IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA
CONSTITUTIONAL AND ADMINSTRATIVE DIVISION
PROCEEDING FOR JUDICIAL REVIEW

2018-HC-DEM-CIV-FDA-310

IN THE MATTER OF AN APPLICATION
BY RAMON GASKIN FOR WRITS OF
CERTIORARI AND PROHIBITION

BETWEEN:

RAMON GASKIN

APPLICANT

And

THE MINISTER OF NATURAL RESOURCES

RESPONDENT

And

ESSO EXPLORATION AND PRODUCTION GUYANA LIMITED;

CNOOC NEXEN PETROLEUM GUYANA LIMITED

And

HESS GUYANA EXPLORATION LIMITED

Added Respondents (Interveners)

SUBMISSIONS ON BEHALF OF THE APPLICANT
RAMON GASKIN

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[1] These submissions will address two (2) discrete issues:

a. Merits

b. Delay.

[2] A useful starting point is to set out a chronology of events which will assist the Honourable Court in its determination of this application.

CHRONOLOGY

Date	Event
27th June 2016	Government of Guyana represented by Minister of Natural Resources ("the Minister") entered into a ***Petroleum Agreement*** with Esso Exploration and Production Guyana Ltd ("**Esso**"), Hess Guyana Exploration Ltd ("**Hess**") and CNOOC Nexen Petroleum Guyana Ltd ("**Nexen**"). The Petroleum Agreement ("***the Petroleum Agreement***") ***was not made public***.
7th October 2016	The Minister (of Natural Resources) granted a ***Petroleum Prospecting Licence to Esso, Hess and Nexen.*** *This licence was not made public*.
2016/2017	ERM (Environmental Resources Management) carried out an ***Environmental Impact Assessment for Esso***
1st June 2017	ERM submitted the ***final version*** of the Environmental Impact Assessment submitted to the ***Environmental Protection Agency ("the EPA"***).
1st June 2017	The EPA granted an ***Environmental Permit to Esso.*** *The EPA did not make the permit publicly available and the permit is still not available on the EPA's website.*
15th June 2017	The Minister (of Natural Resources) as 'Minister Responsible for Petroleum' granted a ***Petroleum Production Licence ("the PPL") to Esso, Hess and Nexen***. The Petroleum Production Licence ***was not made public***.
27th December 2017	The EPA provided a copy of Environmental Permit to the ***Applicant's/Appellant's attorney-at-law for the first time.***
28th December 2018	The Government ***released*** *a co*py of ***the Petroleum Agreement.***
29th December 2017	Stabroek News article revealed that the Petroleum Agreement had been registered at the Deeds Registry and was therefore a public document. The photo in the Stabroek News article also revealed that a petroleum licence had been filed at the Deeds Registry. This had been hitherto unknown to the public and in particular to the Applicant.
19th January 2018	Applicant's attorney-at-law obtained a copy of the PPL.
19th February 2018	Fixed Date Application (FDA) filed at the High Court, within one (1) month of receiving the PPL.
20th February 2018	Hearing in Chambers before Justice Franklyn Holder.

21st and 22nd February 2018	Full/complete copies of the ***Petroleum Agreement***, *Petroleum (Exploration and Production) Act Cap 65:04*, *Environmental Protection Act Cap 20:05* and additional authority, supplied to Justice Holder as requested.
26th February 2018	Decision of Justice Franklyn Holder.
22nd March 2018	Notice of Appeal filed. Marshall served the Notice of Appeal on the Minister of Natural Resources.
23rd March 2018	Motion for an urgent hearing filed.
29th March 2018	Marshall served the Motion for an urgent hearing on the Minister of Natural Resources.
2nd May 2018	Memorandum from the Court of Appeal fixing the hearing date for 29th May, 2018. The memorandum was addressed to the Applicant; the Minister of Natural Resources; and the Attorney-General.
8th May 2018	Applicant's attorneys-at-law received a copy of the Authority to Act by Mr Edward Luckhoo, SC on behalf of the Minister. The Marshall having served the Notice of Appeal and the Motion for an urgent hearing on Mr Edward Luckhoo, SC, a **courtesy** copy of the Notice of Appeal and Motion were also served on the Attorney-General as he was named on the Court of Appeal memorandum even though the Attorney General has no place/or right of audience in judicial review proceedings- See the leading judgment of Desiree Bernard C in ***Jardim v Attorney-General of Guyana*** Civil Appeal 134/98 and Guya Persaud JA in ***Application of Bob Sooknandan*** Civ App N. 109/95 (Trinidad and Tobago)).
28th May 2018	The Minister filed and served his affidavit. Written Submissions were filed and served on behalf of the Minister.
29th May 2018	Hearing in the Court of Appeal.
8th June 2018	Applicant's Affidavit in Reply filed and served on Mr Edward Luckhoo, SC.
11th June 2018	Supplemental Affidavit of the Applicant filed and served.
19th June 2018	Applicant filed and served submissions asking, *inter alia,* for the order of Holder J to ***be set aside*** and for the matter to ***be sent back to the High Court of an urgent re-hearing before another judge.***
28th June 2018	The Court of Appeal made an order stating that the appeal be allowed, the decision of Holder J be set aside and the matter be sent to the High Court for a re-hearing. The Court of Appeal also deemed the matter urgent and instructed that it be heard *de novo.*
23rd August 2018	Applicant wrote to the Registrar informing the Registrar that the Applicant would be seeking an adjournment due to the fact that Senior Counsel was scheduled to have medical treatment; the letter was copied to Mr Edward Luckhoo, SC.
24th August 2018	Affidavit in Defence filed by Respondent Minister.
27th August	Applicant served on Mr Edward Luckhoo, SC Notice of Intention to amend

2018	Fixed Date Application.
28th August 2018	Applicant served amended Fixed Date Application on Mr Edward Luckhoo, SC.
3rd September 2018	Counsel for Esso, Hess and Nexen served Notice of Application for Esso, Hess and Nexen *to be added as respondents.*
4th September 2018	Hearing before the Hon. Chief Justice (Ag); Amended Fixed Date Application struck out; Chief Justice (Ag) ordered Applicant (Gaskin) to file and serve an Affidavit in Reply and submissions by 26th September; and ordered Esso, Hess and Nexen to file submissions by 10th October; and fixed the hearing of the application for 25th October at 11 am.
25th October 2018	Hearing before the Hon. Chief Justice (Ag) in which the Hon. Chief Justice (Ag) ordered that Esso, Hess and Nexen be joined as added respondents/interveners on condition that their costs not be recovered against the Applicant, Ramon Gaskin. It was further ordered that the Applicant serve the FDA on counsel for the added respondents/interveners on or before 31st October, 2018; that the added respondents/interveners serve and file their Affidavit in Defence on or before 14th November 2018 and that the Applicant be permitted to serve and file affidavits in response to the Respondent and the added respondents/interveners by 28th November 2018. It was also ordered that the Applicant serve and file written submissions on or before 3rd January 2019.
30th October 2018	Applicant served the FDA on counsel for the added respondents/ interveners.
15th November 2018	Added respondents/interveners served affidavit in defence.
27th November 2018	Applicant served and filed affidavit in response to Respondent and affidavit in response to added respondents/ interveners.

Note: The Attorney-General is not a party to the Action. The complaint is against the Minister and we are asking for remedies against the Minister not the AG. The AG cannot be a party to the action.[1]

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[1] He enforces on behalf of the Crown (State)**.** In ***Jaundoo v Attorney-General of Guyana*** [1971] AC 972, [p7] [**TAB 1**] the PC opined thus:

> "At the relevant time, the executive authority of Guyana was vested in Her Majesty and exercised by the Governor-General on her behalf under Article 33 of the Constitution. At the time of the hearing of the Motion in the High Court an injunction against the Government of Guyana would have been an injunction against the Crown, which a court in Her Majesty's Dominions had no jurisdiction to grant. The reason for this is that the court exercises its judicial authority on behalf of the Crown. Accordingly any orders of the court are themselves made on behalf of the Crown and it is incongruous that the Crown should give orders to itself."

Jaundoo was overruled in part: remedies are available against the State, not just an individual minister: ***Gairy v Attorney-General of Grenada*** **[2001] UKPC 30 (June 19, 2001).** But it does not affect the principle that in judicial review, proceedings are brought against the subject minister, not the AG.

(I) THE MERITS OF THE APPLICANT'S CASE

[3] On 1st June 2017 the Environmental Protection Agency ("*the EPA")* issued environmental permit no. 20160705-EEDPF to Esso ("*the Esso Permit"*) in respect of Phase 1 Liza Development Project ("*the Liza Project"*). The EPA has not issued an environmental permit or other environmental authorisation to Hess and/or Nexen. On 15th June 2017 the Respondent Minister purported to issue a Petroleum Production Licence to Esso, Hess and Nexen ("*the PPL"*). These facts are not in dispute. They are admitted by the Respondent and by Esso, Hess and Nexen in their respective affidavits of defence. (A copy of the Esso Permit is exhibited in the Applicant's affidavit as exhibit **RG5**; a copy of the PPL is exhibited at **RG7**.)

[4] The Applicant's case is that the Minister has acted, *inter alia,* irrationally, unlawfully, illegally and without or in excess of jurisdiction by purporting to grant the PPL to Esso, Hess and Nexen, contrary to the *Environmental Protection Act Cap 20:05* (*"the EP Act").*

[5] It may be helpful to clarify at the outset that the Applicant is not seeking judicial review of any action taken or decision made by Esso, Hess or Nexen (the added respondents/interveners) ("*the Interveners*"). Any additional factual material which the Interveners have sought to put before the Hon. Court has no bearing whatsoever on the **legal** question of whether the Minister's grant of the PPL was irrational, unlawful, illegal, etc. We note that the Interveners repeated *ad nauseam* the arguments made by the

Respondent; they have added nothing new. It is as though they believe that the weight of the arguments is by repetition, like a stuck gramophone. In order to avoid burdening this Hon. Court with repetition we will address the arguments made by the Interveners only when such arguments might raise a separate legal point.

[6] By way of reminder we draw this Hon. Court's attention to *section 14 of the EP Act* which says that-

> "A public authority shall not give **development consent** in any matter where an environmental authorisation is required unless such authorisation has been issued...." [**Our emphasis**.]

[7] We submit that an environmental authorisation was required before the Respondent could have lawfully issued a PPL to Esso, Hess and Nexen as *section 2 of the EP Act* defines a *'public authority'* as,

> "a Ministry, local government authority or local democratic organ."

[8] In this respect *section 7 of the Interpretation and General Clauses Act Cap 2:01* (*"the Interpretation Act") is most relevant and* provides that:

> "In any written law or in any public document –
>
> (a)……..
>
> (b) a reference to "the Ministry" shall be construed as a reference to the business of the Government of Guyana under the administration of the

Minister, or any part thereof as the President may direct as constituting a Ministry"

[9] It is therefore beyond argument that the Minister of natural resources is caught squarely within the letter, spirit and meaning of the foregoing provisions, hence the Minister with responsibility under the *Petroleum (Exploration and Production) Act Cap 65:04* is a public authority within the meaning of *section 14 of the EP Act* **and is duty bound to act within the law as prescribed.** The Minister cannot escape his public duty by his shenanigans to put a twisted meaning to the otherwise pellucid provisions of the relevant statutes.

[10] The Applicant further relies on *section 2 of the EP Act, which* states that:

> "*development consent*" **means**[2] the decision ***of the public authority*** which **entitles the developer** to proceed with the project." **[Our emphasis.]**

Hess and Nexen are not 'developers' within the meaning of s.2 EP Act

[11] We submit that the effect of *section 2 of the EP Act* is that the public authority (the Minister) can only grant development consent to a person who is a developer within the meaning of the *EP Act.* As Hughes LJ has stated in ***Wirral Metropolitan Council v Salisbury Independent Living*** [2012] EWCA Civ. 84 at [23], "The principle of construction can be given the Latin tag *expressio unius exclusio alterius*, but it is equally simply explained by the ordinary proposition that when a legislative provision sets out who or what is within the meaning of an expression**, it ordinarily means that no-one**

[2] It does not say "includes" or use any other qualifying words or expressions.

else or nothing else is. If it wishes to say that its provisions are other than exhaustive, it usually says so, in terms such as "Without prejudice to the generality of the expression….", or "The following are included in....", or "In construing the expression….the court shall have regard to all the circumstances including…." [**our emphasis] [TAB 2]**

[12] *Section 2* says **"means**"; it does not contain any qualifying words.

[13] *Section 10 of the EP Act* defines a developer for this purpose as, "the applicant for environmental authorisation for a project or the State initiating a project."

[14] Applying again the principle of construction *expressio unius exclusio alterius*, a person who is not an applicant for environmental authorisation is not a developer and is therefore not within the category of persons who are eligible for development consent. The decision of the public authority is limited by *section of 2 EP Act.*

[15] Hess and Nexen have not applied for environmental authorisation. We respectfully submit that Hess and Nexen have not met the criteria for becoming developers within the meaning of *section 2 EP Act* and cannot obtain development consent. With respect, we further submit that it is pellucid that the Minister acted contrary to *section 14 of the EP Act* by purporting to grant development consent (the PPL) to Hess and Nexen.

[16] We accept that the Minister was not prohibited by *section 14* from granting a PPL <u>solely</u> to Esso as the developer with an environmental authorisation.

The mere grant of the PPL constitutes a breach of the EP Act

[17] *Section 8 of the Petroleum (Exploration and Production) Act Cap 65:04.* (*"the Petroleum Act*) states that,

> "No person shall search for in, or get from, any land in Guyana petroleum except— (a) under and in accordance with a licence granted by the Minister under this Act;"

[18] It is to be noted that the word "licence" is defined in *s. 2(1) of the Petroleum Act* as meaning "a petroleum prospecting licence or a petroleum production licence, or both, as the context requires…" It is artificial to read the *Petroleum Act* in isolation from the *EP Act*; they must be read side by side.

[19] A petroleum production licence entitles the licence holder to get petroleum and constitutes the 'development consent' in *section14 of the EP Act.*

[20] *Section 38 of the Petroleum Act* **confers on the holder of a PPL, exclusive rights** ---

> "(a) to carry on prospecting and production operations in the production area;
>
> (b) to sell or otherwise dispose of petroleum recovered;and
>
> (c) "to carry on such operations and execute such works in the production area as are necessary for, or in connection with, any matter referred to in paragraph (a) or (b)."

[21] The PPL slavishly repeats the words of the *Petroleum Act* and states that it grants (or purports to grant) to Esso, Hess and Nexen exclusive rights in the Liza Production Area –

> "(a) to carry on prospecting and production operations in the production area;
>
> (b) to sell or otherwise dispose of petroleum recovered; and
>
> (c) "to carry on such operations and execute such works in the production area as are necessary for, or in connection with, any matter referred to in paragraph (a) or (b)."

[22] The PPL **entitles** all three of Esso, Hess and Nexen to proceed with the Liza Project without purportedly being in breach of *section 8 of the Petroleum Act*. It constitutes development consent as it is "*the decision by the public authority which entitles the developer to proceed with the project*." This is wholly untenable and contrary to express statutory provisions.

[23] Only Esso has an environmental authorisation. The Esso Permit is granted to Esso. It states that Esso is the permit holder and authorises Esso to undertake the Liza Project. In return, Esso states that it accepts the terms and conditions on which the Esso Permit has been granted. The Esso Permit has not been issued to Hess or Nexen. No environmental permit or other environmental authorisation has been issued to Hess and/or Nexen. Hess and Nexen cannot piggy back on Esso because of the precatory provisions of the *EP Act*, which are designed to protect, preserve and sustain the environment for generations to come. The Minister has taken a farcical and unsustainable (no pun intended) approach to

the grant of the PPL; the PPL has no legs to stand on; it is condemned to the dustbin of history by the *EP Act*.

[24] It is settled law that a public body acts illegally if it has failed to comply with a duty. The words “shall not” in *section 14* clearly impose a duty on the Minister to refrain from giving development consent to Esso, Hess and Nexen when only Esso has the required environmental authorisation (the Esso Permit).

[25] It is settled law that, “Statutory words requiring things to be done as a condition of making a decision, especially when the form of the words requires that something “shall” be done, raise an inference that the requirement is “mandatory” or “imperative” and therefore that failure to do the required act renders the decision unlawful. The above inference does not arise when the statutory context indicates that the failure to do the required act is of insufficient importance in the circumstances of the particular decision, to render the decision unlawful.” [***de Smith's Judicial Review*** 8th ed. (electronic) (2018) chapter 5 paragraph 5-058 at (b) and (c)]. [**TAB 3]**

[26] It is precisely because of the critical importance of regulating development that *section 14* makes it **mandatory** to obtain an environmental permit. The Minister has no discretion; the environmental permit is a condition precedent to the giving of development consent. The importance of this requirement is further emphasised by *section 15 of the EPA* which states:

> "Any person who fails to carry out an environmental impact assessment or who commences a project without obtaining an environmental permit as required under this Act……shall be guilty of an offence…"

[27] The penalties are not merely monetary (fines) but include the serious sanction of imprisonment.

[28] We also refer the Hon. Court to *section 5 of the EP Act,* which provides that

> "Without prejudice to the provisions of section 14, any person or authority under any other written law, vested with power in relation to the environment shall defer to the authority of the Agency and shall request an environmental authorisation- before approving or determining any mater in respect of which an environmental authorisation is required under this Act."

[29] Clearly the Respondent failed to do so but has instead acted unlawfully, irrationally, without or in excess of jurisdiction, etc.

[30] We respectfully submit that it is as night follows day that the Respondent has acted illegally and without or in excess of jurisdiction by purporting to grant the PPL contrary to *section 14 of the EP Act*. As Lord Diplock has pointed out in ***CCSU v Minister for Civil Service*** [1985] 1 AC 374 at 410 F**,** "By illegality as a ground for judicial review I mean that the decision-maker must understand correctly **the law** that regulates his decision making power and must give effect to it. Whether he has or not is par excellence

a justiciable question, to be decided, and in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable." **[Our emphasis.] [TAB 4]**

[31] It is irrelevant and tendentious for the purposes of *section 14 of the EP Act* whether Hess and Nexen do, or do not carry out, the Liza Project. The mere fact that the PPL **entitles** Esso, Hess and Nexen to carry out the Liza Project when only Esso has an environmental permit is sufficient to constitute a breach (nay, a flagrant breach) of *section 14* and to render the Minister's purported grant of the PPL, illegal for being made without or in excess of jurisdiction, irrational, unreasonable, an improper exercise of his powers and/or taking into consideration irrelevant matters while omitting to take into consideration relevant matters.

Hess and Nexen also require an environmental permit

[32] In order to obtain development consent (the PPL), Hess and Nexen must become 'developers' and must comply with *section 11 of the EP Act* which states that

> "A developer of any project listed in the Fourth Schedule, or any other project which may significantly affect the environment ***shall apply to the Agency [EPA] for an environmental permit….***" [**Emphasis added**.]

[33] The fact that *the EP Act* only uses the singular 'developer' does not restrict *section 11* to a single developer. *Section 6(1) of the Interpretation Act* states that

"(b) words in the singular shall include the plural and words in the plural shall include the singular;"

[34] The EPA has the authority to grant an environmental permit to any developer(s) that meet(s) the requirements of *the EP Act*.

[35] Where there is more than one developer (whether persons or entities) *section 11* should therefore be read as providing that the 'developers' of a project are required to apply for an environmental permit. To put any other construction thereon would be to do violence to the clear and obvious language used by the framers of the *EP Act*; the clear intent is that "developers" must have the financial wherewithal to restore the environment in its pristine condition in the event that an environmental disaster occurs. An indigent "developer" cannot piggy back on a financially sound "developer" as liabilities may be distinct or apportioned. A critical purpose of the *EP Act* is to make sure that "developers" have the financial capability to restore the environment, in the event of a disaster. In this case, the Minister has even given Esso, Hess and Nexen a "bligh" and has allowed then to self-insure.

[36] We respectfully submit that in order for the three (3) companies, (Esso, Hess and Nexen) lawfully to obtain a petroleum production licence (PPL) that entitles all three (3) of them to carry out the Liza Project, they must together make up the "developer" or alternatively, each one may be a "developer" so that they must all have an environmental permit (one permit for all three) or each must have an environmental permit in its own right.

[37] We further submit with respect that all three (3) of Esso, Hess and Nexen should have applied for an environmental permit to be granted to all three (3) of them - just as the PPL has been granted to all three of them and the Petroleum Agreement is made with all three of them. The most crucial of the three (3) documents, namely, the *environmental permit* or the *environmental authorisation* was scrupulously avoided like the plague but they are prepared to hoodwink the public by applying for and being granted the PPL together, by applying for and being granted the Petroleum Agreement together, but in relation to the environmental permit/authorisation by being content to ride on the back of the Esso environmental permit/authorisation and the Minister shutting his eyes to the obvious.

[38] Indeed, the Petroleum Agreement makes *it clear that it requires an environmental permit granted to all three (3) companies since article 28* states that, "the Contractor (defined as Esso, Hess and Nexen) **shall** obtain an environmental authorisation."

[39] We respectfully submit that the Minister has acted contrary to the Petroleum Agreement as well as the *EP Act* in granting the PPL to Hess and Nexen as well as Esso. The statutory mandate in the *EP Act* has been flouted with impunity thus far.

[40] With respect we further submit that the Minister has acted irrationally and irresponsibly by not enforcing Article 28 of the Petroleum Agreement.

The 'project' and the 'developer(s)' must be approved

[41] *The EP Act* establishes a two-stage due diligence process for the grant of an environmental permit to the developer(s). The ***first*** stage is the environmental impact assessment (*"the EIA"*) of the proposed project in accordance with the procedure in *section 11*. The ***second*** stage is the assessment of the developer(s) under *section 13(2)*. This latter provision is critical in that the EPA must be satisfied that the developers of the project can comply with the terms and conditions of the environmental permit and can each pay compensation for any loss or damage, which may arise from the project or breach of any term or condition of the environmental permit. Since Hess and Nexen do not have an environmental permit the issue of their respective compliance and capacity to pay compensation is a *non sequitur*. *Ergo*, the granting of the environmental permit to Hess and Nexen is a *sine qua non* for the grant by the Minister of the PPL to them, either individually or collectively (along with Esso). The Minister's decision under challenge is therefore inescapably irrational and unalwful, *inter alia*.

[42] If the EPA approves the project, *section 13(1) of the EP Act* requires the EPA to put into the environmental permit, conditions ***which are reasonably necessary to protect human health and the environment***. These conditions are specific to the project. *This concludes the first stage of the permitting process.*

[43] The EPA must then turn to the *second stage* of the permitting process. Even if the EPA approves a project, it does not follow that the EPA will issue an environmental permit. *Section 13(2) of the EP Act* **prohibits** the EPA from issuing an environmental permit

unless the EPA is satisfied that

> "(a) the developer can comply with the terms and conditions of the environmental permit; and
>
> (b) the developer can pay compensation for any loss or damage which may arise from the project or breach of any term or condition of the environmental permit."

[44] *Section 31 of the EP Act* also gives the EPA the power to require the person to whom an environmental permit is issued to provide **financial assurance** for the performance of any action or compliance with any condition in the environmental permit. Such a requirement has nothing to do with the approval of the project but is intended to ensure that the permit holder complies with the conditions in the environmental permit. *Section 31(2)* provides that a requirement under *subsection (1*) shall specify the amount of the financial assurance and may provide that the financial assurance may be provided, reduced or released in stages specified in the environmental authorisation.

[45] It is clear that at this ***second stage*** the EPA **is assessing the developer not the project**. Where there is more than one developer, **each developer has to be assessed. This is crucial in the assessment process. If a developer cannot satisfy the EPA of its ability to meet the conditions in the environmental permit,** including providing any financial assurance that the EPA might require, the EPA cannot issue the environmental permit to that developer, even if the EPA has approved the project.

[46] Esso, Hess and Nexen should have all applied for the environmental permit, all complied

with the EIA procedure, all been assessed by the EPA under *section 13* and all been issued with an environmental permit. One environmental permit issued to all three (3) companies would have been sufficient to fulfil the requirements of *section 14*.

[47] However, one environmental permit issued to Esso only does not fulfil the requirements of *section 14*. The plain meaning of the *EP Act* is that if one developer (Esso) out of three (Esso, Hess and Nexen) obtains an environmental permit that does not obviate the need for the other two developers (Hess and Nexen) to obtain an environmental permit.

[48] It is impermissible for either Hess or Nexen or both to attempt to piggy back on the Esso Permit. That course is proscribed as a matter of law and obviously common sense, logic and experience.

[49] The Minister was/is not prohibited by *section 14* from issuing a licence solely to Esso, as the sole holder of the Esso Permit, but the Minister was and is prohibited by *section 14* from issuing the PPL to all three of Esso, Hess and Nexen. The grant of an environmental permit to Hess and Nexen is a precondition for the grant of a PPL to them.

[50] The *EP Act* regards the failure to obtain an environmental permit as so egregious/serious that it carries criminal sanctions. As noted earlier, s*ection 15 of the EP Act* states that-

> "Every person who fails to carry out an environmental impact assessment or who commences a project without obtaining an environmental permit as required under this Act or the regulations shall be guilty of an offence and shall be liable to the penalties prescribed in the Fifth Schedule."

[51] The Respondent asserts (e.g. pages 5-11) that an environmental permit is issued in respect of a project and once the Esso Permit has been issued the Minister is lawfully entitled to give development consent for the Liza Project to Esso, Hess and Nexen. Such triviality is seldom seen in such a major scenario.

[52] It is settled law that the starting point for construing a statute is to give the words their plain meaning. The '**plain meaning rule'** is set out at Section 195 of ***Bennion On Statutory Interpretation A Code*** 6th ed. (2013) at pp 507-508. [**TAB 5**.] ***Bennion*** states the rule in these words –

> "It is a rule of law (in this Code called the plain meaning rule) that where, in relation to the facts of the instant case:
>
> (a) the enactment under inquiry is grammatically capable of one meaning only, and
>
> (b) on an *informed* interpretation of that enactment the interpretative criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislator,
>
> the legal meaning of the enactment corresponds to that grammatical meaning, and is to be applied accordingly."

The plain meaning rule was explained by Lord Reid in ***Pinner v Everett*** [1969] 1 WLR 1266 at 1273 paragraphs C and D [**TAB 6**] as follows:

> "In determining the meaning of any word or phrase in a statute the first

question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in that statute. It is only when the meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase."

[53] ***Halsbury's 44 Laws of England*** 4th ed. para 863 [**TAB 7**] puts it with admirable clarity: "If there is nothing to modify, alter, or qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning."

[54] Sir Rupert Cross in his significant work, ***Cross Statutory Interpretation*** 3rd ed.(1995) (Reprinted 2004) at p. 1 [**TAB 8**] with accustomed clarity wrote: "The essential rule is that words should generally be given the meaning which the normal speaker of the English language would understand them to bear in the context in which they are used …the courts will give those words their ordinary meaning,[because] …it would be impossible for lawyers and other experts to act and advise on the statute in question with confidence."

[55] The plain meaning of the *EP Act* is that any person who intends to carry out a project which may significantly affect the environment must obtain an environmental permit by carrying out an EIA under *section 11* and by meeting the conditions of *section 13.*

[56] Alternatively, the court is entitled, or ought to give, a ***purposive construction*** of *the EP*

Act and in this regard we draw the Court's attention to the ***Long Title of the EP Act Cap 20:05*** which states:

> "An Act to provide for the management, conservation, protection and improvement of the environment, the prevention or control of pollution, the assessment of the impact of economic development on the environment, the sustainable use of natural resources and for matters incidental thereto or connected therewith."[Our emphasis.]

[57] The Respondent's argument (that an environmental permit is issued only for a project) is untenable, specious, fallacious, spurious, meretricious, and contrary to the plain meaning of *section 13(2)* and the scheme established by *the EP Ac*t to regulate the impact of development activities on the environment and/or contrary to ***the Long Title*** of same.

[58] The Respondent attempts (at page 9) to rely on the *Environmental Protection (Authorisation) Regulations* in support of his assertion that the environmental permit is only for a project. However, the *Environmental Protection (Authorisation) Regulations* (which is subsidiary legislation and therefore subservient to the parent /enabling Act) cannot extend or alter the meaning of the enabling act (the *EP Act*). As ***Bennion on Statutory Interpretation*** 7thed. (2017) [**TAB 9**] **section 3.13** at pp. 96-97 reminds us so eloquently:

> "The delegate is not intended to travel wider than the object of the legislature. The delegate's function is to serve and promote that object while at all times remaining true to it. In *Utah Construction and Engineering Pty Ltd v Pataky*,

the following passage was adopted:

> '[Power delegated by an enactment] does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provision. But such a power will not support attempts to widen the purposes of the act, to add new or different means of carrying them out or to depart from or vary its ends.'"

[59] In other words the *Environmental Protection (Authorisation) Regulations* cannot relieve Hess and Nexen of their statutory obligation to obtain an environmental permit before obtaining a petroleum production licence. Nor can such Regulations remove the statutory prohibition on the Minister, which makes it unlawful for him to grant a PPL to Hess and Nexen when they have not obtained an environmental permit.

[60] If the law requires that an environmental permit be issued for a project only, such permit would attach to the project and be transferable as argued by the Interveners (para 45) but this is far from the case or essentially contradicts that hypothesis, as Article 1.18 of the Esso Permit contains the following instruction or mandate to the Esso as the permit holder:

> "Do not assign or transfer the Environmental Permit to any person without prior consent of the Agency [EPA]."

[61] *Regulation 21 of the Environmental Protection (Authorisations) Regulations* also clearly states:

> "No environmental authorisation is assignable or transferable to any person without the prior consent of the Agency [EPA] having been obtained."

[62] The regulatory oversight is for good reason: the EPA must be satisfied that the assignee has the factual capability or capacity (including the financial wherewithal) as the assignor to prevent and remedy any environmental disaster. The EPA is bound by *section 13(2)* and would not have the legal power to consent to a transfer of the Esso Permit to any person who did not meet the requirements of that subsection. We respectfully submit that it is untenable to argue that an environmental authorisation in general, and the Esso Permit in particular, is capable of being unwittingly hijacked by poachers or moonlighters, such as Hess and Nexen. It is clearly of crucial importance as to who constitutes the transferee/assignee. A person (natural or artificial) of straw cannot constitute a transferee/assignee.

[63] The Respondent (at <u>pages 12-13</u>) postulates that the category of persons to whom licences may be granted is "infinitely wider" than the developer who has obtained an environmental permit for the project. This is so far-fetched that it defies logic. Taken to its logical conclusion, it means that once a person has obtained an environmental permit, the Minister can grant a petroleum production licence to as many people as he likes, all of whom would then be entitled to produce petroleum. The absurdity of this argument is

self-evident and ought to be rejected out of hand.

[64] In support of their assertion that an environmental permit is issued for a project, the Interveners refer (paras 21-23) to the alleged "settled practice" of the EPA and (para 44) to the alleged interpretation of the law made by the EPA whom they refer to as a 'designated expert.' The expression, "settled practice" is not an unruly horse and must as a matter of law must be demonstrated by unassailable evidence to have been in use for a considerable period, some authorities say 15 years or more. Further, and in any event, only the judiciary has the power to give an authoritative interpretation of legislation and the Interveners' attempt to enable the EPA, which is part of the executive arm of government, to take on this interpretive function is contrary to the doctrine of the separation of powers and undermines the rule of law and the role of the judiciary in a democracy governed by the rule of law, and not the rule of man.

The 'project'

[65] Paragraph 14 of the Respondent's affidavit in defence refers to the *Fourth Schedule of the EP Act* specifically and seeks by implication to bring the Liza Project under paragraph 9 thereof as a project for-

> "the extraction and conversion of mineral resources."

[66] We submit that **petroleum is not a mineral or a mineral resource** and the Liza Project is therefore not capable of being a project for the extraction and conversion of mineral

resources. That is nothing short of a misconception of the relevant statutory regime that governs mineral resources as is demonstrably borne out by section 2 of the *Mining Act Cap 65:01* which seals the fate of such untenable argument, and which states that:

> ""Mineral" includes ore or compound of any mineral, any metal and precious stone and includes any radio-active mineral, **but does not include water or petroleum;** [**Emphasis added.**]
>
> "Petroleum" has the same meaning as in section 2 of the Petroleum (Exploration and Production) Act."

[67] *Section 2 of the Petroleum Act* states:

> "petroleum" means—
>
> a. any naturally occurring hydrocarbons, whether in a gaseous, liquid or solid state;
>
> b. any naturally occurring mixture of hydrocarbons, whether in a gaseous, liquid or solid state; or
>
> c. any naturally occurring mixture of one or more hydrocarbons, (whether in a gaseous, liquid or solid state) and any other substance…"

[68] The court is therefore to reject summarily the argument or suggestion that petroleum is a mineral resource; that's like clutching at straws. Moreover, the Liza Project therefore falls under "any other project" as stipulated *under section 11 of the EP Act.* The fact that Esso has chosen to describe the entire massive undertaking of the Liza Project as a single

project has no effect whatsoever on the legal meaning of *section 11 of the EP Act*. It is pellucid that a project has or comprises several and distinct processes, schemes or works. The Liza Project is not a single project within the meaning of the *EP Act* **but a series of projects, or a series of operations, or a series of activities, jobs or programmes or plan of action**. To the extent that any one of its different installations, schemes, works or prescribed processes may significantly affect the environment, that installation, scheme, work or prescribed process constitutes a project within the meaning of *section 11 of the EP Act* and requires a separate EIA in accordance with the provisions of that *section 11*.

Illegal/unlawful conduct cannot be made legal

[69] By issuing a PPL to Esso, Hess and Nexen, the Respondent acted in breach of *section 14 of the EP Act.* The terms and conditions of that PPL, which was unlawfully granted, cannot remedy that breach or provide the Minister with any form of legal authority to grant the PPL. Arguments by the Respondent and the Interveners based on the terms and conditions of the PPL are therefore irrelevant and a waste of the Hon. Court's time. They cannot seek refuge in an *ex post facto* situation, namely, they cannot seek to justify the regularity or sustainability of the position by looking backwards into the actual PPL, but must justify the validity of the PPL by looking forward, that is to say, at the enabling provisions of the *EP Act*. There is none so the Hon. Minister is out of court.

[70] Similarly, any arguments based on purported contractual or other arrangements involving Esso, Hess and Nexen or the Minister, in relation to the PPL, the Petroleum Agreement or

the Liza Project, are irrelevant since none of these is capable of legalising the breach of a statutory injunction - in this case the Minister's breach of *section 14*.

[71] It is also settled law that a party has a legal duty to obey statue and cannot contract out of its statutory obligations. Thus no provision of the Petroleum Agreement can relieve Hess and Nexen of the obligation under the *EP Act* to obtain an environmental permit before being eligible for a petroleum production licence.

[72] Nevertheless out of *ex abundanti cautela*, we will briefly deal with such arguments.

Sole Operator

[73] The Respondent asserts (at pages 3, 22) that Esso is the sole company designated operator under the Petroleum Agreement and the PPL. The Interveners phrasing (e.g. paras 10, 41 of their affidavit in reply) is that Esso is the sole operator of the Liza Project and is so designated in the Petroleum Agreement and the PPL. Both versions are a misrepresentation or demonstrate a palpable misunderstanding.

[74] The Petroleum Agreement does not state anywhere that Esso is the 'sole operator.' That is a label being ascribed by the Interveners to Esso's role under the Petroleum Agreement. The Respondent relies on Article 2.2(a) which states that,

> "Esso shall be the Operator charged with the day to day activities of the Contractor under this Agreement."

[75] Thus it is clear that far from being the 'sole' operator of the Liza Project, Esso is merely in charge of the Contractor's day to day activities under the Petroleum Agreement. **The two are distinct.** 'Day to day activities' of a contract are a specific subset of the overall business of contract compliance and would normally cover administration, day to day management, day to day accounting, record keeping, communications, and other activities to ensure that the contractor is on track and complying with its obligations. The Liza Project on the other hand is a massive undertaking "[It will]…*include development drilling, installation, production operations, and decommissioning, as well as associated logistics and onshore support.* The engineering stage will precede FPSO and SURF installation and development drilling operations, *and will include front-end engineering and design (FEED) and detailed engineering.* The execution stage *will include procurement, fabrication and construction, drilling, installation, hook-up, commissioning, and start-up*. Operations and maintenance will follow start-up and will be the longest stage of the Project." [Exhibit **RG 26**]. It is contrary to all logic, reason and common sense as well as the ordinary meaning of the English language to assert that if Esso is an operator for day to day activities of the Petroleum Agreement it means that Esso is the only person carrying out the massive Liza Project.

[76] Article 2.2(b) deals separately with Petroleum Operations. It requires the Contractor (Esso, Hess and Nexen) to provide the Minister with a memorandum summarising the operating arrangements between ***the Operator*** (Esso) and ***the Contractor*** (Esso, Hess and Nexen). Neither has the Respondent, nor have the Interveners, provided any such memorandum.

[77] Furthermore, the Petroleum Agreement makes it clear that all three of Esso, Hess and Nexen will be engaged in petroleum operations since it states at Article 9(1)(e) that,

> "The Minister, through duly appointed representatives, upon providing the Contractor with at least seven (7) days notice, shall be entitled to observe the Petroleum Operations conducted by the Contractor..."

[78] There is no provision in the PPL which appoints Esso as the sole operator. Article 2 (h) merely states that the Minister approves the operator Esso. In other words, the Minister approves the appointment of Esso to carry out the day to day activities of the Contractor under the Petroleum Contract.

[79] The Respondent and Interveners argue that since Esso is the operator charged with these 'day to day activities' only Esso requires an environmental permit for the Liza Project. This argument is untenable. Taken to its logical conclusion it would mean that if Esso, Hess and Nexen had hired a fourth party to carry out the day to day activities under the Petroleum Agreement, then Esso would not need to obtain an environmental permit for the Liza Project. This fourth party would not require an environmental permit to carry out its contractual obligations in respect of the day to day activities of the Petroleum Agreement. Therefore there would be no need for anyone to obtain an environmental permit for the Liza Project. This would be an unacceptable state of affairs which flies in the face of logic, common sense, experience and indeed the law. This line of argument from the Respondent and Interveners is nothing more than an attempt to circumvent the

requirements of *the EP Act* by which any person who is entitled to carry out a project which may have a significant impact on the environment, *must first obtain an environmental permit*.

[80] The Intervener's assert in **paragraph 41** that Hess and Nexen are prohibited from carrying out the Liza Project because of Article 2.2 of the Petroleum Agreement and Article 2.(h) of the PPL. This is a nonsensical argument which contradicts the wording of those provisions and *section 38 of the Petroleum Act.* This argument, taken to its logical conclusion, would in fact make the PPL worthless as far as Hess and Nexen are concerned and can be dismissed as nothing more than an attempt to circumvent *section 14*.

The *Petroleum Act and Petroleum Regulations*

[81] The Respondent asserts (page 18) that the *EP Act* should be interpreted to be consistent with the *Petroleum Act* and the *Petroleum Regulations.*

[82] The doctrine of implied repeal would apply. ***Bennion on Statutory Interpretation A Code*** 6th ed. (2013) [**TAB 5**] **"Section 80 Implied amendment**" at pp. 267-268 puts the matter beyond argument:

> "Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them."

[83] Since the *Petroleum Act* was passed in 1986 and *the EP Act* was passed in 1996, the latter would impliedly repeal the former in so far as any inconsistency is concerned, so that the provisions of *the EP Act* would prevail over those of the *Petroleum Act*. This matter is put explicitly by ***Craies on Legislation*** 11th ed. (2017) at p 701 para 14.4.4 [**TAB 10**] under the rubric, **implied repeal** where the learned authors opined thus:

> "Where a provision of an Act is inconsistent with a provision of earlier legislation, the earlier provision is impliedly repealed by the later. The rule was stated by North J. in *Re Williams*-[3]
>
> > "The provisions of an earlier Act may be revoked or abrogated in particular cases by a subsequent Act, either from the express language used being addressed to the particular point, or from implication or inference from the language used"."

[84] The scheme of the *Petroleum Act* (and the *Petroleum Regulations*) must be read subject to the scheme of the *EP Act* and its purposes, including its purpose to protect the environment and prevent pollution. The *Petroleum Regulations* are subsidiary legislation which cannot affect the scope and meaning of the *EP Act.* See also ***Bennion*** *op. cit.* at [58] *supra.*

[85] The Respondent argues (para 15.b) that there is no requirement in the *Petroleum Act* for the developer who applies for an environmental permit to be the only person that is

[3] (1887) 36 Ch. D. 573, 578.

subsequently granted a licence and that the *Petroleum Act* does not equate a developer with a licensee. In advancing this argument the Respondent is again ignoring the basic legal principle of **implied repeal**.

[86] ***Bennion's Statutory Interpretation*** 5th ed. at pg. 304 [**TAB 11**]

> "Where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, the later by implication repeals the earlier in accordance with the maxim *leges posteriores priories contrarias abrogant* (later laws abrogate earlier contrary laws).

> See also ***Bennion*** *op. cit.* at [82] *supra*; and ***Craies*** *op.cit*. at [83] *supra*.

[87] The scheme for exploration and production established in 1986 under the *Petroleum Act* is subject to the scheme established in 1996 by the *EP Act*. To the extent that any provisions of the *Petroleum Act* are inconsistent with the *EP Act*, those provisions of the *Petroleum Act* are abrogated or impliedly repealed to the extent of that inconsistency. We therefore submit that that has put paid to all the curious arguments advanced by the Respondent (and Interveners) surrounding the terms, meaning, tenor, purport and effect of the *Petroleum Act.*

[88] There are **two separate statutory schemes** with which an applicant for a PPL must comply – the environmental permitting scheme in the *EP Act*; and the scheme for

regulating petroleum exploration and production under the *Petroleum Act*. The Respondent has conflated the two and has thereby fallen into the abyss of material errors of interpretation.

[89] The *EP Act* makes it a condition precedent to the grant of a licence (PPL) under the *Petroleum Act* that the applicant for the licence obtains an environmental permit. The obligation to obtain an environmental permit; the process to be followed; the authority to grant same; and the enforcement and termination of an environmental permit are all governed by the *EP Act*. The *Petroleum Act* and the licence (PPL) are irrelevant in determining what obligations are imposed by the *EP Act*. In fact, *section 17* of the *Petroleum Act* expressly recognises the supremacy of the *EP Act (*somewhat akin to the Supreme Law Clause in the Constitution).

[90] The Respondent argues (page 11) that the *Petroleum Act* could not have intended that where there are several licensees, that (sic) every grantee of a licence had to be issued with a separate environmental permit under the *EP Act* following several separate environmental impact assessments of the same project. The Respondent's contention is nothing more than an absurd interpretation of what is a very simple provision of the *EP Act*. Where there are multiple developers, there is nothing in the *EP Act,* which prevents them from applying for a single environmental permit based on one EIA and subject to an assessment by the EPA under *section 13* thereof of each developer. Furthermore, as stated earlier the *Petroleum (Exploration and Production) Act* predates the *EP Act* and must be read subject to the scheme in the *EP Act*. In a manner of speaking the *Petroleum*

(Exploration and Production) Act is subservient to the majesty and supremacy of the *EP Act*.

Joint and several

[91] The Respondent asserts (pages 4, 15, 27-28) that the joint and several obligation to obtain an environmental permit is satisfied if any of the licensees obtains an environmental permit. This assertion shows the extent to which the Respondent has failed to understand and keep separate the two quite different statutory schemes. The *Petroleum Act* regulates petroleum exploration and production. It sets the conditions for the grant of a licence but it cannot extend those conditions to the environmental permit, which is governed by the *EP Act*.

[92] Section 9(3) of the *Petroleum Act* provides that,

> "Where at any time, a licensee is constituted of two or more persons, the obligations to be observed and performed by the licensee **under this Act** shall be joint **and** several obligations, but without prejudice to any right of contribution which may exist between all or any of them."[Our emphasis.]

[93] The obligations to be performed under the *Petroleum Act* are not capable of being extended to cover the obligation created ten (10) years later in the *EP Act* to obtain an environmental permit and therefore the joint and several obligation has no bearing whatsoever on the statutory obligation to obtain an environmental permit.

[94] The PPL provides at paragraph (f) that

> "Any obligations which are to be observed and performed by the Licensee shall be joint and several obligations."

[95] Note the conjunction, "and" is used in section 9(3) of the *Petroleum Act* as well as under paragraph (f) of the PPL. This means that they must jointly, as well as individually, observe and perform all the obligations. Nothing less would suffice.

[96] The issue of joint and several liability under the *Petroleum (Exploration and Production) Act* and the PPL has no bearing at law on the *EP Act* or on the obligations imposed on a developer to obtain an environmental permit and is simply a red herring.

[97] The Respondent has also confused two separate legal matters. A joint and several obligation on Esso, Hess and Nexen to comply with the *EP Act* imposes on each one of them an obligation to comply and to ensure that the other two also comply. That duty of compliance is met when all three of them have an environmental authorisation. Esso cannot comply with the *EP Act* on behalf of Hess and Nexen; only they can do so.

[98] Stating in the PPL at paragraph (o) that the Licensee shall abide by the terms and conditions of the Esso Permit is meaningless in so far as Hess and Nexen are concerned. The Minister is not a Universal Policeman to enforce the provisions of the *EP Act.* The sole authority charged with the responsibility of enforcing the provisions of the Esso Permit and the *EP Act* is the EPA as established by and under the provisions thereof, including section 3. The Esso Permit does not impose any terms and/or conditions on the Licensee (Esso, Hess and Nexen); it imposes terms and conditions on Esso. A

company can only be bound by the terms of an environmental permit if it is issued with such environmental permit having first been assessed and approved by the EPA under *section 13(2) of the EP Act*.

[99] Esso has an obligation to comply with the Esso Permit. Hess and Nexen are not parties to the Esso Permit and are not bound by it. The PPL is not legally capable of extending the Esso Permit to bind Hess and Nexen; the Minister has no power or jurisdiction to so extend it. It would be an unlawful exercise of his powers or he would be acting in excess of his jurisdiction. The Esso Permit is governed by the *EP Act* and it is patently absurd to argue that a Minister, who has no responsibility under the *EP Act*, has the power to interfere with the scheme and architecture established under the *EP Act* and can enforce the obligations under the Esso Permit against two companies which are not parties to that permit. This is an argument that can be best described as *reductio ad absurdum* (reduction to the absurd).[4]

[100] There is no statutory provision and no legal principle by which the Respondent can enforce against Hess and Nexen, the Esso Permit that <u>has been granted solely to Esso</u> and which imposes obligations on Esso <u>alone</u>. *Hess and Nexen are neither the grantees, nor parties or privies to the Esso Permit granted by the EPA to Esso.*

[101] Section 13 gives the EPA the right to cancel or suspend the Esso Permit if Esso breaches any of its terms. The principle, "*expressio unis est exclusio aterius*" excludes the possibility that any other person, and in particular the Respondent, has any power to

[4] In logic, disproof of an argument by showing that it leads to a ridiculous conclusion.

enforce, cancel or suspend the Esso Permit.

[102] At **page 26 paragraph (s) t**he Respondent seeks to rely on *Part VII of the EP Act.* In **paragraphs 39-40** the Interveners also seek, in typical tag team behaviour in this case, to rely on *Part VII* as an alternative sanction against Hess and Nexen. In doing so the Respondent and the Interveners have fallen into error and conflated two separate regimes. *Part IV* establishes a preventative regime by which the EPA assesses proposed projects and developers and grants environmental permits subject to conditions to protect the environment. In carrying out this function the EPA is required to take into the account principles of environmental management set out in *section 4(4)* including the *precautionary principle* and the *avoidance principle*. The enforcement regime under *Part VII* deals with the punishment of criminal offences that have been committed against the environment. It is no substitute for the preventative regime under *Part IV* particularly as the avoidance principle states that "it is preferable to avoid environmental damage as it can be impossible or more expensive to repair rather than prevent damage."

[103] It is trite law that as stated in ***Bennion On Statutory Interpretation*** 5th ed. at page 469 [**TAB 11**]:

> "The sole object in statutory interpretation is to arrive at the legislative intention."

And at section 163 of that celebrated work-

> "An enactment has the legal meaning taken to be intended by the legislator. In other words the legal meaning corresponds to the legislative intention."

[104] In interpreting legislation, the court may take notice of the particulars of the title in legislation. *Section 57 of the Interpretation and General Clauses Act Cap: 2.01* states that-

> "(1) Where any written law is divided into Parts, Titles or other divisions, the fact and particulars of such divisions shall be taken notice of in all courts and for all purposes whatsoever."

[105] The **Long Title** of the *Petroleum Act* states that it is,

> "An Act to make provision with respect to prospecting for and production of petroleum, and for matters connected therewith."

[106] This **Long Title** combined with the content of the *Petroleum Act* shows clearly that this Act is limited to regulating exploration for petroleum and the production of any resulting petroleum. The *Petroleum Act* came into force more than thirty years ago, on 1st July 1986, at a time when there was less understanding of and concern for the environment and the natural world, of which the court is entitled to take judicial notice.

[107] The *Environmental Protection Act Cap 20:05* ("*the EP Act*") came into force on 5th June (World Environment Day) in 1996. Its **Long Title**, as set out earlier, states that it is,

> "An Act to provide for the management, conservation, protection and improvement of the environment, the prevention or control of pollution, the assessment of the impact of economic development on the environment, the sustainable use of natural resources and for matters incidental thereto or

connected therewith."

[108] This **Long Title** combined with the content of the *EP Act*, particularly Parts IV and V which deal with environmental impact assessments and prevention and control of pollution, show beyond argument that the environment is a significant, and at times overriding, concern for the legislature. It is the new science of the world with renewed emphasis on the conservation, preservation, protection and improvement of the environment through effective and dedicated management and the effective prevention or control of pollution and similar noble aspirations. Thus the universal principle, PPP- the Polluters Pay Principle. So that if Hess and/or Nexen pollutes the environment, no one can reasonably ask Esso to pay.

[109] The PPL (the Licence) was granted under the *Petroleum Act* not the *EP Act*. The *Petroleum Act* regulates the grant of the PPL, the conditions that may be put into the PPL and the termination of the PPL. The *Petroleum Act* has no impact on the *EP Act* and cannot affect the meaning of the *EP Act,* ***it being later in time*** *and overarching as a matter of settled law.*

[110] A person who obtains an environmental permit for a petroleum project is in a position to apply for a licence under the *Petroleum Act*; it is not the other way around, because the Minister must first satisfy himself that the applicant for a licence is in possession of an environmental permit/authorisation. Whether the environmental permit holder actually obtains that licence depends on whether the permit holder meets the quite separate

conditions imposed by the *Petroleum Act* on applicants for a Licence for petroleum related activities. If the licence is granted to the permit holder, the permit holder exercises his rights under the licence in accordance with the conditions imposed on him by the environmental permit that he has been granted.

II. DELAY:

[111] Under Part 56 of the CPR there is no requirement for permission (leave) to apply for judicial review and there is no imposition of a time limit or requirement that the proceedings must be brought promptly or that such proceedings must be brought no later than 3 months from the date of the decision being questioned or challenged. The Guyana *Judicial Review Act Cap 3:06* is therefore quite different from most of the Judicial Review Acts ("JRAs") in the Caribbean region. The courts have been liberated in Guyana from the shackles imposed by the regional JRAs. The requirement for leave and the concept of delay are therefore foreign to the Laws of Guyana.

[112] Any attempt to impose a time limit or a requirement for 'promptitude' is a clear challenge to the authority of the Rules Committee, (whose membership included the Chancellor of the Judiciary and the Chief Justice), which made the CPR in exercise of its power under section *67 of the High Court Act Cap 3:02* and which chose not to introduce a requirement for judicial review claims to be commenced promptly or within any particular time limit. In any event the regional JRAs have a substantive provision for leave to be applied for promptly and not later than 3 months, although the courts have a

discretion to grant leave after 3 months. The argument raised by the Respondent and the Interveners about promptitude or the lack thereof has no statutory underpinning or basis and/or it is extra judicial and ought to be rejected out of hand. Whatever the practice was under the Crown Rules 1906, such practice has been discarded to the dustbin of history.

[113] In the Caribbean the legal basis for a requirement to act promptly in judicial review challenges may be found in statute. The *Judicial Review Act Chap 7:08* of Trinidad and Tobago states at section 11:

> "(1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

[114] *Guyana's Judicial Review Act Cap 3:06* does not contain any equivalent requirement for promptness. In seeking to impose a requirement for 'promptitude' the Respondent is clearly acting contrary to the intention of the legislature that there should be no requirement for promptness and is also undermining the fundamental constitutional principle of the separation of powers doctrine. Parliament did not think it fit to impose a time limit and the Courts cannot through judicial legislation now seek to impose some time limit sounding in promptitude.

[115] Without prejudice to the soundness of our argument, we nevertheless hasten to point out that the Applicant has acted with remarkable promptitude. The Fixed Date Action (Claim

Form) was filed on 19th February within one (1) month of obtaining a copy of the PPL and in less than two (2) months from the time that the Government released a copy of the Petroleum Agreement into the public domain and the EPA provided a copy of the Esso Permit to the Applicant's attorney-at-law.

[116] The Respondent alleges (page 29) that the Applicant is guilty of gross and inordinate delay because the Petroleum Agreement was signed in June 2016 (becoming effective in October 2016), the Environmental Permit was granted on 1st June, 2017 and the PPL was granted on 15th June 2017, but the Fixed Date Application was not filed for another eight (8) months. There is an underlying fallacy in these statistics. When the facts are distilled, it is pellucid that there has been no such delay.

[117] This is nothing more than an attempt by the Respondent to distract the court's attention from the fact that the expiry of time, which the Respondent categorises as 'gross and inordinate delay' ***is attributable solely to the failure on the part of the Government (of which the Hon. Minister is part) to make information and documents publicly available, a failure which is inconsistent with the twin pillars of good governance/government, namely, transparency and accountability.*** In **paragraphs 92-104** of his affidavit in reply to the Respondent, the Applicant sets out the facts concerning the refusal of the Government in general, and the Respondent in particular to make these documents available. In **paragraphs 15-18** of the Applicant's Affidavit accompanying the FDA, he also sets out the fact of the EPA's failure to publish the Environmental Permit on its website despite publishing other documents for the Liza Project. The

Respondent cannot therefore cry "wolf" in these circumstances. No party to litigation should or ought to be permitted to benefit from his own wrong. Therefore, the Respondent cannot complain in these proceedings about any or any inordinate delay or lack of promptitude. Any argument about delay is a red herring in this case and should be given short shrift by the Hon. Court.

[118] The Respondent's argument amounts to no more than saying that wholly unreasonable and self-serving secrecy and obstructiveness on the part of the executive and state agencies, is sufficient to deny a citizen access to the courts in order to challenge executive abuse of power. Access to justice is a much valued weapon and may be a nuclear weapon in the arsenal of the citizenry against unlawful action or conduct of governments. The Courts as guardians of the Constitution and the laws must remain ever vigilant, less the hard fought for rights be eroded by those wielding the reins of political power.

[119] The Respondent asserts (page 30), that if the Applicant had exercised any due diligence he would have known that the Environmental Permit and the PPL had been issued in June 2017 and were in the public domain and states that had the Applicant asked the Ministry of Natural Resources he would have been told that the PPL had been issued, the Petroleum Agreement had been signed and the Environmental Permit had been issued. This is supposedly further evidence of delay when it should be obvious to the Respondent that the Applicant required **copies** of those documents in order to determine whether there were grounds for judicial review. No competent attorney-at-law would accept

instructions for judicial review in the absence of the documents which establish what decision was taken and the relevant facts. *In this case in particular the information put out by the Respondent that the petroleum production licence was issued to ExxonMobil and that the Petroleum Agreement was signed by ExxonMobil were blatant mistruths.*

[120] In **paragraph 66** of the Applicant's Affidavit in Reply to the Interveners, he has addressed the Interveners repetition of the Respondent's assertions regarding delay.

[121] The Interveners' complaint in **paragraph 50** that the Applicant did not seek information from them is indicative of a lack of respect for the rule of law, specifically the duties of accountability and transparency owed by the Respondent to the citizens of Guyana. The Interveners cannot seek to put themselves in the Respondent's shoes and to do so is to usurp the functions of government and undermine democracy.

[122] The Respondent has been less than frank in his assertions regarding public information. **Exhibits RGCT-3** and **RGCT-4** do not inform citizens that a PPL has been issued but merely say that the government expects to issue the PPL – an action to be taken at an unknown time in the future; something *in futuro*. **Exhibit RGCT4** even quotes the Ministry of Natural Resources as saying that the PPL would be issued to "ExxonMobil" which has turned out to be a painful untruth.

[123] **Exhibit RGCT5** is an extract from Bloomberg and it does not say that the Government of Guyana has issued a PPL to Esso, Hess and Nexen. This extract is completely

irrelevant since it is a basic principle of democracy that a Minister must account to the electorate for his actions, not seek to hide behind the speculations of a foreign media outlet, over which, presumably, he has no control.

[124] The Respondent (page 31) states that, "No one was ever denied a copy of the Environmental Permit [Esso Permit]. Exhibited to the said Affidavit as Exhibit "***RGCT-6"*** is a printout from the website of the EPA showing the aforesaid publication." This is a blatant untruth; it is patently false. Exhibit ***RGCT-6*** is a screenshot of part of the EPA's website showing part of the EPA's Public Notice that a permit was issued. It is not a printout of the Esso Permit.

[125] The Respondent's statement in **paragraph 22** that the Petroleum Agreement, the Esso Permit and the PPL were in the public domain is a blatant untruth; the only information (not document) in the public domain was that these documents had been signed/issued. They (the actual documents) were kept hidden and secret from the public, including the Applicant. The Applicant has set out in **paragraph 93** the excuses made by the Respondent and the Minister of Business for not releasing the Petroleum Agreement and the Respondent's participation on 27th December 2017 at the official release of the Petroleum Agreement. (**Exhibits RG27, RG28 and RG29.)**

[126] The Respondent says in **paragraph 25** that the Applicant did not need the documents because the gravamen of his complaint appears to be that there was a violation of the Petroleum Agreement which made the issue of the PPL unlawful. This is a blatant

misrepresentation of the Applicant's case. The Applicant has no "truck" with the Petroleum Agreement; his frontal challenge is with respect to the colossal failure of the Minister to ensure that Hess and Nexen had an environmental permit before granting them a PPL.

[127] The Respondent asserts in **paragraph 21(iii) page 30** that the PPL became a document of public record as soon as it was filed at the Deeds Registry. As the Respondent knows, or ought to know, there is no public notice when a document is filed at the Deeds Registry (not even when it is a document as important as the PPL or the Petroleum Agreement), there is no public index of documents filed, and no provision for electronic or other searches of the records of the Deeds Registry. When a document is so filed it becomes by operation of law, or a legal figment, notice to the entire world ***but it is not actual or factual notice to the public.***

[128] Under *section 7(n) of the Deeds Registry Act Cap5:01*, the Registrar is required to make available to members of the public, copies of all records held by the Deed Registry, subject to payment of the prescribed fees. Section 11 provides that, *"Anyone may upon payment of the prescribed fees, ask for and obtain access to each and every register or record in the registry and obtain copies thereof or of any part or portion thereof.*" However, such access depends on the public knowing what was filed and when in order to have any idea of where in the register the document might have been recorded. . The Respondent would want the Applicant to become our local Sherlock Holmes and use his extraordinary powers to discover the truth; the law is not measured or tested by such

extraordinary prowess but by reasonableness. It was patently obvious that the Executive was not anxious to make the relevant documents public. **Exhibit RG 6** shows the extract from Stabroek News on Friday 29th December 2017, by which the public, including the Applicant, first became aware that the PPL had been registered.

[129] It is common and public knowledge that the Government in general and the Respondent in particular repeatedly asserted that these documents ***could not be released to the public and did not at any time inform the public that the PPL had been filed.*** Filing the PPL and the Petroleum Agreement at the Deeds Registry and then failing to inform the public was an act of concealment and registration by stealth; it was not an overt act in the circumstances described herein. It was a surprise and has been so eloquently said, surprise is the enemy of justice. Fairness is the guiding light of public law.

[130] The courts have repeatedly condemned this kind of executive secrecy with respect to matters that affect citizens.

[131] In the context of decisions which affect the individual Lord Steyn has stated in ***Regina v. Secretary of State for the Home Department and another (Respondents) ex parte Anufrijeva (FC) (Appellant)*** **[**2003] UKHL 36 [paras 28;30] [**TAB 12**], setting his face firmly against such deplorable conduct:

> "This view is reinforced by the constitutional principle requiring the rule of law to be observed. ***That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be***

adversely affected. The antithesis of such a state was described by Kafka: a state **where the rights of individuals are overridden by hole in the corner decisions** or knocks on doors in the early hours. That is not our system….In our system of law **surprise is regarded as the enemy of justice**. **Fairness** is the guiding principle of our public law" **[Our emphasis.]**

[132] In the context of a decision which affects, not just one individual but the entire nation of Guyana, and has the potential to damage or destroy not only the exclusive economic zone and marine/coastal environments of Guyana, but also those of sovereign states in South America and the Caribbean, it is even more crucial that members of the public have full, unlimited and immediate access to such information as is relevant/necessary for a challenge to abuse/misuse of power by the executive.

[133] Fairness as a guiding principle requires not only that the public must know what has been decided but that the public must have access to the decision itself. In this application that would mean access to the Petroleum Agreement, the Esso Permit and the PPL.

[134] The right to information is not simply a right to know that a decision has been taken but a right to know the grounds and content of that decision as held by the European Court of Justice in ***Racke v Hauptzollampt Mainz*** (Case 98/78) [1979] ECR 70 [para 15] [**TAB 13**] where it was stated that-

"A fundamental principle in the Community legal order requires that a measure adopted by the public authorities shall not be applicable to those concerned

before they have had the opportunity to make themselves acquainted with it."

[135] It is not suggested that the Esso Permit, or the Petroleum Agreement or the PPL cannot take effect until they are put into the public domain. But it is submitted that it is crucial for the public to have access to these documents in order to know whether it has grounds for judicial review. The rule of law depends on public scrutiny of executive action and every attempt at concealment of executive action is a step towards the 'hole in the corner decisions' that are the antithesis of fairness and justice.

[136] In **paragraph 20(a)** the Respondent states that the reason for that an application must be made promptly is it may be unfair for a dilatory application to upset a decision long after it has been implemented, expenditure incurred and vested rights created. The Respondent seems to be approbating and reprobating at the same time: he has embraced the secretiveness with which these documents have been created and subsequently leisurely came to the attention of the public but has suddenly awoken from his slumber and now decries the time taken to mount this challenge. While we do not accept that there has been any delay on the part of the Applicant, we wish nevertheless to point out that the reasons for the prohibition on delay do not apply in this matter. The delay, if any, was self-engendered and self-inflicted, so the Respondent must come with clean hands, this being a discretionary remedy.

[137] It is common and public knowledge that the PPL is for the duration of the Liza Project, that the Liza Project is expected to last until 2040 and that the Esso Permit under

paragraph 13.8 is valid until 31st December 2040. The granting of the PPL is merely an early step in a project whose implementation will not be completed for another twenty-two (22) years. It is wholly different from the example of a challenge being brought after a motorway has been built. It is also public and common knowledge that oil is not expected to come on stream until 2020.

[138] There is every reason to quash the PPL and ensure that the Liza Project does not proceed on the basis of illegality and grave risk to the people and environment of Guyana and the Caribbean as set out in **paragraphs 19-35** of the Applicant's Affidavit in Reply to the Respondent.

[139] The Respondent asserts in **paragraph 20 (a)** that 'vested rights' have been created but does not state what these are. Suffice it to say that the *unlawful grant* of the PPL does not and cannot give Esso, Hess and Nexen any vested rights to the PPL.

[140] The Hon. Court is asked to believe in **paragraph 56** of the Interveners' affidavit in defence that the PPL is "very valuable property" while at the same time it is equally clear that Esso, Hess and Nexen have not individually or collectively taken any steps to protect this purported property by complying with the law. It is acquisition of "property" by stealth.

[141] We respectfully submit that whether the PPL is or is not property has no bearing on whether the Respondent acted lawfully. Furthermore if Esso, Hess and Nexen do not take

steps to protect their alleged property, there is no reason for the Hon. Court to withhold a remedy in the form of an administrative order of certiorari.

[142] *Section 15 EP Act* prohibits Hess and Nexen from carrying out the Liza Project (or any part of it) without an environmental permit. The effect of *section 15* is that Hess and Nexen may not exercise their rights under the PPL unless and until they first obtain an environmental permit. They may not produce petroleum. They may not sell or dispose of petroleum or carry out related activities such as obtaining or transporting petroleum. (**Paragraph 77** of the Applicant's affidavit in reply sets out the dangers of transporting petroleum and the damage to the environment.) *Section 15* thus renders the PPL worthless in relation to Hess and Nexen.

[143] At **paragraph 41** of the Interveners' affidavit in defence, they admit that the *EP Act* would not permit Hess and Nexen to commence petroleum operations without an environmental permit.

[144] We also wish to remind the court of **paragraph 110** of the Applicant's affidavit in reply to the Respondent which rebuts the Respondent's allegations of losses that will be suffered by Esso, Hess and Nexen and we respectfully point out that no public servant, and in particular no Minister of Government, should seek to place the profits of three (3) foreign companies above the environment and people of Guyana and the Caribbean. In this case, a refusal to quash the PPL would benefit three (3) foreign companies of dubious financial standing and be to the detriment of the millions of people inhabiting Guyana

and the Caribbean.

[145] For the sake of completeness we draw the Court's attention to *CPR 56.01(5)*, which states that –

> "Apart from any time-limit imposed by any relevant enactment, relief may be refused in any case in which, the Court considers that the granting of relief would be likely
>
> (a) To cause substantial hardship to or substantially prejudice the rights of any person; or
>
> (b) To be detrimental to good administration."

[146] That sub-rule applies to the Court's discretion as to whether or if to grant discretionary relief. That is a matter for the trial judge, after hearing all the evidence and arguments. We reiterate that although the Minister's purported decision goes back to 15th June 2017, that was a matter that was shrouded in secrecy and mystery since, apart from an announcement that the PPL had been granted, the Government refused to release the PPL and the Petroleum Agreement and the public had no access to these documents. The Minister (and indeed the Government) cannot have its cake and eat it. It was only after the applicant's attorney-at-law was able to secure a copy of the PPL on 19th January 2018 and with commendable promptitude that the judicial review proceedings were launched on 19th February 2018, within a period of one (1) month.

[147] As a footnote we would respectfully remind the Hon. Court that on 22nd March 2018 the

marshal served the Respondent with the Notice of Appeal to which the FDA and the Affidavit were attached as the proposed record. The Respondent has known for over nine (9) months of this challenge to his unlawful action in granting the PPL to Esso, Hess and Nexen. This is longer than the alleged "inordinate delay" on the part of the Applicant. The Respondent has had ample time to require Esso, Hess and Nexen to comply with national law. He has not done so. He has not even attempted to enforce Article 28 of the Petroleum Agreement which requires the Contractor (Esso, Hess and Nexen) to obtain an environmental permit for the Contractor (Esso, Hess and Nexen). To come before the Hon. Court at this stage and plead inordinate delay on the Applicant is a gross misrepresentation of the situation that the Respondent is now in. He could, and should, have upheld the rule of law and required Hess and Nexen to comply with the *EP Act.* Instead he has chosen to defend the illegal actions of foreign companies and put at grave risk the safety of the people and environment of Guyana and the Caribbean.[5]

[148] It is absurd for the Respondent to suggest (as he does in **paragraph 26)** that quashing a PPL purportedly issued to Esso, Hess and Nexen illegally would impose an unconscionable burden on Esso, Hess and Nexen when neither he nor these three (3) oil companies has taken any steps to comply with the *EP Act* or even with Article 28 of the Petroleum Agreement. They are the authors of their own misfortune.

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[5] With respect we would further remind the Hon. Court that Esso and Nexen were present through their legal representatives in the Court of Appeal in May 2018 and fully aware of the legal challenge to the grant of the PPL. They have had seven (7) months in which to comply with national law and apply for an environmental permit. The fact that they have not done so but have chosen to oppose this action for judicial review demonstrates contempt for the laws of Guyana and for the rule of law.

[149] The continuing illegality of Hess and Nexen having a PPL without first obtaining an environmental permit also strengthens the case for relief as pointed out by Kerr J on 25th May 2018 in ***The Queen on the application of the Fire Brigades Union and South Yorkshire Fire and Rescue Authority*** [2018] EWHC 1229 (Admin) [para 142 p27] [**TAB 14**] where the learned judge opined-

> In the present case, the illegality is continuing and there is a concerted plan to continue the unlawful conduct. The consequences of granting relief, for the parties and others affected, must still be considered. **But the case for relief is stronger where there is no plan to put an end to the unlawful conduct and every intention of continuing with it. [Our emphasis.]**

[150] A decision by the court to quash the PPL will also assist the oil and gas industry to know and comply with the law.

[151] We note the Interveners' assumption (paragraph 16) that the personal experience of the deponent in Qatar, Russia, Argentina has some relevance to the meaning of Guyana's laws and we respectfully submit that this lack of respect for the rule of law in Guyana makes it all the more urgent for this Hon. Court to uphold strictly the requirements of the *EP Act* and to quash the Minister's unlawful action in granting the PPL.

[152] We respectfully draw the attention of the Hon. Court to **paragraph 43** of the Applicant's

affidavit in reply to the Respondent which sets out the failure of Esso, Hess and Nexen to comply with the Companies Act Cap 89:01 and a pattern of behaviour which suggests contempt for the laws of Guyana, or at least high handedness. These companies although having names as the international oil giants, are in substance Off Shore Companies incorporated in the Caribbean Islands of Barbados, Bermuda and the Bahamas.

[153] We respectfully submit that the PPL should be quashed in its entirety and that the Hon. Court should not merely excise Hess and Nexen and leave the rest of the PPL intact. A court may sever (excise) a provision or a word from a licence only if that severance (excision) does not alter the character of the licence. See ***R v North Hertfordshire District Council ex parte Cobbold*** [1985] 2 All ER 486 at 492 B-D**. [TAB 15]**

[154] The PPL is granted to Esso, Hess and Nexen. To excise Hess and Nexen would require the court to excise all references to joint and several obligations, duties etc. Such excision would alter fundamentally the character of the PPL. In the event of a default by Esso of its obligations under the PPL, the Government of Guyana would no longer have recourse under the PPL to Hess and Nexen. Only Esso would be liable under the PPL. In such a case the Minister might well have exercised his discretion differently and imposed more stringent conditions on Esso in order to protect Guyana against increased risk.

[155] For all the above reasons we submit that this Hon. Court should make all appropriate orders as suggested below.

[156] The Respondent has misled the court in many material ways/particulars, which are set out in **paragraph 8** of the Applicant's affidavit in reply to the Respondent. The Applicant has relied on the said **paragraph 8** in relation to the misleading statements repeated by the Interveners.

[157] Such conduct falls short of the duty of an advocate to the court as long established by the seminal case of ***Rondel v Worsely*** [1969] 1 AC 191, HL at 227F-228A [**TAB 16**] per Lord Reid

> "Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not with-hold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce."

[158] It is settled law that the Respondent owes a duty of candour to the Hon. Court. As Sir John Donaldson has held in ***R v Lancashire CC*** [1986] 2 All ER 941 at 945 A and D **[TAB 17]** when there is a judicial review application,

> "Then it is the duty of the respondent to make full and fair disclosure…. [A public authority] must explain fully what they have done and why they have done it…It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why." He continued that while the respondent could resist the application for judicial review if he considered it to be unjustified, judicial review, "is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."

[159] Yet, throughout his affidavit in defence the Respondent has misled the Hon. Court – he has concealed facts and has perpetrated blatant mistruths that have been exposed by the Applicant's affidavit in reply and the material exhibited thereto. In ***R (Al-Sweady) v Secretary of State for Defence*** [2009] EWHC 2387 para 44 **[TAB 18]** Scott-Baker LJ opined that such conduct resulted in the court imposing on the respondent an order of costs on an indemnity basis.

[160] The duty of candour also extends to other parties in a judicial review application. In ***Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment and Belize Electric Company Ltd*** [2004] UKPC 6 **[TAB 19]** Lord Walker of Gestingthorpe, while dissenting on the actual decision, held that the second respondent also owed a duty of candour which he expressed thus,

> "It is now clear that proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation. <u>A respondent authority</u>

owes a duty to the court to cooperate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings. [86]

In this case that duty certainly rested on the first respondent, the Department of the Environment of Belize ("the DoE"). **In my opinion it also rested on the second respondent, Belize Electricity Company Ltd ("BECOL").** Although BECOL has been put forward as an independent commercial concern, it is clear from the evidence…..that there is a very close identity of interest between these parties. They are in effect partners in an important public works project. This has been relied on by the appellant, the Belize Alliance of Conservation Non-Governmental Organisations ("BACONGO") as a ground establishing perceived bias in the decision-making progress. But for present purposes its **most important consequence** is that **BECOL was also,** in my opinion**, under a duty to make candid disclosure** to the court." [87] [Emphasis added.]

[161] Yet Esso, Hess and Nexen, the added respondents/interveners in this case have repeated many of the misstatements made and also misled the court and repeated blatant untruths. There is a news item that Hess is drilling in the Liza field - so they were lying when they said they were not doing anything. This is public knowledge and the Court is entitled to interrogate Hess on this aspect. https://www.stabroeknews.com/2018/news/guyana/12/16/projected-cost-for-exxons-liza-phase-1-slashed-by-us700m/

[162] The Interveners repeatedly argue against themselves. They claim that Hess and Nexen are not developers even though that would exclude them from being eligible for development consent in the form of the PPL. With total disregard for national law, they claim that Hess and Nexen are not operators under the PPL even though the entire purpose and scheme of the *Petroleum Act* is that the licensees should produce petroleum, sell and dispose of it and carry out associated works and if Hess and Nexen had no intention of doing so they are not entitled to the PPL. They claim that Hess and Nexen *are merely financial investors* thereby automatically disqualifying them from holding a PPL since financiers do not carry out petroleum operations. These contradictions, circumventions and contortions are against all law, logic and reason. They are solely due to the Interveners' desperate attempts to retain the benefit of the PPL without the burden of applying for and having an environmental permit, and require the Hon. Court to abandon basic common sense in its construction of the *EP Act and Petroleum Act.*

[163] It is absurd for the Interveners to seek to convince this Hon. Court that they have been validly granted a PPL which entitles them to carry out the Liza Project but that Hess and Nexen, whose rights are identical to Esso's under that PPL, as a result of the *Petroleum Act* and the PPL, do not require an environmental permit. It is equally outrageous for them to argue that the PPL is a property right of great value and simultaneously argue that they cannot exercise their rights under it in order to escape the ambit of *Part IV of the EP Act.* It goes beyond absurdity to claim that *section 14* should be interpreted so as allow the Minister to give development consent to as many people as he wishes, as long as someone has an environmental project. As Lord Justice Oliver opined in ***Exxon***

Corporation v Exxon Insurance Consultants International Ltd, "In my judgement it is not necessary, in construing a statutory expression, to take leave of one's common sense." **[TAB 20]** Yet these assertions by the Respondent and Interveners would require this Hon. Court to do precisely that.

DISPOSITION

[164] It is pellucid that we are not trying to interrupt or hamper Guyana's economic development but that this case is, and always has been, that such development must take place subject to the rule of law.

[165] As a consequence we ask for

a. An administrative order of certiorari quashing the PPL.
b. If necessary, an administrative order of mandamus compelling the Minister with responsibility under the Petroleum (Exploration and Production Act) Cap 65:04 to grant a PPL to Esso in accordance with that act.
c. If and when necessary, in order to enable the Minister with responsibility for petroleum to make an informed decision an order directing Esso, Hess and Nexen to file full financial statements in accordance with section 329 of the Companies Act 1991 prior to applying for a petroleum production licence under the Petroleum (Exploration and Production Act) Cap 65:04.
d. An order directing the Minister responsible for Petroleum to enforce Article 28 of the Petroleum Agreement
e. An order compelling Hess to refrain or prohibiting Hess from (a) carrying on

prospecting and production operations in the production area;(b) selling or otherwise disposing of petroleum recovered; and (c) carrying on such operations and executing such works in the production area as may be necessary for, or in connection with, any matter referred to in paragraph (a) or (b).

f. An order compelling Nexen to refrain or prohibiting Hess from (a) carrying on prospecting and production operations in the production area;(b) selling or otherwise disposing of petroleum recovered; and (c) carrying on such operations and executing such works in the production area as may be necessary for, or in connection with, any matter referred to in paragraph (a) or (b).

g. Alternatively, a declaration that the PPL has not been validly granted to Hess and Nexen on the grounds that they have not signed it and Esso has not signed as their representative but only as the operator under the Petroleum Agreement.

h. Costs.

i. In the special circumstances of this case in the event that the application is dismissed, no order as to costs. This was not a frivolous or vexatious challenge but a challenge grounded in concern for the people and environment of Guyana and the region. An award of costs against an unsuccessful public interest litigant has a chilling effect on the willingness of citizens to challenge executive abuse, an effect which inhibits access to justice, and which is contrary to the rule of law and the public interest.

j. Further and /or other relief as to this court may seem just.

Respectfully submitted.

Dated this day of December, 2018.

SEENATH JAIRAM, SC
Leading **Melinda Janki**,
Of Counsel

TO: **The Registrar**,
Court of Appeal
60 High Street, Kingston
Georgetown

AND TO: **Mr Edward Luckhoo, SC**

AND TO: MESSRS HUGHES, FIELDS, STOBY