Hilary Term
[2015] UKPC 12
Privy Council Appeal No 0075 of 2012

JUDGMENT

Fazal Ghany (Appellant) *v* Attorney General and Another (Respondents) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Kerr
Lord Sumption
Lord Hughes
Lord Toulson
Sir David Lloyd Jones

JUDGMENT GIVEN ON

24 March 2015

Heard on 25 June 2014

Appellant	*Respondents*
Hendrikson Seunath SC Kristendath Neebar (Instructed by Bankside Commercial Solicitors)	Michael Fordham QC Tom Richards (Instructed by Charles Russell Speechlys)

SIR DAVID LLOYD JONES:

1. The Compensation Committee of Trinidad and Tobago ("the Committee") was established by section 5(1) of the Protective Services (Compensation) Act 1996 ("PSCA"). The long title of the Act is "An Act to provide for the payment of compensation in respect of officers of the protective services who suffer injury or die in circumstances arising out of and in the course of employment with the State". This stated purpose reflects the fact that, before the enactment of PSCA, officers in the police, fire and prison services had not been eligible for compensation for work-related injuries under the Workmen's Compensation Act 1960 ("WCA"). To address this anomaly, PSCA provides a scheme that allows injured officers to claim compensation. One issue in this appeal is how far the scheme introduced by PSCA is intended to extend.

2. The appellant, Fazal Ghany, was a corporal in the police service of Trinidad and Tobago when he suffered an injury as a result of falling while descending a flight of stairs at his place of work on 1 December 2006. As a result he suffered a fracture of the anterior superior iliac spine. Dr Stephen Ramroop, a specialist in orthopaedic surgery, examined the appellant on 20 August 2007 and concluded that he had a 26% permanent disability consequent on the injuries that he had sustained in the fall.

3. Corporal Ghany applied for compensation under the PSCA. The Committee decided that he had suffered injury while carrying out his duties, that the fall had been caused by the condition of the stairs that he had been descending and that the resulting level of disability was as assessed by Dr Ramroop. It concluded, however, that it was not possible to award him compensation. This was because the Committee was of the view that the state's liability to pay compensation arose only in accordance with the PSCA and Corporal Ghany's injury did not qualify under that legislation. Section 13(2) of the Act provides that the Committee shall make an order for the award of compensation in accordance with the Second Schedule. This provides that compensation for permanent partial disablement is to be awarded on the basis of the same percentages of an amount equal to three years gross salary "as those included under the Second Schedule to the [WCA]". The Second Schedule to the WCA contains a list of injuries that are "deemed to result in permanent disablement". This list does not include a fracture of the iliac spine.

4. On appeal to the Court of Appeal (Kangaloo, JA, Stollmeyer, JA and Smith, JA) that Court dismissed the appeal (Kangaloo, JA dissenting), holding that the Committee was correct in holding that it had no jurisdiction under the PSCA to award compensation.

The legislative provisions

5. Section 3 of the PSCA provides that where an officer suffers personal injury in circumstances arising out of and in the course of his employment with the State, it shall be liable to pay compensation "in accordance with this Act". "Personal injury" is defined in section 2 as meaning "permanent partial disablement or permanent total disablement". "Permanent partial disablement" is defined as meaning "such disablement of a permanent nature as reduces the earning capacity of an officer in the service in which he was employed at the time the disablement was sustained".

6. The Committee established under section 5(1) is said by that provision to have been brought into existence "for the purposes of performing the functions detailed under this Act". Those functions are specified in section 13 and include the following: to receive, investigate, hear and determine claims for compensation and to make orders for compensation "in accordance with the Second Schedule" (section 13(1)(a)) and to discharge any other responsibility that is required by the Act (section 13(1)(b)). The Committee is required by section 14 to make and publish its own rules dealing with the initiation of claims and the conduct of the Committee's business. It is required by section 17 to take into account, in making an award of compensation, any damages awarded to an officer or his beneficiary in respect of the same injury or death. It is required by section 18(1) to submit an annual report to the Minister with responsibility for National Security ("the Minister").

7. The Second Schedule is entitled "Benefits that should be granted in respect of injury or death arising out of and in the course of employment". Paragraph (a) of the Schedule deals with compensation for death and specifies (under paragraph (a)(i)) a sum for compensation as an amount equal to three years' gross salary at the date of death, plus (under paragraph (a)(ii)) such entitlement as is due under other legislation. Compensation for permanent total disablement or permanent partial disablement is dealt with in paragraph (b). It stipulates that this should comprise sums produced by applying the same percentages of the amount specified in paragraph (a)(i) as "those included under the Second Schedule to the [WCA]", plus such entitlement as might arise from other legislation. Thus, compensation for permanent partial or total disablement is to have as its base figure an amount equal to three

years' gross salary but the percentage of that amount that is to make up the award is to be the same as is stipulated in the Second Schedule to the WCA. The central issue in this case arises because that Schedule does not give a percentage for the type of injury that the appellant sustained.

8. Section 21 of the PSCA provides, among other things, that the Minister may by order amend the Second Schedule by adding benefits to be recovered by members of the various services who suffer work-related injuries.

9. The structure of the scheme for compensation in the WCA is broadly similar to that under the PSCA although, there are, as we shall see, important differences. Section 5(1) of the WCA provides in relevant part:

> "Subject to this Act, the amount of compensation shall be as follows:
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> …
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> "(c) where permanent partial disablement results from the injury -
>
> > (i) in the case of an injury specified in the Second Schedule, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the incapacity caused by that injury: and
> >
> > (ii) in the case of an injury not specified in the Second Schedule, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the incapacity permanently caused by the injury" …"

Accordingly, under section 5(1)(c)(i), where a workman has suffered permanent partial disablement, his employer is liable to pay compensation calculated according to the percentage of the compensation which would have been payable for permanent total disablement as set out in the Second Schedule. The title of the Second Schedule to the WCA is "List of injuries deemed to result in permanent disablement". Most of the injuries set out in the Schedule are the loss of a member, although the Schedule also includes

total loss of sight, loss of hearing, total paralysis, injuries resulting in being bedridden permanently and any other injury causing permanent total disablement. It provides that total permanent loss of use of a member shall be treated as a loss of that member. Each entry is allocated a percentage of incapacity.

10. In addition, section 5(1)(c)(ii) makes provision for the amount of compensation payable in cases of permanent partial disablement resulting from an injury not specified in the Second Schedule; it is to be such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the incapacity permanently caused. The PSCA does not include a provision corresponding to section 5(1)(c)(ii) of the WCA.

11. The questions which arise, therefore, are whether this omission was an error and, if so, whether it is open to the court to correct the error.

Submissions of the parties

12. On behalf of the appellant it is submitted that there has been an obvious error in the process of enacting the PSCA in that no provision has been made for those injuries resulting in permanent disablement which are not included in the Second Schedule to the WCA. It is further submitted that, had the error been noticed, it is clear that Parliament would have incorporated into the PSCA, a provision equivalent to section 5(1)(c)(ii) of the WCA.

13. On behalf of the respondents it is submitted that effect should be given to the literal meaning of the provisions of the PSCA. The liability of the State under section 3 is to pay compensation in accordance with the Act and, by virtue of section 13, the Committee is under a duty to make orders for compensation in accordance with the Second Schedule. The Second Schedule provides that in the case of compensation for permanent partial disablement the benefits shall be the same percentages of an amount equal to three years gross salary at the date of death as those included under the Second Schedule to the WCA. The injury suffered by the appellant does not appear in the Second Schedule to the WCA and accordingly, it is submitted, the Committee correctly concluded that it had no jurisdiction to make an order for the award of compensation.

Discussion

14. The circumstances in which it is open to the courts in interpreting legislation to correct obvious drafting errors are strictly confined, not least because the role of the courts must be limited to interpreting the statute and must not trespass into legislating. Nevertheless, in appropriate circumstances it is open to the courts to read words into a statute in order to correct an error. The applicable principles were stated by Lord Nicholls in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 as follows:

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, *Statutory Interpretation, 3rd ed (1995), pp 93–105. He comments, at p 103:*
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> > 'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any

> attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see Lord Diplock in *Jones v Wrotham Park Settled Estates* [1980] AC 74, 105-106." (at p 592 E-H)

15. In following this approach the court will not simply mechanically apply these principles. Often the nature of the mistake, the extent of rewriting which would be required and other considerations relating to the particular context will have an important bearing on whether such a process of rectification by interpretation is legitimate. Lord Nicholls expressed this as follows:

> "Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd v Schindler* [1977] Ch 1, 18, Scarman LJ observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation." (at pp 592 H – 593A)

16. The legislative history of compensation for members of the protective services is helpfully set out in the judgments of the Court of Appeal. Kangaloo JA explained that the PSCA was enacted in an effort to remedy an injustice suffered by members of the protective services who received an injury or died during the course of the performance of their duties. The WCA excluded members of the protective services, notably the police service and the fire service, from the definition of "workman" in section 2 and, accordingly, from compensation under that Act. This exclusion became a point of contention and it eventually resulted in an agreement reflected in Cabinet Minute 2289 of 1983 which provided different avenues for injured officers to obtain compensation. However, the resulting procedures were inefficient and cumbersome. The Government failed to create the Injury Board alluded to in the Cabinet Minute to deal with the award of compensation. Cabinet approval was required for every payment to a member of the protective services who died or was injured in the performance of his duties. Moreover, payment of awards was not always forthcoming because the funds came from the budgetary allocation of the Ministry of National Security. Against this background, the PSCA was intended to establish a new compensation process for members of the protective services. It established the Committee and provided that awards should be charged on the Consolidated Fund.

17. The long title of the PSCA is "an Act to provide for the payment of compensation in respect of officers of the protective services who suffer injury or die in circumstances arising out of and in the course of employment with the State". However, on reading the PSCA it becomes clear at once that not all injuries suffered by officers of the protective services in the course of their employment qualify for compensation. The definition of "personal injury" in section 2 makes clear that it is only permanent partial disablement or permanent total disablement which will give rise to compensation. This is confirmed by the Second Schedule to the PSCA. By contrast the WCA makes provision for the payment of compensation for temporary disablement, whether total or partial. Section 5(1)(d) of the WCA provides that in such cases of temporary disablement periodical payments shall be made in a sum calculated as a proportion of the disabled person's monthly earnings. The absence of an equivalent provision in the PSCA may be due to the fact that the protective services would be expected to continue to pay their employees when they are temporarily disabled in the course of their employment but, whether or not this is the case, this is an important difference in the scope of application and the approach of the two statutes to which Mr Fordham QC for the respondents rightly draws attention.

18. This is not the only difference between the two statutes. Mr Fordham places particular reliance on the following further matters:

(1) Under the WCA the earnings criterion is, generally, 36 months earnings in the case of death and, generally, 48 months earnings in the case of permanent total disability (sections 5(1)(a), 5(1)(b)). Under the PSCA no earnings criterion is more generous than that applicable in the case of death ie three years gross salary.

(2) The PSCA does not include a provision equivalent to section 5(1)(c)(ii) of the WCA.

(3) Whereas the WCA makes provision for compensation for occupational diseases (section 17(8), Schedule 1), there is no corresponding provision under the PSCA.

(4) The WCA does not include a provision corresponding to section 21 of the PSCA which permits the Minister by order to add to the benefits in the Second Schedule.

19. It is clear therefore that Parliament in enacting the PSCA did not intend simply to replicate or extend the provision made in the WCA for other

workmen. The WCA, considered in its entirety, is wider in its scope and application than the PSCA.

20. Before considering how the PSCA makes provision for compensation in cases of permanent partial disablement or permanent total disablement, it is convenient to consider how the Second Schedule to the WCA operates in the context of that statute. Its function in that context is to provide a part of the machinery by which the amount of compensation is to be calculated in cases of permanent partial disablement. Such cases are divided into two categories by section 5(1)(c) depending on whether the injury is specified in the Second Schedule. The injuries included in the Schedule are those deemed to result in permanent disablement. In these cases, the amount of compensation will be such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified in the Schedule as being the percentage of the incapacity caused by that injury. The injuries specified are for the most part the loss of or the loss of use of a member, instances in which the resulting permanent disability is clearly demonstrated and in which it might be thought that the relationship that injury bears to permanent total disablement could be relatively readily assessed and a general rule established. Thus, for example, loss of a leg at or above the knee is assessed at 70% of total incapacity and loss of a hand at the wrist at 60% with an adjustment if it is not the dominant hand. However, the cases set out in the Second Schedule are not exhaustive of permanent disablement within the WCA. The Schedule is entitled "List of injuries deemed to result in permanent disablement". Other cases are provided for by section 5(1)(c)(ii): here the amount of compensation is such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the incapacity permanently caused by the injury. The approach applied to both categories is essentially the same in this respect: compensation is calculated in proportion to the relationship of the injury to permanent total disablement. However, whereas in the cases within the Schedule it is possible to fix that relationship in advance, in other cases it has to be assessed on a case by case basis.

21. The PSCA imports part of this machinery of quantification from the WCA. However, because it imports the Second Schedule to WCA but not section 5(1)(c)(ii) the power of the Committee to award benefits is, on the face of it, limited to the cases set out in the Second Schedule. Mr Fordham is correct in his submission that it should not be assumed that the statute is intended to provide compensation for all forms of injury. As we have seen, it does not. However, within the category of permanent partial disablement, it is difficult to conceive of any sensible reason why compensation should be limited to those cases set out in the Second Schedule to the WCA. To distinguish between the loss of an arm (which would attract compensation) and the loss of a lung (which would not) would be totally arbitrary. Similarly, an officer

who was rendered paraplegic would not be able to recover compensation whereas one who had lost a finger would. These irrational results suggest very strongly that something has gone wrong in the drafting of the PSCA and, in particular, in the importation of provisions from the WCA. In this regard, the present case may be considered a stronger case than *Inco* where the restriction on appeals resulting from a literal interpretation of the statute fell short of irrationality.

22. This impression is strengthened when one considers the legislative technique employed. If, as the respondents submit, it had been intended to limit compensation to certain types of permanent partial disablement, one would expect an express provision to that effect. The importation of only one of two complementary provisions governing the calculation of benefits under another statute is, to say the least, a curious way in which to achieve that result. In fact, the scheme of the PSCA demonstrates, on the contrary, that the purpose of this importation was to provide a machinery for the calculation of compensation. This appears from section 13(1) which includes in the functions of the Committee the making of orders for compensation in accordance with the Second Schedule and from that Schedule itself which is headed "Benefits that should be granted in respect of injury or death arising out of and in the course of employment".

23. These considerations all point strongly to the conclusion that the intention was to introduce from the WCA the entire machinery governing the calculation of compensation for permanent partial disablement, ie that which is to be found in both the Second Schedule and in section 5(1)(c)(ii), and that an error occurred in the importation of these provisions.

24. Contrary to Mr Fordham's submission, the undoubted differences in scheme and scope between the WCA and the PSCA do not detract from this conclusion. The argument on behalf of the appellant that an error has occurred in the legislative process does not depend on both statutes following an identical approach in all respects. For the reasons given above, it appears that there was a clear intention to adopt the machinery of the WCA in one specific respect. What was actually achieved in that regard, on a literal reading of the statute, is irrational. The fact that there are differences in the approach of the statutes in other areas such as the maximum earnings criterion, provision for temporary disablement or compensation for occupational diseases has no bearing on the issue under consideration.

25. In this regard Mr Fordham also points to the provision in section 21 of the PSCA empowering the Minister to amend by Order the Second Schedule to that Act by adding to it any other benefits. He submits that a rational

legislature could have concluded that it was for the Minister to decide whether other conditions should be added to the list. There is nothing in the material we have seen to suggest that section 21 was intended to fulfil a role in substitution for that played by section 5(1)(c)(ii) in the WCA. More fundamentally, however, this argument encounters the difficulty that there is no sensible basis on which Parliament could have taken as its starting point for limiting injuries giving rise to compensation, a division between two categories of cases devised for a wholly different purpose and the application of which gives rise to irrational results.

26. For these reasons, it is possible to be confident, to the high standard indicated by Lord Nicholls in *Inco*, that by inadvertence the draftsman and Parliament failed to give effect to the statutory purpose. The intention was to import the complementary provisions of the WCA providing for the quantification of benefits in cases of permanent partial disablement but, no doubt by an oversight, that part of the machinery provided for by section 5(1)(c)(ii) was omitted.

27. This then leads to the further question whether the Board can be abundantly sure of the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed.

28. The respondents here advance two lines of argument. The first is founded on the differences between the WCA and the PSCA. It is submitted that the PSCA does not and was not intended to replicate the WCA and that it is therefore not possible to conclude with the required degree of assurance that the intention was to include a provision on the lines of 5(1)(c)(ii). In particular it is submitted that there are other ways in which Parliament could have dealt with the *casus omissus*, had it been noticed. In the course of argument Mr Fordham advanced the following possible alternatives:

(1) allowing a wide discretionary judgement to the Committee as to the appropriate level of compensation;

(2) specifying, in cases of permanent partial disablement not within the Schedule, an appropriate percentage of the compensation for permanent total disablement;

(3) providing for a proportionality assessment by reference to individual cases;

(4) making alternative provision under the Police Service Act or the Police Service Regulations.

29. With regard to the first alternative – allowing a wide discretion to the Committee to set an appropriate level of compensation – it is difficult to see how, within the scheme of the legislation, this could permit an award which failed to take account of the maximum award for permanent total disablement. To the extent that the assessment would operate by reference to that maximum award it would in essence introduce the machinery of section 5(1)(c)(ii). However, Mr Fordham contemplates that Parliament might have conferred a wider discretion in the Committee. If it is accepted that the purpose of the distinction drawn by the Second Schedule of the WCA is between cases in which the proportionate level of disability can be fixed in advance and those in which it is necessary to do so on a case by case basis, it is difficult to see what rational justification there could be for allowing in the second case a wider discretion extending beyond a power to assess the relationship of the disablement to total disablement. There is nothing inherent in the injuries falling outside the Second Schedule which would justify such preferential treatment exceeding the power to assess the proportion of disability by reference to the facts of the particular case.

30. The second alternative would involve setting, in respect of each of those permanent partial disablements falling outside the Second Schedule, an appropriate percentage of the level of compensation for permanent total disablement. However, this overlooks the fact that the whole reason for the distinction drawn by the WCA between these two categories of case is that in these cases it is not possible, with any degree of fairness, to set compensation in this way. These are the cases which require an assessment on their particular facts. Moreover, it would simply not be possible to identify in advance every form of disablement which might arise. If Parliament were to adopt this approach some cases of permanent partial disablement would be left without compensation.

31. The third alternative identified by Mr. Fordham is not, in fact, an alternative at all. It is, rather, the introduction of section 5(1)(c)(ii).

32. Mr Fordham's fourth alternative - making alternative provision under the Police Service Act or the Police Service Regulations – encounters the same difficulties. To the extent that such alternative provision might require the ascertainment of the proportion the disablement bears to total disablement, this is essentially the same as importing section 5(1)(c)(ii). To the extent that it adopts a different approach, the distinction between cases which are within

the Second Schedule and those which are not does not provide a rational basis for treating these case differently.

33. The second line of argument advanced by the respondents is based on section 21 of the PSCA which empowers the Minister by order to amend the Second Schedule by adding to it any other benefits. Mr Fordham submits that a rational legislature could have concluded that it was for the Minister to decide whether other conditions should be added to the list. However, this approach would not work in cases where there is a need to assess the degree of disablement by reference to the circumstances of the individual case. Furthermore, we are here considering what Parliament would have done had it realised that it had omitted a provision which would have provided in very general terms for the assessment of compensation on a proportionate basis for permanent partial disablement. This suggested alternative, which would operate in a piecemeal manner and with prospective effect only, hardly fits the bill.

34. In considering whether the Board can be confident to the very high standard set by Lord Nicholls in *Inco* as to the substance of the provision Parliament would have made had the error in the Bill been noticed, the nature of the mistake is a vital consideration. This is not a case where the legislature has simply failed to make provision for a particular class of case. Rather, it is clear that the intention was to introduce from the WCA the entire machinery governing the calculation of compensation for permanent partial disablement, ie that which is to be found in both the Second Schedule and in section 5(1)(c)(ii), and that, in error, part of the machinery was omitted. This feature of the case permits the confident conclusion that, had Parliament been aware of the error, it would have taken the obvious step of introducing the substance of section 5(1)(c)(ii). Furthermore, although it is not necessary for the interpreting court to be abundantly sure of the words which the legislature would have used, in this case one can be because the words are provided by section 5(1)(c)(ii).

35. It remains, however, to consider whether it is appropriate for a court to take the step of interpreting the statute in the manner contended for by the appellant. The governing considerations here are the proper scope of the judicial function and the danger of usurping the function of the legislature. This will inevitably be a matter for judgement in the circumstances of the individual case. The circumstances in which Lord Nicholls considered that a court may find itself inhibited from giving effect to what it is confident was the underlying intention of Parliament include an alteration in language which is too far-reaching or a context which calls for a strict interpretation of the statutory language. The latter consideration does not apply in the present case. As for the former, the question of how much rewriting would be too

much must depend on the context of the particular case. Here, the reading for which the appellant contends would require the insertion of some forty four words from section 5(1)(c) of the WCA. However, given the context and, in particular, the nature of the error, this insertion would be far less drastic than its size alone might suggest.

36. In this regard Mr Fordham submitted that the power conferred on the Minister by section 21 of the PSCA to add other benefits to the Second Schedule is a powerful reason for the courts to decline to adopt the interpretation for which the appellant contends. Here he draws attention to the observations of Lord Collins of Mapesbury JSC in *Enviroco Ltd v Farstad Supply A/S* [2011] 1 WLR 921 at para 50, to the effect that the danger of evasion of statutory regulation could be met by the power of the Secretary of State to amend the relevant provisions by regulation. In the present context the power would not extend to the introduction of a provision resembling section 5(1)(c)(ii). Moreover, in the context of the PSCA, for the reasons explained above, the power to add other benefits could be only a partial remedy and only prospective. Accordingly, section 21 does not assist the respondents.

37. We are not here concerned with the grant of a discretionary remedy but with statutory interpretation. In light of the obvious and particular error which has occurred, this is a permissible and necessary insertion.

The loss of earnings issue

38. The Court of Appeal raised of its own motion the issue of whether the failure of the appellant to adduce evidence before the Committee of a loss of earnings prevented his claim from succeeding. It did not proceed to consider that issue in the light of its conclusion that the Committee had no jurisdiction to award compensation in this case.

39. This issue was not argued before us on the appeal and we remit this matter for consideration by the Committee.