in the Minister's circular or reg. 2, para. (e) of the 2001 Regulations.
>
> (8) An injunction restraining the defendants from implementing regulation 2, para. (e) of the 2001 Regulations or the decision of March 20th, 2001."

The judgment of Pizzarello, A.J.

24 The judicial review application was heard by Pizzarello, A.J. He gave judgment on November 4th, 2002. After setting out the facts and the respective arguments of counsel in his judgment, the learned judge considered first the question whether the lease contained an implied term and if so to what effect. As to this the judge said:

> "In my view, counsel for the defendants is right to a large extent. Notwithstanding what is said in the affidavits and argued on behalf of the claimant, the covenants sought to be implied in respect of rights to land were never specifically in the contemplation of the parties at the time the lease was negotiated (1966) or signed (1968). The situation existing at both points of time was that no fees were payable to enter the Upper Rock and there seems to me to be little reason why the parties should have addressed their minds to it even if entrance to St. Michael's Cave might have been subject to a fee (I do not know the exact position about that, but I am assuming there was in 1966 as there was in 1968). Had they done so, what would have been their undoubted reply? It is impossible to say. The claimant's predecessor might not have taken on the project or specific provision might have been made, the ambit of which I will not hazard. But there is no reason why any term should be added to give the lease business efficacy. Part of the claimant's case, and arguments, is that the cable car is a tourist attraction in its own right as an immovable structure and for that purpose the lease is surely adequate. The only matter where a covenant may be implied which may be enforced by the claimants is the right to discharge passengers at the middle station to visit Apes Den without any fee for entry therein. I am of the opinion that is much more than a licence and the defendant is not entitled to revoke that at will. Any other rights are too inchoate and at most can only be regarded as licence to enter. In my view a separate charge to enable passengers to visit the Apes Den is the equivalent of preventing them from getting to visit the Apes Den and it seems to me that as a matter of contract the Government may not do so, subject of course to public interest considerations. In my view the Nature Protection Ordinance does not extinguish this right. In respect of the submission that the 10% royalty caps the Government's entitlement to no more than that and that it cannot introduce fees or charges that would prevent the claimant from obtaining a reasonable return on capital and that these terms should be implied, I reject it, because the parties agreed this lease and it is not necessary to imply these terms to give the lease business efficacy."

25 On the alternative argument that the lease was to be deemed to grant rights to M.H. Bland by virtue of s.6 of the Conveyancing and Law of

Property Act 1881, the judge dealt with two issues. First, at a late stage of the proceedings Mr. Neish, Q.C. advanced a submission that the 1881 Act did not bind the Crown in Gibraltar. The judge agreed with him. He said: "I am of the opinion that the Conveyancing and Law of Property Act 1881 does not bind the Crown either expressly or by necessary implication." He then went on to consider what, if that decision were wrong, was the nature of the right granted under the 1881 Act. He said:

> "I am of the opinion that the right falls within the scope of the expressions 'easement' or 'advantages.' As to easement, the cable car was built on the landlord's property, there is by way of the implied grant a dominant and servient tenement, the easement accommodates the dominant tenement, the dominant and servient owners are different persons and the grant is capable of forming the subject-matter of a grant. As to 'advantage,' the expression is so wide that I have little hesitation in coming to the conclusion that the implied right that I have found fits it. I have endeavoured to find some authority defining advantage but my researches have not availed."

26 There was an argument that the Fees Regulations are contrary to the Treaty of Rome because they exempt residents in Gibraltar from paying the entry fees, and were thus said to be discriminatory by reason of nationality. The learned judge quite correctly rejected this argument, and there is no appeal against that conclusion.

27 Turning to the circular letter of March 20th, 2001, the judge said:

> "But the decision taken by the Minister on March 20th, 2001 has to be regarded as void; it was attacked immediately and the Minister, because there were Regulations regulating the admission fees, did not have the capacity to set them administratively and it was *ultra vires* anyway. By the same token I consider Mr. Neish is right to suggest that the May 12th, 1993 agreement was entered into contrary to the statutory regime at the time in force. Here again between the dates of the last appearance of the parties before me and the present day, the agreement is no longer in force and the parties are left to consider their positions under the lease."

That last sentence was, I assume, a reference to the letter of termination of the agreement dated April 10th, 2002.

28 Mr. Feetham, for M.H. Bland, submitted that the 2001 Fees Regulations were and are invalid as being unreasonable, *i.e.* "*Wednesbury* unreasonable" or "irrational" to use Lord Diplock's phrase. Alternatively, Mr. Feetham submitted that—

> "the claimant had a legitimate expectation that the Government would not introduce any legislation which would breach the

claimant's right under the lease and the agreements (of May 1993 and December 2000) and the claimant was entitled to expect that it would be consulted before making the decisions contained in the circular of March 20th, 2001, and before introducing the 2001 Regulations."

29 On these submissions, the judge decided that the circular letter was unreasonable in the *Wednesbury* sense, and offended also against legitimate expectation. Referring to the exchange of correspondence in December 2000, he said:

"This course of conduct gives rise in my view to a 'legitimate' . . . expectation on the part of the claimant that the agreement of December 2000 would be put in place, and as a consequence it has to be implied that any change will be discussed with the claimant. With no such consultation, the circular letter of March 20th, 2001 was published and the claimant protested."

30 The judge then considered whether the benefit of which M.H. Bland had a legitimate expectation was procedural, *i.e.* the right to be consulted about a change in fees, or substantive, as infringing the implied terms of the lease. He concluded that it was both.

31 The judge did not in his judgment expressly conclude that the 2001 Fees Regulations were invalid as being irrational or in breach of legitimate expectation, but in the light of the orders he made it must be assumed that he did so or intended to do so.

32 His order was:

"(1) The lease entered into between the Government of Gibraltar and Bland Aerial Ropeway Ltd., dated April 2nd, 1968, contained an implied covenant that the passengers of the claimant have a right to alight from the cable car at the middle station to travel to and from the Apes Den free of any charge by the landlord.

(2) Regulation 2(e) of the Upper Rock Nature Reserve (Admission Fees) Regulations 2001 is unlawful and void in so far as it applies to entry to the Upper Rock Nature Reserve via the cable car middle station."

Against both parts of this order, the Attorney-General and the Minister now appeal.

33 M.H. Bland has filed a cross-appeal, claiming the following relief:

"(1) By grant of a declaration that the lease ('the lease') between His Excellency the Governor and Bland Aerial Ropeway Ltd., dated April 2nd, 1968, contains the following implied terms or any of them:

(a) That the landlord would not levy a fee on passengers of the cable car, either alighting at the top or middle stations and entering land retained by the landlord or entering the aforementioned land for the purposes of getting onto the cable car at those stations, which would, when coupled with the royalty payable under the lease, give the landlord more than 10% of the income that the tenant needs in order to achieve a reasonable return on capital.

(b) Alternatively, that the landlord would not levy such an entry fee, which would, when coupled with the royalty, exceed 10% of the gross takings of the cable car.

(c) Alternatively, that the landlord would not levy such an entry fee without first consulting the tenant.

(d) Further or in the alternative, the right of passengers of the cable car through the respondent to freely enter the Upper Rock in order to obtain access to the top and middle stations and further the right of those customers to alight freely at the top or middle stations for the purposes of gaining access to the Apes Den.

(2) By grant of a declaration that the Upper Rock Nature Reserve (Admission Fees) Regulations 2001 were [not] *ultra vires* the Nature Protection Ordinance 1991, as amended.

(3) By grant of a declaration that reg. 2(e) of the Upper Rock Nature Reserve (Admission Fees) Regulations 2001 is unreasonable.

(4) By grant of a declaration that the respondent had a legitimate expectation that the Government of Gibraltar would not introduce reg. 2(e) of the Upper Rock Nature Reserve (Admission Fees) Regulations 2001 or would not unilaterally introduce any other fee regime for entry into the Upper Rock affecting cable car passengers and/or would not introduce the regulation or such regime without consulting the respondent.

(5) Alternatively, by grant of a declaration that the appellants are estopped from implementing the aforementioned Regulations."

Issues raised in the appeal

34 The issues raised in the appeal and the cross-appeal are intertwined. I propose therefore to deal with them together, in the following order:

(a) Did the lease contain an implied covenant? If so, what were its terms?

(b) Alternatively, did the Conveyancing Act 1881 import into the lease a term similar to that found by Pizzarello, A.J. to have been an implied term?

(c) Did M.H. Bland have a legitimate expectation arising out of the implied covenant in the lease and/or the agreement of May 12th, 1993 as amended in December 2000? If so, what was the nature of the right covered by it?

(d) Was the 1993/2000 agreement enforceable? If it was, did this affect the legitimate expectation?

(e) Was reg. 2(e) of the Fees Regulations 2001 unlawful and void because either;

(i) it was irrational, or

(ii) it contravened Bland's legitimate expectation?

(f) In any case were the Fees Regulations 2001 invalid because they were not made within the powers given by s.24A of the Nature Protection Ordinance?

A. ***Implied covenant in the lease***

35 There are two types of terms which may be implied into contracts. First, there may be a general rule that all contracts of a particular kind contain standard terms which are implied if not expressed, *e.g.* the covenant for quiet enjoyment in a lease. We are not here concerned with the implication of a term of this kind. Secondly, a court may be asked to imply that a particular contract contains a term which the parties have not expressed. That is what is claimed by M.H. Bland to be the situation here.

36 The court is slow to imply a term of this kind in a contract, and will only do so if certain requirements are fulfilled. These requirements have recently been summarized by Neuberger, J. in *Iceland Foods P.L.C.* v. *Dangoor* (2), a decision given by that learned judge on February 8th, 2002, to which Mr. Neish, Q.C. for the Attorney-General has referred us. Neuberger, J.'s summary was in turn based on a passage in a judgment of Bingham, M.R. in 1995. The summary, which I gratefully adopt, was in the following terms ([2002] 2 E.G.L.R. at 8):

> "(a) A term will not be implied unless it is 'reasonable and equitable'.
>
> (b) A term will not be implied into a contract if the contract is effective without the term.
>
> (c) Before a term will be implied, it must be so obvious that 'it goes without saying'.
>
> (d) It is more difficult to imply a term where the parties 'have entered into a lengthy and carefully-drafted contract'.

(e) The argument that a term must be implied will frequently arise after a problem has arisen, and the court must therefore be wary of using the benefit of hindsight not available to the parties when they made the contract."

37 The wider implied terms for which Mr. Feetham for M.H. Bland contends, in paras. 1(a), (b) and (c) of his cross-appeal (see para. 33 above), are based on the proposition that there is a necessary connection between the maximum royalty payable by M.H. Bland to the Government as landlord under the lease, *i.e.* 10% of the gross takings of the cable car, and the fees which the Government, as the body responsible for conservation on the Rock, may properly charge to cable car passengers for access to the Upper Rock. It is true that the Government has sometimes agreed to waive the royalty payable by M.H. Bland when setting a fee for passengers to pay. However, it is my firm view that there is no necessary connection between the royalty to be paid by M.H. Bland and the fees to be paid by its passengers. The submission that there is such a connection has no foundation. I would therefore reject the claim in these sub-paragraphs of the cross-appeal.

38 That leaves in issue an implied covenant either in the terms ordered by Pizzarello, A.J., *i.e.* "that the passengers of [M.H. Bland] have a right to alight from the cable car at the middle station to travel to and from the Apes Den free of any charge by the landlord," or in the wider terms set out in para. 1(d) of the cross-appeal (see para. 33 above). I start by saying that there is an implied term which, in accordance with the principles I have set out above, is to be implied in the lease, namely a right in the nature of an easement for M.H. Bland's passengers to ascend or descend the steps which give access to the middle cable car station. These steps were constructed by M.H. Bland's predecessor on land which was not demised by the lease. This is a good example of an implied term which is necessary to make the lease effective, and is so obvious that "it goes without saying."

39 The argument for M.H. Bland, in favour of the implication of the term found by the judge, is that—

(a) from 1966 until 1991, and particularly before the execution of the lease in 1968, people did have access to the roadways on the Upper Rock, including in particular those to the Apes Den and from the upper station, without paying any fee; and

(b) the reason for the construction of the middle cable car station was to enable passengers to visit the Apes Den.

But in my view this argument confuses M.H. Bland's rights with those of its passengers. Cable car passengers were not the only people who had access to the Upper Rock without paying a fee over that period of time.

Anybody who wished to go there did so, both residents of Gibraltar and visitors. The natural conclusion is that any person who visited the Upper Rock (other than the tourist sites) before 1991 was permitted—in legal terms was granted a licence—by the Government to do so. Since no such person had an interest which would entitle him to claim that his licence was irrevocable, it follows that it must have been revocable, or alternatively made subject to terms, including payment of a fee at the will of the Government. It follows therefore from the nature of the right claimed that it would not be appropriate to imply it as a term of the lease.

40 It must be noted in addition, to quote again two parts of Pizzarello, A.J.'s judgment, that he said:

> "The covenants sought to be implied in respect of rights through land were never specifically in the contemplation of the parties at the time the lease was negotiated (1966) or signed (1968) . . . there is no reason why any term should be added to give the lease business efficacy."

With respect to the learned judge, those conclusions, with which I entirely agree, were inconsistent with his finding two sentences later that a term should be implied into the lease. It follows that on this issue I would allow the appeal and dismiss the relevant part of the cross-appeal.

B. ***The effect of s.6 of the Conveyancing Act 1881***

41 Section 6(1) of the Conveyancing and Law of Property Act 1881 provided, so far as is material:

> "A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all . . . privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land . . . or at the time of conveyance . . . enjoyed with . . . the land . . . "

By definition, a conveyance included a lease.

42 In England, the 1881 Act was repealed and replaced by the Law of Property Act 1925. Section 62 of the 1925 Act is in terms identical to s.6 of the 1881 Act, except for s.62(6), which provides that "this section applies to conveyances made after the 31st day of December, 1881" (the day before the 1881 Act came into force). However, the combined effect of the English Law (Application) Ordinance and the Supreme Court Ordinance is that the 1881 Act still generally applies in Gibraltar.

43 In his cross-appeal, Mr. Feetham submits that Pizzarello, A.J. was correct to conclude as he did, that a right for M.H. Bland's passengers "to alight from the cable car at the middle station to travel to and from the Apes Den free of any charge by the landlord" was a right in the nature of

an easement or advantage which was included in the lease by virtue of s.6. The judge, however, also decided that the 1881 Act did not apply to the Crown in Gibraltar, and therefore that it had no application. It is against this later conclusion that Mr. Feetham's cross-appeal is directed.

44 In para. 39 above, I have explained that in my view such rights as members of the public, including M.H. Bland's passengers, enjoyed after April 1st, 1966 to have access to the Apes Den and the road leading to it, or indeed to any other roadways on the Upper Rock, were no more than personal licences revocable by the Government. Thus, they were the rights of the individual passengers and not of M.H. Bland, they were not rights in the nature of easements, and they did not appertain to nor were they enjoyed with the land. It follows that they were not rights which came within or could be conveyed by the operation of s.6 of the 1881 Act.

45 This makes it strictly unnecessary for me to decide whether Pizzarello, A.J. was right to conclude that the 1881 Act did not apply to the Crown in Gibraltar. However, I think it right to express my present view that the judge was correct in this respect. Put shortly, the main reason for my tentative view is that, when the 1881 Act was replaced in England by the Law of Property Act 1925, that Act contained an express provision in s.208 that its provisions did bind the Crown. There is no such express provision in the law of Gibraltar, and no basis for implying one. Thus the general rule that a statute does not bind the Crown unless it so provides, expressly or by necessary implication, applies. I would therefore dismiss the cross-appeal on this issue.

C. *Legitimate expectation*

46 Pizzarello, A.J. found that M.H. Bland had legitimate expectations of two kinds, arising from two sources. First, he decided that they had a legitimate expectation, derived from the agreement of May 1993/December 2000, that they would be consulted before any further change was made in the fees for access to the Nature Reserve. This was a procedural matter. Secondly, he decided that M.H. Bland had a legitimate expectation that they would not be deprived of a substantive benefit, namely, the right for their passengers to have access to the Apes Den free of charge. This expectation the judge based on his decision that the lease contained an implied covenant to that effect. Since in my judgment there was no such implied covenant, the basis for legitimate expectation of a substantive benefit disappears. It remains, therefore, for me to consider the expectation arising out of the May 1993/December 2000 agreement.

47 Legitimate expectation has been a well-established concept in Administrative Law since, at latest, the decision of the House of Lords in *Council of Civil Service Unions* v. *Minister for Civil Service* (1). In his speech in that case, Lord Fraser of Tullybelton said ([1985] A.C. at 401):

> "Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

Lord Diplock said (*ibid.*, at 408):

> "To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
>
> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a 'legitimate expectation' rather than a 'reasonable expectation,' . . .)."

Clearly the agreement of May 1993/December 2000 gave rise to such an expectation, as Mr. Neish, Q.C. properly concedes.

D. ***Enforceability of the agreement***

48 The decision of the House of Lords in *R.* v. *Inland Rev. Commrs.*, *ex p. Preston* (5), is authority for the proposition that if an authority is "guilty of conduct equivalent to a breach of contract or breach of representations" ([1985] 1 A.C. at 867, *per* Lord Templeman) its decision may be challenged by judicial review. There was some discussion before both the judge and us as to whether the agreement was invalid because it conflicted with the terms of the Fees Regulations 1993. Mr. Feetham was concerned that, if the agreement were held to be valid, it might be argued that his breach gave his clients only rights in private law, *e.g.* to damages or an injunction. He submits, however, that such an interpretation would not be correct and that, even if the agreement is valid, his clients would still have a legitimate expectation which they could enforce in public law. In my view, Mr. Feetham is generally correct in this. For present purposes, I think that his clients were entitled to rely upon and seek to

enforce by judicial review the benefits which they had a legitimate expectation of receiving under the May 1993/December 2000 agreement, whether that agreement was enforceable in private law or not.

49 What were those benefits? They were that M.H. Bland and the Government should cooperate and consult with each other with a view to agreeing the fare structure which reflected the entrance fees payable by cable car passengers wishing to enter the Upper Rock Nature Reserve, fees which would be "in the best interest of both parties." Secondly, the agreement was terminable only by not less than three months written notice.

50 Clearly the circular letter of March 20th, 2001 was a breach of the agreement, and did not accord with M.H. Bland's expectation. Quite apart from such private law rights as they may have had, I think that if the judicial review application could have been heard immediately after the circular letter was received, M.H. Bland might well have obtained some relief which could have required the Government to consult. But of course by the time the proceedings come before Pizzarello, A.J. much time had passed, other events had occurred, and the claims in the proceedings had substantially changed.

E. ***Regulation 2(e) of the Fees Regulations 2001—irrationality***

51 In *Council of Civil Service Unions* v. *Minister for Civil Service* (1), Lord Diplock described what he meant by "irrationality" in the following terms ([1985] A.C. at 410):

> "By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (*Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*, [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system."

52 Pizzarello, A.J. concluded that "the circular letter was unreasonable in the *Wednesbury* sense, so far as the claimant is concerned." He decided that the Fees Regulations 2001 could also be struck down as being irrational, but he was basing this conclusion on his finding of an implied term in the lease.

53 Considering the rationality of the Fees Regulations 2001 as a separate matter, by which I mean without regard to the term which I have concluded should not be implied in the lease, I do not see how it can be

argued properly that the Minister's decision to make the Fees Regulations 2001, including reg. 2(e) was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." This ground of challenge must therefore fail.

F. *Regulation 2(e) of the Fees Regulations 2001—legitimate expectation*

54 I have concluded at para. 50 above that the circular letter of March 20th, 2001 did not accord with M.H. Bland's expectation that under the agreement of May 1993/December 2000 the Government would cooperate and consult with M.H. Bland if it wished to alter the fees for admission to the Nature Reserve again. Mr. Feetham's argument is, in effect, that if the circular letter did not accord with Bland's legitimate expectation, neither did the 2001 Fees Regulations. Nothing, he submits, had occurred between March and November 2001 to lessen M.H. Bland's rights to be consulted. Therefore reg. 2(e) should be held to be void.

55 I cannot accept this argument. As a matter of fact, the letter from the Minister for Tourism and Transport of March 27th, 2001 (the "finesse" letter), the terms of which I have quoted in para. 17 above, received a detailed reply dated March 29th, 2001 from M.H. Bland's solicitors, in which it advanced many of the arguments which Mr. Feetham on its behalf has put before us. In particular, the letter of March 29th, 2001 referred to—

(i) breach of the terms of the lease;

(ii) rights acquired by M.H. Bland by virtue of s.6 of the Conveyancing Act 1881;

(iii) the fact that the fees in the Fees Regulations 2001 were "completely at odds" with those agreed in December 2000;

(iv) the fact that the Fees Regulations were outside the powers of the Nature Protection Ordinance.

The Minister immediately replied that the Government intended to "introduce the regime" set out in the circular letter of March 20th, 2001 with effect from April 1st, 2001. M.H. Bland's solicitors' letter therefore did not produce the desired result, but by March 31st, 2001 each party knew clearly what the other was saying.

56 The circular letter of March 20th, 2001 was a repudiatory breach of the agreement of May 1993/December 2000, assuming that the agreement was valid. It is arguable that, by starting the action claiming damages on April 3rd, 2001, M.H. Bland accepted that repudiation, and thus put an end to the agreement. But whether that argument is correct or not, it is

clear that by the later part of 2001, before the date when the Fees Regulations 2001 were made, both parties treated the agreement as being no longer in force.

57 It might be argued that the exchange of letters, unproductive though it was, amounted to consultation which satisfied the agreement of May 12th, 1993, but I do not base myself upon this. I prefer to remind myself that judicial review is a discretionary remedy. If relief is sought which would not be effective, that is a strong argument against granting that relief. It is clear from the exchange of correspondence in March 2001 that, if there had been an attempt at consultation later in that year, it would almost certainly have achieved nothing; it would have proved futile. The Government seems to have accepted the argument that in March 2001 the Ordinance as then in force did not, or might not, empower a Minister to make regulations containing the proposed fee structure set out in the circular letter of March 20th, 2001. The House of Assembly then, in November 2001, enacted s.24A of the Ordinance. Consultation or negotiation about the actual fee structure after that date would have been wholly unproductive. As a matter of discretion, I would therefore not strike down reg. 2(e) of the Fees Regulations as being unlawful and void because the regulation conflicted with M.H. Bland's legitimate expectation.

G. *Were the Fees Regulations made within the powers given by s.24A of the Nature Protection Ordinance?*

58 The foundation of Mr. Feetham's submission on this issue is the decision of the House of Lords in *Padfield* v. *Minister of Agriculture, Fisheries & Food* (3). It is convenient to refer to it by quoting a paragraph from the speech of Lord Bingham in the later decision of the House of Lords in *R.* v. *Environment Secy.*, *ex p. Spath Holme Ltd.* (4) ([2001] 2 A.C. at 381):

> "At issue in this appeal is the scope of the order-making power conferred by section 31: to what (if any) limits is that power subject?
>
> Mr. Bonney for Spath Holme rightly reminded us that no statute confers an unfettered discretion on any minister. Such a discretion must be exercised so as to promote and not to defeat or frustrate the object of the legislation in question. Counsel relied on *Padfield* v. *Minister of Agriculture, Fisheries and Food*, [1968] AC 997, 1030 where Lord Reid said:
>
>> 'Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be

> determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.'"

In the same paragraph, Lord Bingham said (*ibid.*, at 381):

> "The object is to ascertain the statutory purpose or object which the draftsman had in mind when conferring on ministers the powers set out in section 31."

59 Mr. Feetham submits that the purpose of the Nature Protection Ordinance is to be ascertained from its long title. This reads:

> "An Ordinance to provide for the protection of wild birds, animals and plants and for the designation and preservation of protected areas for the purpose of nature conservation and matters incidental thereto."

Mr. Feetham submits that the Fees Regulations 2001 were not introduced for any of the purposes within that title. Instead, he argues, the true purpose was that by reducing the disparity between the fees charged to people entering the Nature Reserve and visiting the tourist sites and to those who enter simply to walk in the reserve including seeing the Apes Den, more people would be persuaded to visit the tourist sites, thus increasing Government revenue. As Mr. Feetham puts it concisely, "what the Government is really doing is running a business."

60 Section 24A was added to the Nature Protection Ordinance by the House of Assembly in November 2001. It is convenient to repeat its wording:

> "The Minister with responsibility for the environment may by order published in the Gazette set—
>
> (a) the terms and conditions of entry, including times and dates; and
>
> (b) the fees for entry,
>
> to the nature conservation area or tourist or other sites within or comprising that area in respect of different classes of person and vehicles."

61 It is clear that the legislature took the view that setting the terms and conditions of entry and fees for entry into the Nature Reserve and to the

tourist sites within it, which had not previously been specifically covered by the Ordinance, was a proper power to add to the Ordinance and fell within its general scope. Section 24A itself was a proper piece of primary legislation, and the contrary has not been argued.

62 The Fees Regulations 2001, on their face, do precisely what the Ordinance permits the Minister to do. It is to be noticed that the Minister, who was empowered to and did make the regulations, was the Minister for the Environment, not the Minister for Tourism and Transport. Amongst other matters, it is certainly arguable that to attempt to limit the number of persons visiting the Nature Reserve by increasing the fees payable is a way of protecting the reserve. Be that as it may, the argument in favour of the regulations being outside the powers of the Ordinance must therefore be that, though the regulations appear to be valid on their face, the fee structure they contain can only have been devised for an ulterior purpose. In my judgment, in order so to conclude, the court would have to find that the fee structure was so obviously biased or flawed as to be *Wednesbury* unreasonable. I have already rejected the argument that the regulations are irrational. It follows that in my judgment this challenge to the validity of the regulations must also fail.

Conclusion

63 Strenuously and ably though Mr. Feetham has argued on his client's behalf, for the reasons set out above I would allow the appeal and dismiss the cross-appeal. The orders made, or more strictly the declarations granted, by Pizzarello, A.J. should be set aside.

64 **NEILL** and **STUART-SMITH, JJ.A.** concurred.

Appeal allowed; cross-appeal dismissed.