IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF
THE CO-OPERATIVE REPUBLIC OF GUYANA

CCJ Appeal No GYCV2023/005
GY Civil Appeal No 20 of 2020

BETWEEN

RAMON GASKIN **APPELLANT**

AND

MINISTER OF NATURAL RESOURCES **RESPONDENT**

AND

EXXONMOBIL GUYANA LIMITED
CNOOC PETROLEUM GUYANA LIMITED
HESS GUYANA EXPLORATION LIMITED **ADDED RESPONDENTS**

ENVIRONMENTAL PROTECTION AGENCY **AMICUS CURIAE**

Before: **Mr Justice Saunders, President**
Mr Justice Anderson
Mme Justice Rajnauth-Lee
Mr Justice Barrow
Mr Justice Burgess

Date of Judgment: **27 June 2024**

Appearances

Mr Seenath Jairam SC, Ms Melinda Janki, Mr C V Satram, Mr Mahendra Satram, Mr Ron Motilall, Mr KV Jairam and Ms Sasha Sukhram for the Appellant

Mr Edward Luckhoo SC, Ms Deborah Kumar, Deputy Solicitor General and Ms Eleanor Luckhoo for the Respondent

Mr Andrew M F Pollard SC and Mr Nigel Hughes for the Added Respondents

Mr Sanjeev Datadin and Ms Frances Carryl for the Amicus Curiae

Environmental law – Oil and Gas law – Statutory interpretation – Delay in issuing judgments – Whether non-operators required to apply for environmental permit – Whether Minister may grant petroleum production licence to non-operators who do not have environmental permits – Whether delay by court in issuing judgment breached statutory time limit for judgment delivery – Environmental Protection Act, Cap 20:05 – Petroleum (Exploration and Production) Act, Cap 65:04 – Time Limit for Judicial Decisions Act, Cap 3:13.

SUMMARY

The first respondent is the Minister of Natural Resources ('the Minister'). The three added respondents, ExxonMobil Guyana Ltd ('Exxon'), CNOOC Petroleum Guyana Limited ('CNOOC') and Hess Guyana Exploration Ltd ('Hess') formed a joint venture to find and exploit petroleum from the Stabroek Block, offshore Guyana. They and the Minister entered into a Petroleum Agreement on 27 June 2016, which appointed Exxon as the operator. Exxon alone applied for and was granted an environmental permit by the Environmental Protection Agency pursuant to the Environmental Protection Act of Guyana. Subsequently, the three added respondents applied for and were all granted a Petroleum Production Licence dated 15 June 2017.

The appellant, Mr Ramon Gaskin, filed a Fixed Date Application in the High Court seeking to quash the Minister's decision to issue the Petroleum Production Licence and to prevent him from granting the Licence to Hess and CNOOC until they acquired an environmental permit. The High Court dismissed the application but took three hundred and sixty-six (366) days to deliver judgment. On appeal, the Court of Appeal determined that the Minister did not breach the Environmental Protection Act or the Petroleum (Exploration and Production) Act ('PEP Act') by granting the Licence to the three added respondents because the environmental permit was tied to the Liza 1 Project of the Stabroek Block itself and not to the permit holder Exxon. The Court of Appeal also held that the trial judge did not unduly delay in giving her decision and was not in breach of the Time Limit for Judicial Decisions Act. Mr Gaskin then appealed to this Court seeking to have the Court of Appeal decision set aside. He contended that the delay by the High Court and Court of Appeal in delivering judgment contravened the relevant statutory time limits.

Two principal issues fell to be determined by the Caribbean Court of Justice (CCJ). These were: (i) Whether the Minister acted unlawfully in granting the Petroleum Production Licence to the three added respondents when only Exxon was granted an environmental permit; and (ii) Whether the High Court and the Court of Appeal breached the statutory time limit for judgment delivery and if so, the effect this had on the judgments they delivered.

In delivering the judgment of the Court, Anderson J commented that arts 25, 36 and 149J of the Constitution of the Co-operative Republic of Guyana, in expressly providing for environmental rights, placed protection of the environment upon an exalted plane and that these provisions must be borne in mind when interpreting legislation that touch and concern the environment. Under ss 14 and 4(5) of the Environmental Protection Act, the granting of environmental authorisation was a condition precedent to the power exercisable by the Minister under s 35 of the PEP Act to grant a Petroleum Production Licence.

Interpreting the Environmental Protection Act as a whole and within the context of its objectives and constitutional underpinnings, Anderson J concluded that environmental authorisation must be given for the undertaking of a project and that the Environmental Protection Agency must be convinced that a developer can fulfil their role and responsibilities and comply with the terms and conditions of the environmental permit. As sole operator, Exxon alone was able to comply with the obligations of the developer under the Environmental Protection Act.

In this case, the Petroleum Production Licence had been granted on the basis that Exxon was the operator of the project and was subject to extensive environmental obligations which were extended to Hess and CNOOC through joint and several liability. The grant of the Licence to CNOOC and Hess did not render the Licence invalid for four (4) reasons. Firstly, the essential requirements under s 14 of the EP Act to obtain an Environmental Permit had been satisfied with the grant of the environmental permit to the sole operator of the Liza 1 Project. Secondly, it was consistent with international oil and gas industry practice that Exxon as operator functioned as representative of the joint venturers and that

Hess and CNOOC be included within the Licence as financial partners to secure financing. Thirdly, the three added respondents shared liability for environmental harm guaranteed by their joint and separate liability. Lastly, there was no increased risk of harm to the environment under either the precautionary principle or avoidance principle by the inclusion of Hess and CNOOC in the Licence. Anderson J concluded that there was no basis for finding that the Minister acted unlawfully and thus considered it unnecessary to address the issue of amendment of grounds of relief pleaded. As the appellant had acted as a public-spirited citizen intent on advancing the constitutional protection of the environment costs ought not be awarded against him.

Saunders P concurred with Anderson J that the appeal must fail. The President reasoned that the environmental permit was obtained in contemplation of works that placed the environment at risk to be undertaken solely by Exxon. It is only necessary that those co-venturers who were to be engaged in development activity that may have a significant impact upon the environment should be granted an environmental permit. Given that a) the liabilities undertaken in connection with the Licence are joint and several; b) Exxon (and not CNOOC nor Hess) was the developer carrying out day to day activities; c) neither the grant of the permit nor of the Licence, in each case to Exxon, is being challenged and d) no grounds were advanced to impugn either of those two authorisations to Exxon, it could not fairly be said that, in licensing CNOOC and Hess, the Minister acted illegally or irrationally or unfairly or unreasonably.

Saunders P highlighted the importance of transparency and accountability in environmental governance, acknowledging Mr Gaskin's concerns about environmental risks.

Regarding the issue of delay, this Court’s comments on lengthy delay in *Reid v Reid* were referenced. Saunders P took the view that the time limits set out in the Time Limit for Judicial Decisions Act, Cap 3:13 must be construed as being of a discretionary and not mandatory nature. While a one-year delay should not be condoned, the Court had no way of knowing what objective difficulties, if any, faced the courts below. Finally, the Court on principle should avoid imposing a costs order on a citizen who in good faith files

proceedings in a genuine effort to comply with their constitutional duty to participate in activities designed to improve the environment and protect the health of the nation.

In a concurring judgment, Rajnauth-Lee J recounted this Court's approach to statutory interpretation in *OO v BK* and highlighted arts 25, 36 and 149J of the Constitution of Guyana which were given legislative force by the Environmental Protection Act. The Constitution of Guyana and Guyana's international obligations required balancing of sustainable development and the use of natural resources, with justifiable economic and social development, to safeguard the environment for the benefit of future generations. The question of whether an environmental permit approves a project or an applicant undertaking the project ought not to be bifurcated. The Environmental Protection Act did not envision a multiplicity of applications. Accordingly, there was nothing in the Act requiring CNOOC and Hess to make separate applications for an environmental permit.

Rajnauth-Lee J was therefore of the view that the objectives of the Environmental Protection Act, particularly the environmental protection and the sustainable development and use of the natural resources of Guyana, were fully satisfied by the grant of the Licence to the three added respondents. There was also no increased risk of harm to the environment by the inclusion of CNOOC and Hess in the Licence.

Rajnauth-Lee J further emphasised the role of the public in the decision-making process in environmental matters in accordance with the Rio Declaration. Rajnauth-Lee J agreed that the appellant as a member of the public played a key role in advancing environmental law in Guyana through the pursuit of this matter and costs are not to be awarded against him.

Having regard to the opinions expressed the Court ordered that the appeal should be dismissed and that each party should bear its costs in this Court.

Cases referred to:

BCB Holdings Ltd v A-G of Belize [2013] CCJ 5 (AJ) (BZ), (2013) 82 WIR 167; *Caledonian Rly Co v North British Rly Co* (1881) 6 App Cas 114; *Collins v Environmental*

Protection Agency (GY CA, 3 May 2023); *Commissioner of Police v Alleyne* [2022] CCJ 2 (AJ) BB, [2022] 2 LRC 590; *Environmental Protection Agency v Midland Scrap Metal Co Ltd* [2016] IECA 64; *Gaskin v Minister of Natural Resources* (GY CA, 21 December 2022); *Harding v Cork County Council* [2008] 4 IR 318; *OO v BK* [2023] CCJ 10 (AJ) BB, [2024] 1 LRC 169; *Prairie Pacific Energy Corp v Scurry-Rainbow Oil Ltd* [1994] 147 AR 260; *R v Flowers* [2020] CCJ 16 (AJ) BZ, [2020] 5 LRC 628; *R v Monopolies and Mergers Commission, ex p Argyll Group plc* [1986] 2 All ER 257; *R v Panel on Take-Overs and Mergers, ex p Datafin plc* [1987] QB 815; *R (Edison First Power Ltd) v Central Valuation Officer* [2003] 4 All ER 209; *Reece v Abdulla* [1975] 1 GLR 57, (1975) 23 WIR 34 (GY CA); *Reid v Reid* [2008] CC J 8 (AJ) (BB), (2008) 73 WIR 56; *Sersland v St Matthews University School of Medicine Ltd* [2022] CCJ 16 (AJ) BZ; *Smith v Selby* [2017] CCJ 13 (AJ) (BB), (2017) 91 WIR 70; *Spillers Ltd v Cardiff Assessment Committee* [1931] All ER Rep 524; *Sussex Peerage Case* (1844) 11 Cl & Fin 85, 8 ER 1034; *Thomas v Environmental Protection Agency* (GY HC, 7 October 2020); *Titan International Securities Inc v A-G of Belize* [2018] CCJ 28 (AJ) (BZ), (2019) 94 WIR 96.

Legislation referred to:

Guyana - Constitution of the Co-operative Republic of Guyana Act, Cap 1:01, Environmental Protection Act, Cap 20:05, Petroleum (Exploration and Production) Act, Cap 65:04, Supreme Court (Civil Procedure) Rules 2016, Time Limit for Judicial Decisions Act, Cap 3:13; **European Union** - Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ No L 175/40, Council Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ No L 26/1; **Ireland** - Waste Management Act 1996.

Treaties and International Materials referred to:

Charter of Civil Society for the Caribbean Community (adopted 19 February 1997), Rio Declaration on Environment and Development (adopted 14 June 1992) (1992) 31 ILM 874.

Other Sources referred to:

Anderson W, *The Law of the Sea in the Caribbean* (Brill 2022); Anderson W, *Principles of Caribbean Environmental Law* (Environmental Law Institute 2012); Anderson W and Lamarche D B, *Ensuring Environmental Access Rights in the Caribbean Analysis of Selected Case Law* (Caribbean Court of Justice Academy for Law and United Nations Economic Commission for Latin America and the Caribbean 2018); Bailey D and Norbury L, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis 2020); Black A and Dundas H R, 'Joint Operating Agreements: An International Comparison from Petroleum Law' (1992) 8 J Nat Resources & Envtl L 49; Bonney W H and Park J J, 'Recent Judicial Developments of Interest to Oil and Gas Lawyers' (1995) 33 Alta L Rev

365; Caribbean Court of Justice (Appellate Jurisdiction) Rules 2021; Czepiel A, 'Is the Right Person Certifying Environmental Compliance in your Organization?' (Enviro.BLR.com: Compliance Tools for Environmental Professionals, 25 September 2014) < https://enviro.blr.com/environmental-news/EHS-management/EPA-and-multistate-environmental-law-regulations/Is-the-right-person-certifying-environmental-compl > accessed 10 May 2024; de Sadeleer N, 'The Principles of Prevention and Precaution in International Law: Two Heads of the Same Coin?' in Malgosia Fitzmaurice and others (eds), *Research Handbook on International Environmental Law* (2nd edn, Edward Elgar Publishing Ltd 2021); Driedger E A, *Construction of Statutes* (2nd edn, Butterworths 1983); *Encyclopaedia of Forms and Precedents* (2022) vol 14(2); Fordham M, *Judicial Review Handbook* (6th edn, Hart Publishing 2012); *Halsbury's Laws of England* (4th edn, 1995) vol 44 (1); *Halsbury's Laws of England* (4th edn, 1998) vol 9(1); Hughes W E, *Fundamentals of International Oil & Gas Law* (PennWell Publishing 2017); Law J and Martin E A, *A Dictionary of Law* (Oxford University Press 2009); Merriam-Webster Dictionary (2024) < https://www.merriam-webster.com/dictionary/matter > accessed 9 January 2024; Periera E G, *Joint Operating Agreement: Risk Control for the Non-Operator* (Globe Law and Business 2013); Roberts P, *Joint Operating Agreements: a Practical Guide* (2nd edn, Globe Law And Business 2012); Serwer A, Interview with Henry Paulson, Former United States Treasury Secretary (Fortune Global Forum, Chengdu China, 2 April 2013) C-Span < https://www.c-span.org/video/?311863-1/political-economic-china > accessed 14 May 2024; Styles S C, 'Joint Operating Agreements' in Greg Gordon, John Paterson and Emre Usenmez (eds), *UK Oil and Gas Law: Current Practice and Emerging Trends - Commercial and Contract Law Issues* (3rd edn, Edinburgh University Press 2018).

JUDGMENT

Reasons for Judgment:

ANDERSON J:

Introduction

[1] This appeal marks the first occasion on which the Court has been asked to decide an issue of direct concern to the protection and preservation of the environment. The issue is whether it is permissible for a Petroleum Production Licence ("Licence") to be granted to joint venture licensees consisting of three persons where only one person, the operator, applies for and receives an environmental permit for the joint project. In one sense, the appeal has become somewhat academic in that the environmental authorisation has, since the start of the litigation, expired, and was subsequently renewed on terms which acknowledge and accept that the other two co-venturers are involved in the joint venture.[1] However, a statement of the relevant governing principle and the reasons underpinning it remain important for future regulatory conduct. Other matters were raised in the litigation primarily related to the delay by the courts below in the handing down of judgments in this case, but these are not core to the environmental issue on appeal.

[2] The relevant project concerns the carrying out of petroleum prospecting and production operations in the offshore area of Guyana known as the Liza Phase 1 Project in the Stabroek Block. The appellant is Ramon Gaskin, a person of age and a national of the Co-operative Republic of Guyana. The respondent is the Minister of Natural Resources having responsibilities for the natural resources of Guyana and the designated Minister of Government entitled to exercise the powers and authority under the Petroleum (Exploration and Production) Act, Cap 65:04 ('PEP Act').

[1] See [78], [83] below.

[3] There are added respondents. These are ExxonMobil Guyana Ltd, ('Exxon')[2], CNOOC Petroleum Production Ltd ('CNOOC')[3], and Hess Guyana Exploration Ltd ('Hess'). The added respondents are the three companies in the joint venture on the petroleum prospecting and production operations in the Liza Phase 1 Project. The three companies are also parties to a Production Agreement with the Government of Guyana.

[4] The amicus curiae is the Environmental Protection Agency ('EP Agency') which is a statutory body corporate established by the Environmental Protection Act ('EP Act').[4] It is the regulatory agency formed to exercise the powers and authority as proscribed in the EP Act and is responsible for deciding whether to issue an environmental permit or authorisation for projects.

[5] Exxon sought and obtained an environmental permit, dated 1 June 2017, from the EP Agency in respect of the Liza Phase 1 Project. On 21 December 2022, the Court of Appeal of Guyana dismissed the appeal from the appellant and agreed with the High Court that as the environmental authorisation had been granted to the operator of the Project, there was no need for the other two persons in the joint venture, to have applied for and received an environmental permit. It was from this decision that the appellant appealed to this Court.

The Background

[6] Exxon, CNOOC, and Hess formed a consortium to find and exploit petroleum from an area offshore Guyana known as the Stabroek Block. Pursuant to s 10 of the PEP Act, the Government of Guyana, represented by the Minister responsible for petroleum, entered into a Petroleum Agreement with the consortium dated 27 June 2016. The Petroleum Agreement was a production sharing agreement whose

[2] Since the commencement of these proceedings Esso Exploration and Production Guyana Ltd has changed its name to ExxonMobil Guyana Ltd. By an Order dated 30 November 2023, the CCJ granted leave to the companies to amend the rubric of the proceedings.
[3] Since the commencement of these proceedings CNOOC Nexen Petroleum Guyana Ltd has changed to CNOOC Petroleum Guyana Ltd. By an Order dated 30 November 2023, the CCJ granted leave to the companies to amend the rubric of the proceedings.
[4] Cap 20:05.

objective was the exploration for and production of petroleum in geographical areas covered by the Agreement. This 2016 Agreement, which followed the 1999 Petroleum Agreement between Guyana and Exxon, is a complex and detailed contractual document covering such matters as Exploration Programme and Expenditure Obligation (art 4); Annual Work Programme and Budget (art 7); Discovery and Development of Petroleum (art 8); Cost Recovery and Production Sharing (art 11); Disposal of Production (art 14); Rights to Assets and Insurance (art 20); and Social Responsibility and Protection of the Environment (art 28). The Petroleum Agreement may be terminated upon expiry, surrender or lawful cancellation of the Petroleum Production Licence.

[7] On 5 July 2016, Exxon applied to the EP Agency for an environmental permit for the Project pursuant to the EP Act. Exxon was required to conduct an environmental impact assessment. The environmental impact assessment also included a Revised Oil Spill Response Plan and Wildlife Response Plan dated 1 June 2017 which is subject to the terms and conditions of the environmental permit. On 1 June 2017, the Environmental Protection Agency approved Exxon's application and granted Exxon Environmental Permit Reference No 20160795-EEDPF for the Project.

[8] On 15 June 2017, further to the agreements in the Petroleum Agreement, and pursuant to s 35 of the PEP Act, the Minister of Natural Resources issued to Exxon, Hess, and CNOOC a Licence in respect of the Liza 1 Petroleum Production Area. The Licence granted the consortium exclusive rights to carry on prospecting and production operations, sell or otherwise dispose of petroleum, and carry on other necessary works. Under the terms of the Petroleum Agreement and the Licence, Exxon is the sole operator of the project. Article 2.2 of the Petroleum Agreement expressly provides that –

> (a) Exxon shall be the Operator charged with conducting the day-to-day activities of the Contractor under this Agreement. No transfer of operatorship to another party not comprising the Contractor shall take effect unless it has been approved by the Minister … and

(b) The Contractor shall provide the Minister with a memorandum summarizing the operating arrangements between the Operator and the Contractor, including any Party comprising the Contractor for the conduct of Petroleum Operations which will include, among other things, a provision whereby the Operator agrees to conduct the Petroleum Operations in accordance with this Agreement, the Licences and any applicable laws of Guyana.

The 'Contractor' is defined in the Petroleum Agreement to mean Exxon, CNOOC and Hess and includes their successors and permitted assignees.

[9] Of critical importance to this appeal is the fact that neither CNOOC nor Hess had applied for or were included in the environmental permit. CNOOC and Hess have never received an environmental permit from the EP Agency.

High Court Proceedings

[10] The appellant commenced proceedings against the respondent by way of a Fixed Date Application on 19 February 2018. The appellant sought the following principal remedies:

(a) An order of certiorari to quash the Respondent Minister's decision to issue a Petroleum Production Licence on 5 June 2017 to the Added Respondents.

(b) An order of prohibition to prevent the Respondent Minister from taking any further steps in exercising any further authority pursuant to the s 35 of the Petroleum (Exploration and Production) Act, Cap 65:04 and to prohibit the Respondent Minister from granting any Petroleum Production Licence to Hess Guyana Exploration Ltd until an environmental authorisation was issued to Hess Guyana Exploration Ltd and

(c) An order of prohibition to prevent the Respondent Minister from taking any further steps in exercising any further authority pursuant to the s 35 of the Petroleum (Exploration and Production) Act, Cap 65:04 and to prohibit the Respondent Minister from granting any Petroleum Production Licence to CNOOC Nexen Petroleum

> Guyana Ltd until an environmental authorisation was issued to CNOOC Nexen Petroleum Guyana Ltd.

[11] The matter was called before Justice Franklyn Holder on 20 February 2018, and on 26 February 2018, the matter was dismissed. However, it appears that the Judge had conducted the proceedings and exercised powers under the old High Court Rules instead of the Civil Procedure Rules. The appellant filed an appeal to the Court of Appeal on 22 March 2018, and the matter was called up for hearing on 29 May 2018. On 28 June 2018, the Court of Appeal allowed the appeal and ordered that the matter be sent back to the Chief Justice and be fixed for a hearing de novo.

[12] At the de novo hearing before George CJ (Ag), the respondent filed an Affidavit of Defence for the first time, and the added respondents were granted leave to intervene in the proceedings and duly filed Affidavits. The respondent filed his Affidavit in Defence on 23 August 2018 which in substance denied any wrongdoing and denied that the appellant was entitled to the remedies sought.

[13] Following submissions by all parties, and by Order dated 12 February 2020, the Chief Justice ordered that the claims made in the Fixed Date Application be dismissed with costs. The Chief Justice found that Exxon could be classified as the developer within the meaning of the Environmental Protection Act and that as the environmental permit had been issued in respect of the project for which the developer had applied 'it was not necessary for it to be issued to each company … for the execution of the project …'. It was sufficient that CNOOC and Hess were joint licensees together with Exxon in respect of the project and that their obligations under the Licence were statutorily joint, meaning that each of them or all of them would be liable under the terms of the Licence.

Court of Appeal Proceedings

[14] Being dissatisfied with the decision of the Chief Justice, the appellant appealed to the Court of Appeal consisting of Cummings-Edwards C (Ag), Gregory and

Persaud JJA. The appellant sought an extended list of reliefs, including an order reversing or setting aside the decision of the Chief Justice. In its judgment delivered on 21 December 2022, the Court of Appeal considered that the 'critical issue' before it was whether the Minister of Natural Resources breached the Environmental Protection Act in exercising his powers under s 35 of the Petroleum (Exploration and Production) Act to award the Licence to the three companies of Exxon, CNOOC and Hess when two of them did not have an environmental permit for the Liza Phase 1 Project.

[15] The Court of Appeal explained that the fears of the appellant that there was insufficient attachment to bind CNOOC and Hess to the permit for them to be named on the Licence was unfounded and that the principle of joint and several liability was sufficient attachment to bind those entities to comply with the environmental permit and the Licence. The Court adopted the view of the Chief Justice who stated at [58]:

> I agree with the submissions on behalf of the Respondents that where liability is joint, and several [of] the parties have jointly and individually promised to carry out the same promise or obligation; that there is only one obligation by which they are all bound. The various instruments therefore clearly set out the obligations of the licensee which ensure that the EP [environmental permit] is binding on all of them…
>
> I therefore do not agree that the effect of the joint and several obligations on ESSO [EXXON], HESS and NEXEN [CNOOC] means that each has a separate obligation to comply with the Environmental Protection Act by each obtaining an EP. They are bound to comply with the EP [environmental permit] that was issued to ESSO [EXXON] by virtue of the PPL and the PA as well as s. 6 of the Petroleum Act.

[16] The appellant also raised issues in relation to delay. The failure of the Chief Justice to observe the time limits as set out in the Time Limit for Judicial Decisions Act, Cap 3:13 was argued as a ground for setting aside the ruling of the High Court. The Court of Appeal determined that the drafters of the Act did not intend that failure to comply with the 120-day limit invalidated the decision. To hold otherwise would

mean that all cases would have to be heard de novo or be abandoned once judgment was delivered outside the time limit. That, said the Court of Appeal, '…could never be in the interest of justice. The delay complained of by the Appellant could not render the decision a nullity.'[5]

[17] The Court of Appeal dismissed the appeal and affirmed the decision of the Chief Justice. The court ordered that each party shall bear its own costs.

Caribbean Court of Justice

[18] By Notice of Appeal dated 8 September 2023, the appellant appealed to this Court against the whole judgment of the Court of Appeal except the decision as to costs. The Notice of Appeal detailed some fourteen (14) grounds of appeal and sought some thirteen (13) orders and reliefs.

[19] The grounds of appeal all recited the ways in which the Court of Appeal was alleged to have misdirected itself and/or failed to take account of relevant considerations/matters and/or took account of irrelevant considerations/matters and/or erred at law and/or was plainly wrong. The considerations or matters in which the Court was alleged to have erred or was wrong essentially related to its finding that the Minister had not breached s 14 of the EP Act when he granted a Licence to the added respondents including CNOOC and Hess. The appellant also contended that the Court of Appeal misconstrued or misapplied the principles of joint and several liability. Finally, the grounds of appeal took issue with the holding by the Court of Appeal that there was no delay and hence no injustice to the appellant even though the Chief Justice took 366 days to deliver her decision.

[20] The essential relief sought was the setting aside of the decision of the Court of Appeal and consequential orders of certiorari, declaration, mandamus, and prohibition in respect of the alleged unlawful act of the Minister in granting the

[5] *Gaskin v Minister of Natural Resources* (GY CA, 21 December 2022) at [88].

Licence to Exxon, CNOOC and Hess, and costs. A declaration was also sought that the delay by the High Court and by the Court of Appeal in delivering judgment contravened the relevant statutory time limits. The appellant submitted that the inordinate delay occasioned a change in the situation and that the original reliefs sought may not now be appropriate. As an alternative to quashing the Licence in its entirety, the appellant sought an order directing the deletion of Hess and CNOOC from the Licence and the issuance of a corrected Licence in the sole name of Exxon.

Appellant's Submissions

[21] The appellant submitted that environmental authorisation is a prerequisite to development consent under s 14 of the Environmental Protection Act, and ergo, that by granting the Licence to Hess and CNOOC, who had not received environmental authorisation, the first respondent breached s 14 of the EP Act. He argued that the environmental permit was tied to and/or issued and directed to Exxon alone. Section 13 of the EP Act required an assessment of the developer, and the EP Agency shall not issue an environmental permit unless satisfied that the developer can comply with the requirements of the permit. Relying on *Environmental Protection Agency v Midland Scrap Metal Co Ltd*,[6] the appellant submitted that the environmental permit was to Exxon otherwise, petroleum production may be carried out by someone who was not a fit and proper person thereby defeating the statutory scheme governing environmental authorisations.

[22] The appellant thereafter submitted that the first respondent breached the doctrine of separation of powers by stating in the Licence that the conditions of the environmental permit granted to Exxon applied to Hess and CNOOC. The appellant further submitted that although PEP Act and the Petroleum Agreement impose joint and several obligations on the added respondents, these provisions were not legally capable of overriding the EP Act. Thus, as the first respondent issued the Licence

[6] [2016] IECA 64.

in breach of the EP Act and the Petroleum Agreement, the issuance was illegal, and the Licence could not be relied upon to circumvent the requirements of the EP Act.

[23] Regarding delay, the appellant submitted that the High Court and the Court of Appeal exceeded the time limit prescribed for judgment delivery as per ss 4(1) and 5 of the Time Limit for Judicial Decisions Act, Cap 3:13. The appellant submitted that it had suffered injustice because of the inordinate delays in Guyana's judicial system.

[24] Regarding relief, the appellant submitted that due to the change in factual circumstances since inception of the matter and the environmental risk associated with petroleum production, the original relief may not be appropriate. The Government of Guyana was alleged to have benefitted from the wrongdoing of the Minister and had received revenue from petroleum extracted under the illegal Licence. This Court was therefore urged to set aside the Court of Appeal's decision and to exercise its discretion to grant remedies which uphold the rule of law, and which ensure that corrective action is taken and there was no benefit from wrongdoing. Consequently, orders were sought which were different from those sought in the High Court.

Submissions of the Respondent

[25] The respondent submitted that the issue was whether s 14(1) of the EP Act requires each of the joint venture licensees to apply for and be issued an environmental permit as contended by the appellant or whether it was sufficient that the operator of the joint venture had received the permit. The respondent's case was that the environmental permit was obtained for the Liza Phase 1 Project itself, and that the respondent therefore acted lawfully in granting the Licence to the added respondents who were the three joint venturers in the project.

[26] The respondent endorsed the appellant's enunciation of the principles of interpretation set out in *Bennion, Bailey and Norbury on Statutory Interpretation*[7] but submitted that the appellant's interpretation of s 14 of the EP Act was erroneous in that the section did not state that development consent may not be granted to any person unless that person has environmental authorisation. Section 14 of the EP Act prohibited the giving of development consent '*in any matter*' rather than 'to any person' unless an environmental permit was obtained. The ordinary and grammatical meaning of 'in any matter' was fundamentally different and this error led to the erroneous conclusion of the appellant that Hess and CNOOC, by not carrying out an environmental impact assessment and in not obtaining an environmental permit had not met the prerequisite of s 14.

[27] The respondent relied upon the definition of 'matter' in Merriam-Webster Dictionary,[8] *Harding v Cork County Council*,[9] and the principle in *Spillers Ltd v Cardiff Assessment Committee*,[10] to submit that the words 'in any matter' must refer to a project. Further, the respondent argued that neither the EP Act nor the PEP Act required or inferred that a Licence could only be granted to a person to whom an environmental permit had been issued. The requirement that the project be approved prior to development consent being granted was consistent with international legislative provisions[11] since 'it is the project which is approved as consistent with the EPA as a whole.' The respondent further submitted that *Environmental Protection Agency v Midland Scrap Metal Co Ltd*[12] does not assist the appellant, as the statutory requirements of the Act in that case and the EP Act are manifestly different. The respondent explained, relying on academic and practitioner texts,[13] the difference between the "operator" (Exxon) and the "non-

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[7] Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020).
[8] 'Matter' (Merriam-Webster Dictionary, 2024) < https://www.merriam-webster.com/dictionary/matter > accessed 9 January 2024.
[9] [2008] 4 IR 318 at [95].
[10] [1931] All ER Rep 524 at 528 (Lord Hewart CJ).
[11] ibid. See also Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, which was repealed by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.
[12] *Midland Scrap Metal* (n 6).
[13] Scott Crichton Styles, 'Joint Operating Agreements' in Greg Gordon, John Paterson and Emre Usenmez (eds), *UK Oil and Gas Law: Current Practice and Emerging Trends - Commercial and Contract Law Issues* (3rd edn, Edinburgh University Press 2018) vol II para 2.24; William E Hughes, *Fundamentals of International Oil & Gas Law* (PennWell Publishing 2017) 334; *Encyclopaedia of Forms and Precedents* (2022) vol 14(2), Commentary, para 1085.

operators" (CNOOC and Hess) in an oil and gas joint venture, essentially concluding that the operator (Exxon) takes overall responsibility for the conduct of the project and the non-operators (CNOOC and Hess) are merely a form of 'investors' and are not involved in the conduct of the petroleum operation.

[28] Regarding delay, the respondent contended that the appellant has not established any prejudice arising out of the delay in delivery of the judgments of the Court, and that '…the time limits under the Time Limit for Judicial Decisions Act, are directory. The Act itself at ss 5 and 7 addresses the consequences of non-compliance.' And that based on *Reece v Abdulla*,[14] the time limit was not intended to be absolute or imperative but only directory with the consequence that a failure to comply could not invalidate the decision given.

[29] Finally, the respondent submitted that the relief sought by the appellant at para 65(iii) of their submissions, was not a relief sought in the original application. As these reliefs are of a substantially different nature and type than those sought in the Fixed Date Application, the respondent argued that these new orders should not be entertained. The respondent concluded that as the prerequisites to being granted a Licence were satisfied, the appeal ought to be dismissed with costs.

Submissions of the Added Respondents

[30] The submissions of the added respondents are consistent with those of the respondents. The added respondents submitted that the respondent acted lawfully in issuing the Licence to the added respondents, although only Exxon was named on the environmental permit. They relied on ss 4, 10 and 11, 12 and 13 of the EP Act. They relied further on *Halsbury's Laws of England*[15] which stated:

> …Joint and several liability arises where two or more persons join in the same instrument in making a promise to the same person, and at the same

[14] [1975] 1 GLR 57, (1975) 23 WIR 34 (GY CA).
[15] (4th edn, 1998) vol 9(1), para 1079.

> time each of them individually makes the same promise to that same promisee… Joint and several liability is similar to joint liability in that the co-promisors are not cumulatively liable…

[31] The added respondents also contended that *Environmental Protection Agency v Midland Scrap Metal Co Ltd*,[16] was of a different factual situation than the present circumstances and emphasised that the licence in that case was personal turned on the actual wording of the relevant statutory provision before it. Further, the added respondents agreed with the respondents that the appellant breached r 8:02(1)(c) of the Civil Procedure Rules 2016 ('CPR') by adding additional reliefs not contained in the original Fixed Date Application. The added respondent submitted that the administrative orders sought by the appellant, namely, order of certiorari and two orders of prohibition are discretionary reliefs.[17] Relying on *R v Panel on Take-Overs and Mergers, ex p Datafin plc*,[18] and *R v Monopolies and Mergers Commission, ex p Argyll Group plc*,[19] the added respondents argued that it would not be good administration to quash the permit as this would result in the Liza Phase 1 Project being halted resulting in massive economic damage to all entities involved and Guyana's petroleum economy would be adversely affected.

[32] Regarding breach of the Time Limit for Judicial Decisions Act, the added respondents submitted that it was unclear whether the appellant desired the decision reversed and the Fixed Date Application be resent for rehearing or if this was evidence that, in taking too long to determine the matter, the Chief Justice 'forgot what the case was about and is seeking a Declaration to that effect'. If the former that this is contrary to the intention of the legislature and would protract litigation in which case the relief sought ought not to be granted as the provisions of the Time Limit for Judicial Decisions Act. If the latter, the prayer ought to be refused as declaratory relief is normally granted to declare real rights of parties.

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[16] *Midland Scrap Metal* (n 6).
[17] Michael Fordham, *Judicial Review Handbook* (6th edn, Hart Publishing 2012) para 24.3.
[18] [1987] QB 815 at 840.
[19] [1986] 2 All ER 257 at 266.

Submissions in Reply

[33] The Submissions in Reply by the appellant reiterated many of the points made in its original submissions. Citing the need for continuous vigilance and controls by the Agency to ensure that a permit holder complies with his permit, the appellant refers to the work *Principles of Caribbean Environmental Law*[20] which states that: 'The imposition of continuing controls is a primary tool for reconciling the findings of the EIA with the desire to permit the development. It is also an important means of retaining environmental control over the developmental process.' *Principles of Caribbean Environmental Law* specifically referred to s 13(2) of the EP Act as an example of continuing control, which according to the appellant, is exemplified by the Environmental Protection (Authorisations) Regulations 2000 ('EP Regulations'), particularly reg 15(1)(b). Continuing Control is reinforced by provisions of the environmental permit including condition 11 'Compliance Reporting' which requires the permit holder to submit regular and extensive reports to the Agency and condition 13.2 'Institutional Authority' under which the Agency has the right to conduct regular inspections. This, the appellant contends, means that the environmental permit is incontrovertibly tied to Exxon as the permit holder not to the Project. If Exxon breached any condition, the Licence could be cancelled under s 13(1)(a) of the EP Act and reg 14(1) of the EP Regulations.

[34] The appellant submitted that s 36 of the PEP Act prohibited the respondent from granting a Licence unless the person to whom it was granted has adequate financial resources and the technical and industrial competence and experience to carry on effective production operations. A financial investor who does not produce oil was not entitled to a Licence, thus as Hess and CNOOC do not carry out petroleum production, these companies were not entitled to a Licence.

[35] The appellant further submitted that the rule of law had been threatened by events in the petroleum sector including the failures of the Agency to carry out its mandate

[20] Winston Anderson, *Principles of Caribbean Environmental Law* (Environmental Law Institute 2012) 229.

and the unlawful behaviour of Exxon. For these submissions the appellant referred the findings in *Collins v Environmental Protection Agency* [21] a case from which there may well be an appeal to this Court and in respect of this it would therefore be unwise for me to comment, even in descriptive terms.

Submissions of Amicus Curiae

[36] The EP Agency, as amicus curiae, submitted that the central issue of this appeal may be determined by the meaning of s 14 of the EP Act and s 35 of the PEP Act. Exxon was the operator of the Liza 1 Project, that is, the entity executing the project; Hess and CNOOC were not. Examining the scheme of the EP Act and the role of the Agency, a multiplicity of applications for the same project is not envisioned as it would consume too much time and resources and would be unnecessary, as under the EP Act, the 'polluter pays' principle is expressly enacted.

[37] The amicus curiae submitted that the first respondent acted within his powers and authority in issuing the Licence for the Liza 1 Project. Section 14 of the EP Act was clear that authorisation is issued to an application made by a 'developer' which has a unique meaning under s 10 of the EP Act as the person or entity making the application for environmental authorisation. Thus the 'developer' is merely an applicant, '… the person identifying the project to the Agency and setting out how the project would be executed and seeking a permit to execute in accordance with the plans submitted.' This would mean that other entities associated with the project can only do so within the confines of the environmental permit issued to the developer.

[38] The amicus curiae submitted that the EP Act focuses on analysing and approving projects not the developers of projects. Examining s 4(1)(g) of the EP Act, the role and function of the EP Agency is to assess developmental activities, ascertain its impact and thereafter consider whether to authorise the relevant activity, and this is

[21](GY CA, 3 May 2023).

facilitated by s 11(1) which requires developers to apply to the EP Agency for an environmental permit. Following ss 11-13 of the EP Act only after a robust environmental assessment and considering the views of the public, the Agency assessed and determined to issue an environmental permit in respect of the Liza 1 Project. The amicus curiae relied on the wording of ss 11-13 of the EP Act to argue that the Act specifically referenced assessment and approval of projects. The amicus presented the view that, as the terms of ss 34 and 35 of the PEP Act, if a holder of a petroleum exploration permit applied for a Licence the first respondent cannot refuse the application.

[39] Regarding the delay, the amicus curiae did not dispute that the appellant experienced delay in that the time for delivery of the judgments of the lower courts exceeded that prescribed under the Time Limit for Judicial Decisions Act but submitted that the appellant was not treated differently from any other litigant and that the delays experienced were not peculiar or unusual. The amicus curiae submitted that the Appeal should be dismissed.

Issues to be Determined

[40] Although the grounds of appeal, remedies sought, and submissions, are many, the issues in this appeal are essentially four. These are: (a) whether the respondent acted unlawfully in granting the Licence to Exxon, CNOOC and Hess as joint venturers in the Liza 1 Project when only Exxon had applied for and was granted an environmental permit to undertake the Project, and if so, (b) whether the appellant may amend the grounds of relief pleaded given change in factual circumstances since the commencement of proceedings? And (c) whether the High Court and Court of Appeal breached the statutory time limit prescribed for judgment delivery and, if so, (d) what effect does this have on the judgments they delivered?

[41] I have had the benefit of reading the opinion of Saunders P on issues (c) and (d) I agree with it. There is therefore no need for me to further address these issues in any way.

(a) Whether the Grant of the Petroleum Production Licence was Unlawful?

(i) *The Constitution and Environmental Protection*

[42] In his oral submissions to this Court, Mr Jairam, Counsel for the appellant drew attention to certain provisions in the Constitution of Guyana which touch and concern the environment and which, he contended, form the background against which the EP Act is to be interpreted. Article 25 of the Constitution places a duty upon every citizen to participate in activities designed to improve the environment and protect the health of the nation. Article 36 provides that the well-being of the nation depends on preserving clean air, fertile soils, pure water and the rich diversity of plants, animals, and eco-systems. Counsel placed greatest emphasis on art 149J which provides as follows:

> 149J. (1) Everyone has the right to an environment that is not harmful to his or her health or well-being.
>
> (2) The State shall protect the environment, for the benefit of present and future generations, through reasonable legislative and other measures designed to –
>
> (a) prevent pollution and ecological degradation;
> (b) promote conservation; and
> (c) secure sustainable development and use of natural resources while promoting justifiable economic and social development.

[43] The Constitution of Guyana is the supreme law of the land. In expressly providing for environmental rights the Constitution invests in the protection and preservation of the environment with high constitutional values. The protection of the environment is thereby placed upon an exalted plane in the juridical consciousness of the citizens of Guyana. The constitutional importance attached to environmental preservation must necessarily be borne in mind when interpreting legislation that touches and concerns the environment and forms a proper background against which such legislation must be interpreted and applied.

[44] However, this is not a case squarely concerned with the nature or scope of the environmental rights as provided in the Constitution of Guyana. Constitutional arguments do not feature in any of the written submissions or pleadings of the parties or amicus curiae in this appeal and the matter remains primarily one of statutory interpretation. For present purposes, it is important that art 149J contemplates that the State's environmental responsibilities will be given effect 'through reasonable legislative and other measures.' The EP Act and Regulations are primary among the 'reasonable legislative and other measures' contemplated by the Constitution and their interpretation and application form the core of this case.

(ii) *The Statutory Context*

[45] The pivotal statutory provision that is determinative of the issue of the lawfulness of the grant of the Licence is s 14 of the EP Act, but s 5 also plays an important supporting role in that determination. Section 14 provides as follows:

> (1) A public authority shall not give development consent in any matter where an environmental authorisation is required unless such authorisation has been issued and any development consent given by any public authority shall be subject to the terms of the environmental authorisation issued by the Agency.
>
> (2) Where an environmental authorisation is cancelled or suspended, the development consent issued by the public authority shall be suspended until and unless a new environmental authorisation is issued or the suspension of the environmental authorisation is revoked.

Section 5 provides:

> (5) 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 from the Agency

> before approving or determining any matter in respect of which an environmental authorisation is required under this Act.

[46] On their face, these provisions would appear to mean that the granting of an environmental authorisation, where required under the EP Act, is a condition precedent to the power exercisable by the Minister under s 35 of the PEP Act to grant a Licence. The Minister is statutorily prohibited from granting development consent unless the required environmental authorisation has been granted by the EP Agency. The priority of the environmental authorisation process is further guaranteed by the statutory provision requiring deference to the authority of the EP Agency.

[47] A more detailed interrogation of the rules of statutory interpretation yields the same results. In the *Sussex Peerage Case*[22] Lord Tindal, CJ stated:

> … the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

[48] In *R (Edison First Power Ltd) v Central Valuation Officer* [23] Lord Millet said:

> The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless.
>
> [117] But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it.

[22] (1844) 11 Cl & Fin 85; 8 ER 1034 at [143].
[23] [2003] 4 All ER 209 at [116] – [117].

[49] These rules have been repeatedly accepted and applied by this Court as it did, for example, in *Smith v Selby*,[24] where the primacy of giving effect to the intention of Parliament was upheld.[25] *R v Flowers*[26] asserted the cardinal principle of statutory interpretation according to the intention of the legislature, 'which is to be inferred from the words used in the piece of legislation'.[27]

[50] The literal rule is elaborated upon by *Bennion*[28] who states that when undertaking the task of construing statutes, statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances. In the words of the 19th Century Lord Chancellor, Lord Selborne, '[t]here is always some presumption in favour of the more simple and literal interpretation of the words of a statute…'.[29] This approach was taken by this Court in *Commissioner of Police v Alleyne*[30] where a literal reading of the legislation in that case led to the conclusion that the word 'person' was gender neutral. The literal rule rests on the simple assumption that Parliament said what it meant and meant what it said. Where there is no uncertainty or ambiguity in the words used according to the grammatical and ordinary meaning of the words used, Parliament has succeeded in clearly communicating its intention in the legislative provision. That intention must be enforced by the courts subject to any absurdity with the overall context and objective of the legislation which would then call for a more purposive intention inclusive of the golden rule and the mischief rule.

[51] In *OO v BK*[31] the following methodology in the interpretation of a statute was cited:[32]

> (1) An Act must be construed as a whole, so that internal inconsistencies are avoided. (2) Words that are reasonably capable of only one meaning must

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[24] [2017] CCJ 13 (AJ) (BB), (2017) 91 WIR 70.
[25] ibid at [9].
[26] [2020] CCJ 16 (AJ) BZ, [2020] 5 LRC 628.
[27] ibid at [37].
[28] Bailey and Norbury (n 8).
[29] *Caledonian Rly Co v North British Rly Co* (1881) 6 App Cas 114 at 121.
[30] [2022] CCJ 2 (AJ) BB, [2022] 2 LRC 590.
[31] [2023] CCJ 10 (AJ) BB, [2024] 1 LRC 169 at [125].
[32] Johnathan Law and Elizabeth A Martin, *A Dictionary of Law* (Oxford University Press 2009).

> be given that meaning whatever the result. This is called the literal rule. (3) Ordinary words must be given their ordinary meanings and technical words their technical meanings, unless absurdity would result. This is the golden rule. (4) When an Act aims at curing a defect in the law any ambiguity is to be resolved in such a way as to favour that aim (the mischief rule)…

[52] In arriving at the legislative intent, it may be necessary to consider the words used by Parliament in their textual and historical context. This is especially useful when considering the intention of Parliament to remedy a particular mischief: *Halsbury's Laws of England*.[33] In *Sersland v St Matthews University School of Medicine Ltd*[34] this Court quoted with approval the view of Professor E A Driedger in *Construction of Statutes* (2nd edn, Butterworths 1983) where he writes:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[53] In the present appeal, construction of the EP Act 'as a whole' ensures that the specific provisions that the Court is asked to interpret and apply are placed within their proper context, including their constitutional moorings, a point to which I shall come shortly. In the terms of its long title, The EP Act 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.' The EP Act established the EP Agency whose functions include the taking of such steps as are necessary for the effective management of the natural environment to ensure conservation, protection, and sustainable use of natural resources. In performing these functions, the EP Agency 'shall' make use of current principles of environmental management namely: the polluter pays, precautionary, strict liability, avoidance, and state of technology. The meaning and implications of each of these principles are

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[33] (4th edn, 1995) vol 44(1), para 1474.
[34] [2022] CCJ 16 (AJ) BZ at [42].

elaborated in the EP Act. The precautionary and avoidance principles are relevant to the reasoning in this judgment and are mentioned later.

[54] The EP Agency must ensure that any developmental activity which may cause an adverse effect on the natural environment is assessed before such activity is commenced and that such adverse effects are considered in deciding whether such activity should be authorised.[35] Assessment is normally undertaken through employment of an environmental impact assessment.

[55] A developer of any project that may significantly affect the environment must apply to the EP Agency for an environmental permit and must provide prescribed information relating to the project including possible effects on the environment. The Agency decides whether an environmental impact assessment is required; every such assessment shall be carried out by an independent and suitably qualified person approved by the Agency and must contain prescribed information and evaluations, the details of which are mentioned in this judgment, below. The Agency approves or rejects the project after taking into consideration matters including the environmental impact assessment.

[56] The breadth of the matters requiring environmental authorisation is aptly captured in Part VI of the EP Act which concerns environmental impact assessments. The requirement of environmental impact assessments is spelt out in s 11 which provides, insofar as relevant, as follows:

> 11. (1) 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 for an environmental permit and shall submit with such application the fee prescribed and a summary of the project including information on –
>
> (i) the site, design and size of the project;
> (ii) possible effects on the environment;
> (iii) the duration of the project;

[35] Environmental Protection Act (n 4) s 4(1)(g).

(iv) a non-technical explanation of the project.

(2) Where it is not clear whether a project will significantly affect the environment, the developer shall submit to the Agency a summary of the project which shall contain the information as required by subsection (1) and the Agency shall within a reasonable period publish in at least one daily newspaper a decision with reasons as to whether the project –

(a) will not significantly affect the environment, and therefore exempt from the requirement for an environmental impact assessment; or

(b) may significantly affect the environment and will require an environmental impact assessment.

…

(4) Every environmental impact assessment shall be carried out by an independent and suitably qualified person approved by the Agency and shall –

(a) identify, describe and evaluate the direct and indirect effects of the proposed project on the environmental including –

(i) human beings;
(ii) flora and fauna and species habitats;
(iii) soil;
(iv) water;
(v) air and climatic factors;
(vi) material assets, the cultural heritage and the landscape;
(vii) natural resources, including how much of a particular resource is degraded or eliminated, and how quickly the natural system may deteriorate;
(viii) the ecological balance and ecosystems;
(ix) the interaction between the factors listed above;
(x) any other environmental factor which needs to be taken into account or which the Agency may reasonably require to be included; and

(b) assess every project with a view to the need to protect and improve human health and living conditions and the need to preserve the stability of ecosystems as well as the diversity of species.

(5) Every environmental impact assessment shall contain the following information –

(a) a description of the project, including in particular –

(i) the geographical area involved, the physical characteristics of the whole project and the land-use requirements during the construction and operational phases, including plans, drawings, and models;

(ii) the main characteristics of the production process, including the nature and quantity of the materials used, plans, drawings and models;

(iii) and estimate, by type and quantity, of expected contaminants, residues, and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation) resulting from the operation of the proposed project;

(iv) the length of time of the project;

(b) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental factors;

(c) a description of the likely significant effects of the proposed project on the environment resulting from –

(i) the existence of the project;

(ii) the use of natural resources;

(iii) the emission of contaminants, the creation of nuisances and the elimination of waste, and a description by the developer of the forecasting methods used to assess the effects on the environment;

(d) an indication of any difficulties (technical deficiencies or lack of knowledge or expertise) encountered by the developer in compiling the required information;

(e) a description of the best available technology;

(f) a description of any hazards or dangers which may arise from the project and an assessment of the risk to the environment;

(g) a description of the measures which the proposed developer intends to use to mitigate any adverse effects

and a statement of reasonable alternatives (if any), and reasons for their rejection;

(h) a statement of the degree of irreversible damage, and an explanation of how it is assessed;

(i) an emergency response plan for containing and cleaning up any pollution or spill of any contaminant;

(j) the developer's programme for rehabilitation and restoration of the environment;

(k) a non-technical summary of the information provided under the preceding paragraphs.

(iii) *Application of Law to the Grant of Development Consent for the Project*

[57] The Liza Phase I Project was not readily identifiable as being among those listed in the Fourth Schedule but is plainly one that could significantly affect the environment and therefore environmental authorisation was properly sought from the EP Agency. As rehearsed above, that authorisation was granted by the EP Agency.

[58] The Licence for Project was given by the Minister in the form of a Deed made on 15 June 2017. The Deed expressly referenced the PEP Act and the Regulations made thereunder. The Deed recited that in exercise of the powers in s 35(1) of the Act, the Minister 'do hereby grant to the Joint Venture Licensees for a period of twenty (20) years next' and subject to Act, Regulations, and specified conditions including the Development Plan submitted by Exxon on behalf of the Licensees, exclusive rights to, among other things, 'carry on prospecting and production operations in the production area.' The Licensee is defined as Exxon, CNOOC and Hess.

[59] Two of the conditions to which the Licence was subject deserve special attention. Article 2(f) of the Deed provides that 'Any obligations which are to be observed and performed by the Licensee shall be joint and several obligations.' Article 2(h) states that 'The Minister hereby approves the Operator, Exxon Exploration and

Production Guyana Limited, which Operator may only be changed by the Licensee to another party not comprising the Licensee with the written consent of the Minister.'

[60] In short, the Minister granted the Licence to the consortium consisting of the three joint venturers of Exxon, CNOOC and Hess, subject to the PEP Act, Regulations made under that Act, and specific conditions. These conditions included the restriction of activities to those consistent with the Development Plan submitted by Exxon on behalf of the licensees, the several and joint liability of the Licensees for obligations to be observed pursuant to the carrying on of activities pursuant to the Licence, and the ministerial approval of Exxon as the Operator which Operator cannot be changed without ministerial involvement.

[61] There can be no question that in granting the Licence to develop the Liza 1 Project, the Minister duly acted in his role as a public authority. A 'public authority' is defined in the EP Act to mean 'any Ministry, local government authority or local government organ'.[36] Under this said Act 'development consent' is 'the decision of the public authority which entitles the developer to proceed with the project'.[37] Section 34(1) of the PEP Act, enables a person holding a prospecting licence to apply to the Minister for a Licence in respect of any discovery of blocks of petroleum reservoirs in the prospecting area. Section 35(1) is subject to s 36 which concerns restrictions on the grant or refusal of the Licence that are not relevant for present purposes. The rest of s 35(1) then provides that:

> (a) where an application is duly made under section 34(1), the Minister shall grant the petroleum production licence applied for on such conditions as are necessary to give effect to the application and the requirements of this Act; and
>
> (b) where an application is duly made under section 34(2), the Minister may grant, on such conditions as the Minister determines, or refuse to grant the petroleum production licence applied for.

[36] ibid s 2.
[37] ibid.

[62] It follows from the overriding nature of s 14 and s 5 of the EP Act and from the deference to be granted to the EP Agency that for the grant of the Licence to be lawful, the grant must not have been given '*in any matter* where an environmental authorisation is required unless such authorisation has been issued…' (emphasis added).

[63] The added respondents and the amicus curiae argued that the 'matter' in respect of which the environmental authorisation is required means nothing more than the 'project' under contemplation. This argument, which was accepted by the Court of Appeal, is supported by several provisions in the EP Act. Throughout the EP Act and in the EP Regulations, the drafters consistently refer to the 'project' as being the subject of the environmental permit or authorisation. The EP Act defines 'project' to mean: '… the execution of construction works or other installations or schemes, any prescribed process or alteration thereof, any interference with any ecosystem or any other activity in the natural surroundings or landscape including those involving the extraction of natural resources, or any project listed in the Fourth Schedule and shall include public and private projects.'[38] A 'developer' is defined as the applicant for environmental authorisation for a project (s 10). 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 for an environmental permit (s 11(1)). The EP Agency shall approve or reject the project after taking into account, among other things, the environmental impact assessment or environmental impact statement (s 12). A decision by the EP Agency to issue an environmental permit for a project shall be subject to conditions which are reasonably necessary to protect human health and the environment, and each environmental permit shall contain specified implied conditions (s 13(1)). As far as relevant, reg 17 of the Environmental Protection (Authorisations) Regulations provides that:

[38] ibid s 10.

17. (1) An application for an environmental authorisation shall be made to the Agency pursuant to section 11, 19 or 21 of the Act.

(2) An application for an environmental authorisation -

(a) …
(b) shall be in respect of one project or facility;
(c) …

(emphasis added)

[64] These are powerful statutory indications that the matter for which environmental authorisation must be given is indeed the project for which development consent is being sought.

[65] However, this is not to say that the character or characteristics of the 'developer' is of no moment. The EP Act must be construed as a whole and within the context of its objectives, including its constitutional underpinnings. Thus construed, the EP Act describes a role for the developer which goes considerably beyond being the mere applicant for the environmental authorisation for a project. In circumstances where it is not clear whether the project will significantly affect the environment, the developer must submit to the Agency a summary of the project containing specifically required information (s 11(2)). During the environmental impact assessment, the developer and the person carrying out the environmental impact assessment must consult with members of the public, interested bodies and organisations (s 11(9)). The developer and the person carrying out the environmental impact assessment shall submit the environmental impact assessment together with an environmental impact statement to the Agency. Under s 13(1) of the EP Act the developer has the obligation to: (a) use the most appropriate technology; (b) comply with directions of the Agency necessary to implement the obligations of Guyana relating to environmental treaties; and (c) restore and rehabilitate the environment. Accordingly, s 13(2) of the EP Act provides that:

(2) The Agency shall not issue an environmental permit unless the Agency 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 (emphasis added).

[66] It is not surprising that the characteristics and relevant competences of the developer are of significance in the environmental permitting process. In some jurisdictions the question of the competence to submit permit applications and environmental compliance certifications is of utmost legal importance. Amanda Czepiel aptly sums up the situation in the United States:

> When submitting permit applications and reports, environmental compliance certifications are often required by environmental professionals and organization heads. Environmental regulations have strict guidelines as to who may certify the truthfulness, accuracy, and completeness of applications and reports. Understanding this regulatory framework for these responsible official (RO) certifications is key to staying in compliance and avoiding civil and criminal penalties.[39]

[67] It may therefore be concluded that a public authority in Guyana may not give development consent in relation to any project where an environmental authorisation is required unless such authorisation has been given by the Agency and that the Agency may not give such authorisation unless satisfied that the developer of the project can carry out the relevant obligations including compliance with the terms and conditions of the environmental permit. In short, the project and the developer are joined at the hip. The project is assessed for environmental impact and the developer is assessed for competence to comply with the obligations specified for the developer in the EP Act.

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[39] Amanda Czepiel, 'Is the Right Person Certifying Environmental Compliance in your Organization?' (Enviro.BLR.com: Compliance Tools for Environmental Professionals, 25 September 2014) < https://enviro.blr.com/environmental-news/EHS-management/EPA-and-multistate-environmental-law-regulations/Is-the-right-person-certifying-environmental-compl > accessed 10 May 2024.

[68] In the present appeal the Licence was granted on the basis that Exxon was the operator and subject to the licensee giving effect to the Petroleum Agreement. The Petroleum Agreement indicates that Exxon as operator is charged with conducting the day-to-day activities of the joint co-venturers, prohibits transfer of operatorship without ministerial involvement, and social responsibility and protection of the environment obligations on the contractor. In granting the June 2017 environmental authorisation to Exxon, the Agency placed Exxon under stringent obligations to manage the project consistent with protection of the environment. These include the obligation to abide by a raft of legislation and international conventions and protocols on the environment, noise management, air quality management, water quality, waste materials management. Other obligations imposed on Exxon relate to well blowout prevention, oil spills and other emergency management, compliance reporting, and liability for pollution damage. Any proposed changes to the operation relating to the nature or functioning or extension or and additional installation which may have consequences for the environment must be notified to the Agency at least twenty-one (21) days prior to the making of these changes. All of these obligations are spread out among the three members of the consortium through the application of the principle of joint and several liability.

[69] As the operator in charge of the operational aspects, Exxon was clearly the appropriate or right person in the consortium to seek and obtain environmental approval for the Liza 1 Project. As the sole operator, Exxon alone was in a position to comply with the obligations of the developer outlined in the EP Act and only Exxon could have properly given the appropriate undertakings to abide by the terms and conditions of the environmental permit. It follows that upon successful completion of the environmental impact assessment and upon the undertaking to adhere to the obligations in the EP Act and the environmental permit, the requirement in s 14 of the EP Act was satisfied and that the respondent Minister could lawfully grant the Licence to Exxon in respect of the Liza Project.

[70] Nonetheless, the question remains as to whether the grant of the Licence was rendered unlawful by the inclusion in it of the other two members of the consortium, namely CNOOC and Hess, who did not apply for or receive environmental authorisation. Four reasons compel me to the view that the grant of the Licence in the circumstances just described did not render the grant invalid or unlawful.

No Express or Implied Prohibition

[71] As analysed earlier, the essential requirement of s 14 of the EP Act is that a public authority may only give development consent in respect of a project that has received environmental authorisation where such is required, and where the Agency is satisfied that the developer of the project is capable of carrying out the statutory obligations in the EP Act as well as the terms and conditions in the environmental authorisation. As also indicated, these essential requirements were met in the present appeal. The section places no other conditions on the ministerial grant of the Licence to conduct or develop the project.

[72] Specifically, where the predicate conditions are satisfied, as they are in this case, there is no express or implied prohibition on other members of the consortium being named in the Licence. Hess and CNOOC are financial partners and do not carry out any prospecting or production activities that could adversely affect the environment. Nothing in the EP Act states that the developer who has secured development consent must proceed with the project alone. It would be contrary to efficiency and the objective of the legislation to suppose that additional joint venturers who do not carry out any operational activities affecting the environment and who are bound by the environmental permit issued to the operator of their joint enterprise must nevertheless apply for environmental authorisation in respect of the same project. This would result in a multiplicity of unnecessary applications.

[73] Section 9 of the PEP Act permits the granting of a Licence to two or more persons associated in any form of a joint arrangement if each of them being individuals is a

citizen of Guyana or is a company or corporation. Section 10 authorises the Minister to enter into an agreement (not inconsistent with the Act) with any person to grant that person or any other person (including a corporate body which is not yet formed), a Licence. Accordingly, the legislation contemplates that a Licence may be issued to an entity which has not carried out an environmental impact assessment or been granted an environmental permit.

[74] The contention by the appellant that s 14 prohibits the Minister from granting development consent in the form of the Licence 'to any person' who does not possess an environmental permit is therefore not consistent with the plain wording or purposive interpretation of s 14 of the EP Act. The appellant's reliance on the Irish case of *Environmental Protection Agency v Midland Scrap Metal Co Ltd*[40] does not advance the contention. The issue in that case was whether a Licence granted under the Waste Management Act 1996 was personal to the holder or could be lawfully transferred to another entity. The case hinged upon s 39 of the Act which established that Licences are personal to the holder and s 40 which further emphasised the personal fitness of the licensee. The legislative intent behind these provisions was that only certain individuals meeting certain criteria should be permitted to operate certain waste facilities, implying the personal nature of the Licence.

[75] However, the statutory and regulatory framework as well as the factual situation in the present appeal are considerably different. Most notably, Exxon was the developer who applied for and received environmental authorisation. Exxon remains the operator of the Liza 1 Project and as such is solely responsible for the operational aspect of the project. Transfer of operatorship is strictly regulated. The terms and conditions of the environmental authorisation expressly make clear that Exxon, 'shall not transfer the Environmental Permit to any person without the consent of the Agency.'[41] There has been no suggestion of any attempt by Exxon

[40] *Midland Scrap Metal* (n 6).
[41] Regulation 15.10, Environmental Permit.

to cease being the operator or to transfer any aspect of its operatorship to any other person.

International Industry Practice

[76] It is trite law that the statutory and regulatory framework for the protection of the environment must take pre-eminence over industry practice however well-established or widespread these practices may be. On the other hand, the aim of environmental management is sustainable development. The EP Act refers to the 'sustainable use of natural resources' no less than four times[42], and expresses the objective that the process of integrating environmental planning is 'for development on a sustainable basis' (s 4(1)(b)). Allowing for development on a sustainable basis leaves room for application of industry practice provided these do not conflict with overall objectives of sound environmental protection and preservation.

[77] More to the point, there are several provisions in the statutory and regulatory framework which encourage the adoption of industry practice. Section 2(r)(i) of the Licence regarding the Duties of Licensees requires the licensee to carry out all activities under the Licence in keeping with 'good oil field practices' as defined under the PEP Act to mean:

> … all those things that are generally accepted as good, safe and efficient in the carrying on of prospecting for petroleum or, as the case may be, operations for the production of petroleum.

[78] Even more important, the June 2017 environmental permit granted to the added respondents remained valid until 1 June 2022[43] and contained an automatic internal process of revision every five years or as otherwise determined by the EP Agency.

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[42] Cap 20:05, ss 4(1)(a), 4(2)(e).

[43] Clause 13.6 of the original environmental permit stated that its validity would continue to December 2040. The validity date was changed to 1 June 2022 by virtue of a Consent Order dated 7 October 2020 in *Thomas v Environmental Protection Agency* (GY HC, 7 October 2020).

In line with international industry practice of the petroleum industry, the current incarnation of the environmental permit, granted to Exxon as operator, contemplates the involvement of its two co-joint venturers. The environmental authorisation expressly refers to the responsibility of the permit holder and its co-venturers to satisfy their respective environmental obligations regarding the Stabroek Block.[44] The authorisation requires that it be governed by, interpreted, and construed in accordance, with the Laws of Guyana and including 'such rules of international law as may be applicable and appropriate, including the generally accepted customs and usages of the international petroleum industry.'[45]

[79] An extensive examination of international petroleum practice in several jurisdictions of the Commonwealth supports the use of Joint Operating Agreements ('JOAs') as featured in this appeal. There is a significant body of literature on JOAs which have existed at least since the first oil fields were discovered in the 1860s and are widely utilised in the corporate extraction of petroleum across the globe.[46] A JOA typically involves two or more natural or legal persons combining property and expertise to carry out a single business enterprise. The JOA identifies the operator to undertake production of petroleum. Non-operators conduct no operations themselves; their participation is restricted to financial contributions to facilitate the performance of operations. In the United Kingdom operators are regarded as agents of the JOA[47] whilst in Canada a fiduciary relationship exists between the operator and the non-operator.[48]

[80] As was admirably summed up by Peter Roberts in *Joint Operating Agreements: a Practical Guide*[49]:

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[44] Clauses 14.5, 14.7, 14.8.
[45] Clause 15.4.
[46] See eg, William H Bonney and J Jay Park, 'Recent Judicial Developments of Interest to Oil and Gas Lawyers' (1995) 33 Alta L Rev 365; Winston Anderson, *The Law of the Sea in the Caribbean* (Brill 2022) ch 5.
[47] Alexander J Black and Hew R Dundas, 'Joint Operating Agreements: An International Comparison from Petroleum Law' (1992) 8 J Nat Resources & Envtl L 49.
[48] *Prairie Pacific Energy Corp v Scurry-Rainbow Oil Ltd* [1994] 147 AR 260.
[49] Peter Roberts, *Joint Operating Agreements: a Practical Guide* (2nd edn, Globe Law and Business 2012).

> Where it is held by several persons, the concession typically provides that those persons will be jointly and severally liable to the government for the proper performance of the terms of the concession….[50]
>
> The JOA will identify a person to undertake the role of operator. The operator will be responsible for managing the performance of the joint operations on behalf of the parties in accordance with the provisions of the JOA, such that the terms of the concession are in turn properly performed…[51]
>
> In the exercise of its role the operator will also be subject to various obligations under the JOA: Operational requirements - most obviously, the operator will be responsible for the performance of the joint operations and the preparation of all necessary plans, programmes and budgets…. The operator will also be required to: … Obtain and maintain all permits and consents required for the performance of the JOA…[52]

[81] For his part, Dr Eduardo G Periera in *Joint Operating Agreement: Risk Control for the Non-Operator*[53]writes that:

> …The operator is usually the party with the highest level of participation and interest in the enterprise… Non-operators retain a smaller working interest in the JV, as they usually have fewer financial and technical resources than the operator…Their situation is akin to that of minority shareholders …[54]
>
> …The operator is the leader of the of the JV, as it is responsible for conducting daily operations on behalf of the consortium …
>
> *Non-operators conduct no operations themselves; their participation is restricted to financial contributions to facilitate the performance of operations* (emphasis added).[55]

[82] In the present appeal Exxon is the sole operator and only party carrying out prospecting and petroleum operations that could adversely affect the environment. The Licence was executed by Exxon on behalf of itself and its fellow joint venturers

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[50] ibid 13-14.
[51] ibid 79.
[52] ibid 83.
[53] Eduardo G Periera, *Joint Operating Agreement: Risk Control for the Non-Operator* (Globe Law and Business 2013).
[54] ibid 13.
[55] ibid 39; See also Greg Gordon, John Paterson, Emre Üşenmez (eds), *UK Oil and Gas Law : Current Practice and Emerging Trends Volume II, Commercial and Contract Law Issues.* (3rd edn, Edinburgh University Press, 2018); *Prairie Pacific Energy Corp v Scurry-Rainbow Oil Ltd* [1994] 147 AR 260.

and the issuance by the Minister of the Licence was executed by Exxon on behalf of itself, CNOOC and Hess. Consistent with international oil and gas practice across the industry, the evidence suggests that Exxon as operator functioned as representatives of the joint venturers. Also consistent with that practice, so the added respondents submitted, it was necessary for CNOOC and Hess to be included within the Licence so that as financial partners they could secure financing from the institutional financiers who would require certainty in rights of CNOOC and Hess in the joint venture in which they claimed to be partners. No evidence was adduced to contradict this assertion.

Shared Liability for Environmental Harm

[83] The shared liability of the three members of the joint enterprise is guaranteed by their joint and separate liability, repeated in the Petroleum Agreement art 2.3, and in the Licence art 2(f). As this implies each of the three members of the joint enterprise has individual as well as combined liability for breach of the terms of the environmental permit. The environmental authorisation renewed in 2023 makes this abundantly clear. Article 14 refers to the financial assurance and liability for pollution damage. Without going into details, the provision states on its face that declarations are to be provided by the permit holder and its co-venturers of their financial capability to fulfill all environmental liabilities as required under the EP Act and the environmental permit.

Risk of Environmental Harm

[84] Against the backdrop of the matters just considered, the most critical question in deciding on the lawfulness of including CNOOC and Hess in the PPL is whether that inclusion increases the risk of harm to the environment. The constitutional value placed on protection and preservation of the environment is statutorily channeled through the EP Act which has two principles specifically dedicated to treating with the risk of environmental harm. These are the precautionary principle

and the avoidance principle, which have their genesis in the venerable 1992 Rio Declaration on Environment and Development, and are described in s 4(4)(b) and (d) of the EP Act as follows:

> (b) the "precautionary" principle: where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation;
> …
> (d) the "avoidance" principle: it is preferable to avoid environmental damage as it can be impossible or more expensive to repair rather than prevent damage;

[85] The 'precautionary principle' has as its basic objective to ensure greater allowance for uncertainty in the regulation of environmental risk and the sustainable use of natural resources and is widely accepted as one of the most important manifestations of sustainable development.[56] The issue for the threshold of triggering the principles remains controversial but is widely accepted as applicable in the context of scientific uncertainty as to whether certain actions will have an adverse effect on the environment.[57] The first and critical stage for application of the principle is to ascertain whether the contested action will cause the potential risk of 'serious irreversible environmental damage'.[58]

[86] The 'avoidance principle' is similar couched in terms of environmental risk, rendering it better, in the context of uncertainty, not to cause environmental damage in the first place rather than to attempt to repair to attempt to repair the environmental harm after the event. The avoidance principle, which is sometimes referred to as the 'preventive principle' addresses tangible risks. Such risks are quantifiable because it is possible to establish the causal link between the initial event and the adverse effects.

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[56] Winston Anderson, *Principles of Caribbean Environmental Law* (n 20) 51.
[57] ibid 53.
[58] ibid.

[87] The interaction between the two principles is usefully described by Nicolas de Sadeleer as: [59]

> Precaution epitomises a paradigmatic shift on the account that it is distinguished by the intrusion of uncertainty. Indeed, precaution does not posit a perfect understanding of any given risk: it is sufficient that a risk be suspected, conjectured, feared. In such a situation, decision-makers cannot determine the threshold levels to which preventive actions appear to be subject in order to avoid or to minimise the occurrence of the risk. In other words, precaution means that the absence of scientific certainty – or conversely the scientific uncertainty – as to the existence or the extent of a risk should no longer delay the adoption of preventative measures to protect the environment.
>
> To sum up, whilst under a preventive approach the decision-maker intervenes, provided that the threats to the environment are tangible, pursuant to the precautionary principle, authorities are prepared to tackle risks for which there is no definitive proof either that there is a link of causation between the suspected activity and the harm or that the suspected damage will materialise.

[88] The simple fact is that neither of these principles is apt or applicable in the present circumstances. The inclusion of CNOOC and Hess in the Licence did not increase the risk of environmental harm. The two additional respondents could not carry out operational activity in relation to the Liza Phase 1 Project outside the environmental authorisation which was based upon the plan of the Project submitted by Exxon to the Agency and the environmental impact assessment conducted in relation to that plan. Being non-operators, CNOOC and Hess could not conduct any operational activity and there therefore could not carry on any activity that could adversely impact the environment. They could not put anything into or take anything out of the environment. There was therefore no activity that threatened any kind of risk, preventive or precautionary, to the environment. Their role as non-operators is guaranteed by the terms and conditions in the Licence itself which prevented any change of operatorship from Exxon to another entity. At the same time, CNOOC and Hess, even as non-operators, remained severally and jointly bound to comply

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[59] Nicolas de Sadeleer, 'The Principles of Prevention and Precaution in International Law: Two Heads of the Same Coin?' in Malgosia Fitzmaurice and others (eds), *Research Handbook on International Environmental Law* (2nd edn, Edward Elgar Publishing Ltd 2021) ch 7, 152.

with the terms of the Licence, including the terms and conditions of the environmental authorisation granted in respect of the Liza Phase 1 Project.

[89] The appellant argues that the wide powers conferred by the Licence could be seen as empowering CNOOC and Hess to act inimically towards the environment, notwithstanding that they have not received environmental authorisation. In addition to what was said in the previous paragraph, it is important to note that s 14(1) the EP Act itself underscores that any development consent given by any public authority '*shall be subject to the terms of the environmental authorization issued by the Agency*'(emphasis added). Any attempt to act outside the terms of the environmental authorisation or to conduct a project without obtaining an environmental permit as required under the EP Act constitutes a criminal act for which the perpetrator would be liable to the penalties prescribed in the Fifth Schedule to the Act.[60]

[90] In the premises where there are no express or implied prohibition on the inclusion of CNOOC and Hess who are non-operators in the joint venturers in the Licence; where there is good industry practice for their inclusion; where liability for environmental harm is shared equally and individually among the three joint venturers; and where there is no increased risk of environmental harm by their inclusion, I see no reason for deciding that their inclusion in the PPL is unlawful.

(b) Amendment of Grounds of Relief

[91] As I have concluded that there was no basis for finding the Minister acted unlawfully, I do not consider it necessary or useful to address the issue of whether the appellant may amend the grounds of relief pleaded.

[92] In the premises, I would dismiss the appeal.

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[60] Environmental Protection Act (n 4), s 15(1).

Costs

[93] As I intimated at the oral hearing, it appears that the appellant has acted as a public-spirited citizen zealous for compliance with the constitutional and statutory principles and provisions protecting the environment. The arguments summoned, although not ultimately successful, served a very useful function in clarifying an important point in the public law of environmental regulation. The appellant's initiation and carriage of this litigation was therefore entirely consistent with the *Escazu Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean 2018*,[61] to which Guyana is a party. The Escazu Agreement aims to provide full public access to environmental information, encourage participation in environmental decision-making, and enable access to legal protection and recourse concerning environmental matters. Accordingly, in the circumstances of this case, I would not impose the costs of losing this appeal upon the appellant but rather would order that the parties should bear their own costs.

SAUNDERS P:

Introduction

[94] Mr Raymond Gaskin, concerned with protecting the natural environment, brought this case against the Minister of Natural Resources ('the Minister'). He complained that the Minister was wrong to issue a Licence to three entities engaged in the oil business. The Licence (or 'PPL') was awarded jointly to ExxonMobil Guyana Ltd, ('Exxon'), CNOOC Nexen Petroleum Production Ltd ('CNOOC') and Hess Guyana Exploration Ltd ('Hess'). Although the action was brought against the Minister, the three companies, self-described as 'co-venturers' or 'joint venture licensees', were added to the suit as added respondents.

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[61] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 22 April 2021) 3398 UNTS 1 (Escazu Agreement).

[95] Mr Gaskin believes that CNOOC and Hess should never have been granted this PPL. He wants the court to prohibit the Minister from doing anything in furtherance of the licence in relation to CNOOC and Hess. He initially desired to have the entire licence rescinded but, during the course of the action, he indicated that he would be satisfied if CNOOC and Hess were removed as licensees. He apparently has little difficulty with the issuance of the licence solely to Exxon.

[96] Mr Gaskin also complained, both before the Court of Appeal and this Court, that because the decision of the court at first instance was rendered outside a certain time period stipulated by s 4(1) of the Time Limit for Judicial Decisions Act[62] he was the victim of a serious miscarriage of justice.

Brief Background

[97] On 27 June 2016, a Petroleum Agreement was concluded between the Government of Guyana and the three co-venturers. By that Agreement, the co-venturers were authorised to prospect for petroleum in certain areas of the Stabroek Block. The Agreement defines all three co-venturers, their successors and permitted assignees collectively as 'the Contractor', but the document clearly states that '*Exxon shall be the Operator charged with conducting the day to day activities of the Contractor under [the] Agreement*'.[63] The Agreement also stipulates that the duties, obligations and liabilities of the Parties comprising the Contractor, both under the Agreement and under any licence issued in keeping with the Agreement, shall be joint and several.[64]

[98] By Article 8.1 of the Agreement, and in accordance with the Environmental Protection Act, Cap 20:05 ('the EP Act'), the Contractor was required to obtain environmental authorisation or an environmental permit from the Environmental

[62] Cap 3:13.
[63] See Article 2.2.
[64] See Article 2.3.

Protection Agency ('the EP Agency') and comply with the provisions of that Act in relation to any activities that could impact negatively on the environment.

[99] In the course of prospecting, the co-venturers struck oil. Indeed, they found oil in very significant quantities. *Exxon* then obtained an environmental impact assessment in respect of what was called the Liza 1 Development Project within the Stabroek Block referenced in the Agreement. On 1 June 2017, Exxon was granted an environmental permit ('the Permit') to undertake Phase 1 of the project. The permit authorised Exxon to engage in drilling and the installation and operation of subsea development, among a raft of other measures. These activities were required to be done in the manner indicated in a) Exxon's Application submitted on 5 July 2016; b) the approved environmental impact assessment dated 1 June 2017 and c) the Environmental and Socioeconomic Management Plan dated 1 June 2017. The permitted activities were all subject to the terms and conditions set forth in the permit and any existing regulations and standards relevant to the project.

[100] The environmental permit imposes a range of obligations and requirements *upon Exxon* aimed at safeguarding the environment and catering to the noble concerns of citizens like Mr Gaskin. At cl12, the permit renders Exxon 'strictly liable for any loss or damage to the environment through any act caused intentionally or recklessly, through the adverse effect of any discharge or release…' Exxon is required strictly to comply with provisions of the Environmental Protection Act, Cap 20:05. The permit renders Exxon liable for '… any gross negligence or wilful conduct caused to the marine environment, biodiversity, protected species and natural habitat with respect to any release or discharge, spill, contaminant fluids, oil or lubricants from fuel storage at any facilities permitted under this project.' The permit further states that Exxon 'may be liable for environmental damage due to pollution from its activities within Guyana, its territorial waters, contiguous zones, continental margins continental shelf, and Exclusive Economic Zone.' Should Exxon fail to comply with the requirements of the permit, the company could be

rendered liable to prosecution and penalties prescribed under the EP Act. See cl 13.5.

[101] Armed with this permit, the co-venturers (or at least, Exxon on their joint behalf) applied to the Minister for a petroleum production licence. They obtained the licence on 17 June 2017. This is the licence that Mr Gaskin challenges. The first recital of the licence clarifies that 'Exxon, representing the Joint Venturers, [had] applied for the grant of the PPL'.

[102] The licence authorised the co-venturers, among other things, a) to carry on prospecting and production operations; b) to sell or otherwise dispose of the petroleum recovered; and c) to carry on associated works in connection with the production and sale of the petroleum.

[103] The hearing of the case against the Minister began on 4 September 2018. Oral submissions were completed on 11 February 2019. The judgment was issued a year later on 12 February 2020, with the Chief Justice dismissing the action. Mr Gaskin appealed. His appeal was dismissed by the Court of Appeal in a judgment authored by Cummings-Edwards C. Mr Gaskin has now further appealed to this Court. We invited the EP Agency to perform the service of a friend of the court and to make written and oral submissions.

Was the Minister Wrong to Issue a Licence to CNOOC and Hess

[104] The essential point made by counsel for Mr Gaskin and argued before both the Chief Justice and the Court of Appeal, is easy to follow. Counsel states that because CNOOC and Hess did not apply for nor were granted an environmental permit, the Minister was wrong to include them in the licence to carry out the project. Since the environmental permit that was issued made no mention of CNOOC and Hess, the EP Agency would have no power to enforce, against those two co-venturers, the various obligations that were imposed on Exxon in the permit.

[105] In support of this submission counsel for Mr Gaskin relies on several provisions of the EP Act including s 5 and s 14. Section 5 states:

> 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 [ie the EPA] and shall request an environmental authorisation from the Agency before approving or determining any matter in respect of which an environmental authorisation is required under this Act.

[106] Section 14(1) states:

> A public authority shall not give development consent in any matter where an environmental authorisation is required unless such authorisation has been issued and any development consent given by any public authority shall be subject to the terms of the environmental authorisation issued by the Agency.

[107] No one disputes that CNOOC and Hess do not possess a permit from the EP Agency, nor that the licence issued to these two companies amounts to the grant to them of 'development consent'. Counsel's view is that the Minister was not authorised to include CNOOC and Hess in the licence because a pre-condition for doing so was that all the co-venturers were required to have an environmental permit. The submission is that their inclusion as licensees allows them to circumvent the EP Act by taking the benefits of the licence without having first subjected themselves to the rigour of seeking and obtaining environmental clearance from the EP Agency. It was suggested that the Minister, who by statute is constrained to defer to the EP Agency, was in breach of s 14 of the EP Act because he wrongly licensed these two companies, thereby allowing them to embark upon activities that would place the environment at risk, avoiding all the measures the EP Agency imposed on Exxon to protect the environment. Counsel cited *BCB Holdings Ltd v Attorney General of Belize*[65] as authority for the view

[65] [2013] CCJ 5 (AJ) (BZ), (2013) 82 WIR 167.

that a Minister cannot unilaterally, without appropriate parliamentary cover, confer on an entity a derogation from the law of the land.

[108] On the surface this does not appear to be a hopeless argument, but for the reasons given by the Chief Justice (Ag) and the Chancellor (Ag) and now Anderson J, I agree that it must fail. The premise is flawed. The argument rests on the notion, nowhere established on the facts, that CNOOC and Hess were going to be engaged in the development or operational works that would impact negatively (or at all) on the environment and in respect of which environmental authorisation was required. The submission assumes that because these two entities were associated with a co-venturer who, as 'operator' and 'developer', was obliged to obtain a permit, all three co-venturers needed to seek and obtain a permit. That assumption is problematic.

[109] In assessing the reasonableness of the Minister's grant of the licence to all three co-venturers it is important to look not just in isolation at the permit granted to Exxon, but at the full picture. One should have regard to the terms of the agreement and all the ancillary and related documents executed in this matter which provide the context for the exercise of the Minister's discretion to grant the PPL to all three co-venturers.

[110] On one view, it may have been considered neater if, as was done in relation to the licence, Exxon had applied for and obtained a single environmental permit expressly on behalf of itself and its co-venturers in relation to the project. Exxon's application for the permit was not placed before us and there is no suggestion that Exxon had applied for the permit on behalf of itself and its co-venturers. But assuming Exxon had not done so, this neglect does not alter certain underlying facts and inexorable inferences. When regard is had to the full picture, and in particular the Agreement that was concluded with the Government, it is obvious that the permit was sought and granted in contemplation of environment-related works *to be undertaken solely by Exxon*. The documentation provided to the Minister

supported the notion that, of the three co-venturers, *it was only Exxon that would be engaging in works that placed the environment at risk*. In the Agreement, at art 2.2, Exxon is plainly stated to be the operator charged with conducting the day-to-day development activities of the co-venturers. The licence states at cl 2(h) that the Minister was approving the operator, Exxon Exploration and Production Guyana Ltd, which operator may only be changed by the licensee to another party not comprising the licensee with the written consent of the Minister. Admittedly, that appears to leave the door open for Exxon to turn over operational aspects to CNOOC and/or Hess without the Minister's consent, but if Exxon did this, Exxon would fall foul of the permit and would be exposed to criminal sanctions.

[111] Take the following scenario, for example. Suppose three parties, A, B and C, embark jointly upon a project in respect of which environmental authorisation is required. The role of B and C in the overall project is limited purely to obtaining financing for the project or structuring commercial arrangements with creditors and other bodies or addressing human resource issues. The role of A, on the other hand, is that of operator and developer. Why do B and C require an environmental permit given the terms of s 11 of the E P Act? Section 11(1) of the EP Act only requires *developers* of projects *which may significantly affect the environment* to apply for an environmental permit. In a scenario such as this, what prohibits the Minister from granting an appropriate licence jointly to all three co-venturers to engage in the project?

[112] The logical question that may be asked, in the above scenario, is why should B and C be licensed if they are not going to be engaged in operational or development activities. This question was asked of Mr Luckhoo in argument, and he gave a perfectly reasonable response to it. In and of itself a licence has significant commercial value, and it is possible (if not likely) that the role CNOOC and Hess are playing in the project absolutely requires them to be recognised and noted as licensees so that they can leverage that commercial value so as to fulfil their role in the project.

[113] In his affidavit, Mr Gaskin suggests that he brought this case because he harbours grave fears about rising sea levels, flooding of low-lying areas, increased shoreline erosion, higher temperatures and higher threats of catastrophic storm surge flooding if all necessary and proper statutory requirements or obligations are not fulfilled by each of the co-venturers. While these risks are appreciated and must be vigorously guarded against so far as that is possible, the reality is that they are not increased or affected either by the inclusion of CNOOC and Hess as licensees or by the fact that neither of these two co-venturers applied for or was granted a permit. The remedy that Mr Gaskin seeks is not the revocation of the licence or any modification of it; he seeks only to have removed from the licence the names of CNOOC and Hess. Such removal would have no effect on the risks under consideration – neither negative nor positive.

[114] I disagree with the submission that, in the case of a joint venture, it is a precondition for the grant of development consent that all the co-venturers, even those whose role in the venture or project is strictly limited to non-development activity, *must* obtain an environmental permit. It is only necessary that those co-venturers who will be engaged in development activity that may have a significant impact on the environment should be granted an environmental permit. That is precisely what s 11 of the EP Act states.

[115] Throughout the litigation there was much discussion as to whether an environmental permit approves *a project* or approves a specific applicant who is undertaking a project. The reality is that, as Anderson J points out, the two concepts should not be bifurcated and examined in isolation from each other. The Permit is clearly in respect of a particular project to be undertaken, so far as concerns matters that would affect the environment, by a particular developer who has demonstrated the capacity and possesses the equipment and technology to complete those aspects of the project that may significantly affect the environment. But it is interesting to

note that cl 1.18 of the permit suggests that, provided the EP Agency gives prior consent, a permit holder may assign or transfer the permit to another entity.

[116] The importance of focusing on *the project* is, however, borne out by a number of sections of the EP Act. As stated above, s 11(1) requires developers of *projects which may significantly affect the environment* to apply for an environmental permit. Section 12(1) makes it clear that the EP Agency shall approve or reject *the project*. Section 13(1) clarifies that the Agency issues a permit for *a project* subject to certain conditions. In these proceedings Exxon was undertaking *a particular project,* and the EP Agency was satisfied that, based on the application and associated material submitted by it, Exxon should be awarded a permit to carry out *the relevant project*, or at least so much of the project as may significantly impact on the environment. The EP Agency is not exactly concerned with the activities of co-venturers who are engaged in activities that may not significantly affect the environment.

[117] On the evidence presented, the Minister was entitled to take the view that, although CNOOC and Hess were included in the licence, the precise role they were playing in the project did not place them in the specific category of 'developers' whose activities posed any significant risk to the environment. The courts below were entitled and right to find that in this venture, Exxon was the developer and that only Exxon required a permit. It would have been superfluous for CNOOC and/or Hess to make separate applications for a permit.

[118] In these circumstances, especially given that a) the liabilities undertaken in connection with the licence are joint and several; b) Exxon (and not CNOOC nor Hess) was the developer carrying out day-to-day activities; c) neither the grant of the permit nor of the licence, in each case to Exxon, is being challenged and d) no grounds were advanced to impugn either of those two authorisation to Exxon, it cannot fairly be said that, in licensing CNOOC and Hess, the Minister acted illegally or irrationally or unfairly or unreasonably.

[119] Two consequences flow, however, from the award of the permit only to Exxon. Firstly, CNOOC and HESS, having not been included in the permit, will have to abide strictly by the notion that their part in the venture or project will not include the activities of a developer. They are not permitted to engage in any activity that may significantly impact the environment without the prior consent of the EP Agency as that would amount to an unlawful transfer or assignment of the permit.[66] If Exxon permitted any such thing, as earlier indicated, under s 21(9)(a) of the EP Act, Exxon will be exposed to criminal sanctions. Secondly, Exxon, whether jointly with its co-venturers or otherwise, remains liable to the State for all the obligations and requirements imposed by the permit.

The Importance and Value of Transparency

[120] In the course of these proceedings, both before the High Court and the Court of Appeal, Mr Gaskin made certain allegations. He alleged that there was a general failure by the State to make timely publication of the Petroleum Agreement; that the environmental permit was not published by the EP Agency as required and that the same was not available on their website; that the PPL was not immediately made public; and that easy public access to the content of the PPL was not satisfied merely by registering the same in the Deeds Registry. On the other hand, the respondents disputed the above allegations. They stated that the licence was filed with the Deeds Registry, by which it became a document of public record, on the 16 June 2017 and numbered 971/2017; that the EP Agency published information regarding the permit on its website on 8 June 2017; that the public was informed on the same date that the Environmental Impact Assessment for the project was approved; that the Department of Public Information issued a News Release dated 15 June 2017 whereby it announced to the public that the Ministry of Natural Resources had that day approved the project and had issued the PPL; and that a

[66] See art 1.18 of the Permit and also the Environmental Protection (Authorisations) Regulations, reg 21(1).

number of online newspaper publications, both locally and internationally, had commented in June 2017 on the issuance of the permit and the licence.

[121] There is only necessary for this Court to emphasise that Mr Gaskin's grave fears alluded to above are not to be derided or brushed aside. They are risks that naturally attend subsea drilling. Corporations, government agencies (like the EP Agency), and other public entities have a solemn obligation to hold themselves accountable for the steps they take in the management, conservation, protection and improvement of the environment. There must be scrupulous compliance with relevant statutes and regulations. Good governance, fairness and the utmost transparency must be observed. In this regard, information about policies and decisions, applications and applicants must be readily made available to the public.

[122] Transparency promotes trust and facilitates public participation in environmental decision-making processes. When information about environmental policies, regulations, applications for permits and enforcement actions is readily available, it becomes easier for the public to identify instances of non-compliance or misconduct and for the EP Agency and other bodies to take appropriate corrective action. A demonstrated commitment to openness and accountability is especially required given the massive investment in subsea drilling for oil currently underway in Guyana.

[123] This is neither pious nor empty sermonising. Article 36 of the Constitution makes it clear that the 'well-being of the nation depends upon preserving clean air, fertile soils, pure water and the rich diversity of plants, animals and eco-systems.' 'Every citizen has a [constitutional] duty to participate in activities designed to improve the environment and protect the health of the nation.' See art 25 of the Constitution. Further, the Constitution (i) specifically assures each citizen that s/he has the right to an environment that is not harmful to her or his health or well-being and (ii) obliges the State to protect the environment, for the benefit of present and future generations, through reasonable legislative and other measures designed to (a)

prevent pollution and ecological degradation; (b) promote conservation; and (c) secure sustainable development and use of natural resources while promoting justifiable economic and social development. See art 149J of the Constitution.

[124] The National Assembly has given force to these high constitutional ideals and principles. Section 36(1) of the EP Act states that it shall be the duty of the EP Agency to maintain, open to the public, registers containing particulars of each environmental authorisation granted by the Agency, and the terms and conditions included therein.

[125] Section 36(3) of the EP Act states:

> The Agency shall ensure that information required to be recorded in the register is recorded in the register as soon as practicable, but in any event, within sixty days, after the information becomes available to the Agency.

[126] Section 36(4) provides that:

> The register must be kept available for inspection by any member of the public during ordinary office hours at the principal office of the Agency.

[127] According to s 36(5):

> A member of the public may obtain a copy of any part of the register subject to payment of the determined or prescribed fee…

[128] In all the circumstances therefore, it is critical that every effort always be made for public bodies to commit to the utmost transparency as a vital tool for the protection of the environment.

Delay in the Disposition of the Case

[129] The second issue raised by Mr Gaskin had to do with the length of time that was taken to dispose of this case. It was originally filed in February 2018 and, following certain procedural issues that went up on appeal, it was remitted by the Court of Appeal for hearing afresh. Counsel states that the Court of Appeal then indicated that the case was urgent. A period of a year elapsed from the completion of the oral submissions on the re-hearing at first instance to the publication of the written judgment on 12 February 2020 dismissing the claim. The Notice of Appeal was filed on 14 February 2020 and the Court of Appeal heard the appeal on 23 June 2022 and 25 July 2022. The Court of Appeal rendered its judgment on 21 December 2022.

[130] Mr Gaskin alleges generally that he has 'suffered injustice as a result of inordinate delays in [the] judicial system' although he has not given any particulars that would suggest that his circumstance is any more deeply felt than that experienced by the litigants on the other side. He nevertheless claimed a declaration that the first instance judge acted unlawfully in taking more than a year to deliver judgment. He states that this delay was contrary to the requirement of the Time Limit for Judicial Decisions Act.

[131] This Court has on previous occasions commented on lengthy delays in the rendering of judgment. See for example, the Barbadian case of *Reid v Reid*.[67] Over the years there has been significant improvement in Guyana, but the problem of delay is still prevalent in several States in the Caribbean. This has impelled some Legislatures, with good motives, to enact legislation in an attempt to address the issue. Guyana's Time Limit for Judicial Decisions Act, passed in 2009, is one such example. That Act at s 4(1) specifies that in civil cases a judge must render judgment 'as soon as possible after the conclusion of the hearing but not later than one hundred and twenty days from the date of conclusion of the hearing.' Provision

[67] [2008] CCJ 8 (AJ) (BB), (2008) 73 WIR 56 at [22].

is made, in exceptional circumstances, for the judge to seek an extension of time from the Chancellor.

[132] In the Court of Appeal, the Chancellor considered that the provisions of that Act must be construed as being of a directory and not mandatory nature and that, in any event, in light of the hallowed Separation of Powers principle, there are unresolved questions surrounding the constitutionality of the legislation. I agree with the Chancellor. The obvious point is that the Constitution creates three co-equal Branches of Government. Each branch must be entitled to establish for itself reasonable performance standards and measures for the despatch of its business and not have these imposed by a sister branch. Court performance standards must take into account a variety of factors which the judicial branch is best able to weigh and balance. The resources and level of technology available to the courts, the number of judges and courtrooms available, the facilities and technology on hand, and of course the support staff available, all have an impact on performance standards. So too, it must be said, do processing and administrative inefficiencies for which the judicial branch is solely responsible, and sub-optimal time management on the part of individual judges.

[133] In lieu of imposing by statute arbitrary time limits on a sister branch of Government, Parliaments and Governments that are understandably concerned about delays in the administration of justice may have to resort to more effective measures to grapple with an undoubtedly serious problem. Courts must be adequately resourced and staffed. Appropriate bodies of the judicial branch should be authorised and enabled to impose intermediate disciplinary sanctions on judicial officers for infractions that fall short of removal from office. An impartial and merit-based system for appointing judicial officers is always necessary. There must be an end to acting appointments for inordinately lengthy periods, and adequate funding must be made available for ongoing and systematic judicial education. It is also important that the judiciary itself should establish its own reasonable performance standards and faithfully monitor and enforce them.

[134] A formal complaint that a judge has taken an excessive period to produce a judgment is sometimes better addressed in an administrative proceeding within the judicial branch with the judge against whom the complaint is made being afforded an ample opportunity to respond to the complaint. It is true, however, that some delays in the handing down of judgment are so egregious as to be, without more, entirely inexcusable on their face. This is not such a case. No one should condone a one-year delay in giving judgment after the close of oral submissions but here we have no way of knowing what objective difficulties faced the court, if any. In all the circumstances, the court below was right to deny the Declaration that was claimed.

Costs

[135] Mr Gaskin has had three bites of the cherry. He has resoundingly lost in each court. On principle, a court at first instance, and even at the level of the Court of Appeal, should avoid imposing a costs order on a citizen who in good faith files proceedings in a genuine effort to comply with their constitutional duty to participate in activities designed to improve the environment and protect the health of the nation. Such public-spiritedness should be encouraged. The Court of Appeal was commendably faithful to this principle and made no order as to costs. At first instance, the trial judge was so dissatisfied with the volume and prolixity of the claimant's filings that she imposed a very modest costs award against Mr Gaskin of GYD100,000. No appeal has been lodged against that award.

[136] When a citizen maintains, right up to this Court, an action that was rejected by all the judges of the courts below, identical considerations do not necessarily apply, but here, although Mr Gaskin did not obtain the revocation of the licence to CNOCC and Hess, he may consider that his efforts bore some fruit. He has firstly obtained confirmation that the law is to be interpreted to recognise that holding a licence does not permit a co-licensee, who does not hold a permit, to conduct the activities of a developer of a project which may significantly affect the environment. Thus, Mr Gaskin has vindicated the distinction between holding a

licence and holding a permit to conduct the licensed activity. Secondly, he has provided us with the opportunity to stress the importance of transparency as a vital tool for protecting the environment. In these circumstances, we would order each party to bear their own costs in this Court.

RAJNAUTH-LEE J:

Economic growth and environmental protection are not at odds. They're opposite sides of the same coin if you're looking at longer-term prosperity.[68]

Introduction

[137] This appeal raises the important issue of the lawfulness of the petroleum production licence ('the PP Licence') issued by the Minister of Natural Resources of the Co-operative Republic of Guyana ('the Respondent') on 15 June 2017 to Esso Exploration and Production Guyana Ltd (now ExxonMobil Guyana Ltd and referred to as 'ExxonMobil')), CNOOC Nexen Petroleum Guyana Ltd ('CNOOC') and Hess Guyana Exploration Ltd ('Hess') (collectively referred to as 'the Added Respondents'). The question to be determined is: Was the PP Licence issued in accordance with the provisions of the Environmental Protection Act ('the EP Act'),[69] and in particular s 14, when only ExxonMobil was granted an environmental permit under the EP Act?

[138] I have read the opinions of Saunders P and Anderson J and I agree with them. As noted by Anderson J, this is the first occasion on which the Caribbean Court of Justice ('the Court') has had the opportunity to consider an issue which directly concerns the protection and preservation of the environment. The opinion of Anderson J has fully set out the factual background to this dispute. It is, therefore, only necessary for me to sketch the following short outline.

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[68] Ancy Serwer, Interview with Henry Paulson, Former United States Treasury Secretary (Fortune Global Forum, Chengdu China, 2 April 2013) C-Span < https://www.c-span.org/video/?311863-1/political-economic-china > accessed 14 May 2024.
[69] Cap 20:05.

[139] Pursuant to s 10 of the Petroleum (Exploration and Production) Act[70] ('the PEP Act') on 27 June 2016 a Petroleum Agreement that came into effect on 7 October 2016 was entered into between the respondent and the added respondents. ExxonMobil applied to the Environmental Protection Agency ('the EP Agency') for an environmental permit for the Liza 1 Project. An environmental impact assessment was carried out and was accepted by the EP Agency. Accordingly, Exxon was granted an environmental permit dated 1 June 2017. As noted above, the added respondents were issued the PP Licence by the respondent under the provisions of s 35 of the PEP Act. Under the terms of the Petroleum Agreement and the PP Licence, ExxonMobil was the sole operator of the Liza 1 Project. CNOOC and Hess were non-operators [financial partners] and according to the respondent and added respondents, did not carry out any prospecting or production activities.

The High Court Proceedings

[140] The appellant commenced an action in the High Court of Guyana seeking inter alia an order of certiorari to quash the respondent's decision to issue the PP Licence. George CJ, the trial judge, dismissed the appellant's claims with costs. George CJ held that the PP Licence was properly issued to the added respondents in the absence of an environmental permit to CNOOC and Hess. She found that ExxonMobil could be classified as the developer within the meaning of the EP Act and that as the environmental permit had been issued in respect of the project for which the developer had applied 'it was not necessary for it to be issued to each company…for the execution of the project…'. It was sufficient that CNOOC and Hess were joint licensees together with ExxonMobil in respect of the project and that their obligations under the PP Licence were statutorily joint, meaning that each of them or all of them would be liable under the terms of the PP Licence.

[70] Cap 65:04.

[141] George CJ did not agree that the effect of the joint and several obligations on ExxonMobil, CNOOC and Hess meant that each had a separate obligation to comply with the EP Act by each obtaining an environmental permit. Indeed, George CJ noted that they were bound to comply with the environmental permit that had been issued to ExxonMobil. George CJ held that the inclusion of CNOOC and Hess in the PP Licence did not violate the provisions of the EP Act regarding the transferring or assigning of the environmental permit to another person or entity. Accordingly, the respondent did not breach the EP Act.

The Proceedings Before the Court of Appeal

[142] The Court of Appeal (Cummings-Edwards C, Gregory and Persaud JJA) determined that the environmental permit was tied to the Liza 1 Project itself and not to the developer (ExxonMobil), and that neither the EP Act nor the PEP Act contemplated a multiplicity of applications for an environmental permit for one project. Thus, the Court of Appeal agreed with George CJ that a separate authorisation was not required in relation to the same activity of the project. Further, the Court of Appeal held that there was no implied repeal between the EP Act and the PEP Act. The Court of Appeal dismissed the appeal.

[143] Regarding the issue of undue delay, the Court of Appeal held that George CJ did not unduly delay the giving of her decision nor was she in breach of the Time Limit for Judicial Decisions Act[71] ('the Time Limit Act'). The Court of Appeal reasoned that the drafters of the legislation did not intend that failure to comply with the time limit set out in the Time Limit Act had the effect of invalidating the decision of George CJ. The appeal was accordingly dismissed, and the decision of George CJ affirmed. The Court of Appeal also ordered that each party should bear its own costs.

[71] Cap 3:13.

Appeal to the Caribbean Court of Justice

[144] Being dissatisfied with the decision of the Court of Appeal, the appellant appealed to the Caribbean Court of Justice ('the Court'). In essence, the appellant contended that the Court of Appeal was wrong to find that the respondent had not breached s 14 of the EP Act when he granted the PP Licence to the added respondents including CNOOC and Hess who had not sought nor obtained an environmental permit for the Liza 1 Project.

[145] This appeal provided another opportunity for the Court to engage in the useful exercise of inviting amicus curiae to assist the Court in accordance with r 12A.5 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules 2021. At the case management conference held by the Court on 22 November 2023, the Court raised with the parties the desirability of inviting the EP Agency, established pursuant to s 3 of the EP Act, to assist the Court as amicus curiae. In the absence of objections by the parties, on 23 November 2023, the Court wrote to the EP Agency, and on 28 November 2023, the EP Agency accepted the Court's invitation to assist as amicus curiae. The Court wishes to express its appreciation for the assistance provided by the EP Agency on the important issues raised before the Court.

Statutory Interpretation and the Lawfulness of the PP Licence

[146] In the Barbadian case of *OO v BK*,[72] this Court expressed the view that the object of statutory interpretation is to give effect to the intention of Parliament. The Court went on to say:

> Various approaches can be employed; the literal and natural and ordinary meaning approach or the purposive approach being among the principles of statutory interpretation. The various approaches should in most cases lead to the same result, and assist the court in its primary task of giving effect to the intention of Parliament.[73]

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[72] *OO v BK* (n 30).
[73] ibid at [49]. See also *Smith* (n 23) at [7]; *Titan International Securities Inc v A-G of Belize* [2018] CCJ 28 (AJ) (BZ), (2019) 94 WIR 96.

[147] The Court also observed at [67] that:

> This Court has pointed out that constitutional democracies function under the rule of law and in the context of constitutional supremacy. Accordingly, where the issue of statutory interpretation is at play, the Court should interpret legislation not only to achieve the objectives of the legislation, and the intention of Parliament but to achieve alignment with (1) fundamental human rights and core constitutional values and principles contained in Commonwealth Caribbean Constitutions and (2) international treaty obligations and commitments of these States.

[148] The Constitution of the Co-operative Republic of Guyana contains special provisions that promote the protection of the environment and the well-being of the nation.[74] Article 25 places a duty on every citizen to participate in activities designed to improve the environment and protect the health of the nation. By virtue of art 36, the well-being for the nation depends upon preserving clean air, fertile soils, pure water and the rich diversity of plants, animals and eco-systems. In addition, art 149J provides:

> 149J. (1) Everyone has the right to an environment that is not harmful to his or her health or well-being.
>
> (2) The State shall protect the environment, for the benefit of present and future generations, through reasonable legislative and other measures designed to –
>
> (a) prevent pollution and ecological degradation;
>
> (b) promote conservation; and
>
> (c) secure sustainable development and use of natural resources while promoting justifiable economic and social development.

[149] It is noteworthy that art 149J(2) is located in Part 2 – Specific Rules – Title 1 Protection of Fundamental Rights and Freedoms of the Individual. Article 149J(2)

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[74] The only other independent Commonwealth Caribbean country which contains specific constitutional provisions relating to environmental protection is Jamaica– See the Constitution of Jamaica ss 13(l) and 15(3)(a).

stipulates that it is the responsibility of the State to protect the environment through reasonable legislative and other measures. This constitutional mandate calls for such legislative and other measures designed to prevent pollution and ecological degradation, promote conservation, and secure sustainable development and use of natural resources while promoting justifiable economic and social development.

[150] The principal legislative measure is the EP Act (together with the Regulations enacted thereunder). The EP Act in its long title sets forth its objectives, that is, 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. As mentioned earlier, the EP Agency is established pursuant to s 3 of the EP Act. Section 4(1) sets out the primary function of the EP Agency, that is, to take such steps as are necessary for the effective management of the natural environment so as to ensure conservation, protection, and sustainable use of its natural resources. In addition, s 4(4) of the EP Act requires that in performing its functions, the EP Agency shall take account of current principles of environmental management. Winston Anderson observes in his text *Principles of Caribbean Environmental Law*, that chief among these principles of environmental management is 'undoubtedly the principle of sustainability'. The Constitution requires this balancing of sustainable development and the use of natural resources, with justifiable economic and social development, in order to safeguard the environment for the benefit of future generations.

[151] As to Guyana's international obligations relating to the protection of the environment, a list of ratified multilateral environmental agreements in the Caribbean has been compiled in *Ensuring Environmental Access Rights in the Caribbean Analysis of Selected Case Law*, a joint publication of the CCJ Academy for Law and the United Nations Economic Commission for Latin America and the

Caribbean (ECLAC).[75] This list includes the several conventions and protocols that have been ratified by Guyana concerning the protection of the environment. Additionally, in *Principles of Caribbean Environmental Law*, Winston Anderson points out that the Revised Treaty of Chaguaramas ('the Revised Treaty') establishing the Caribbean Community including the CARICOM Single Market and Economy contains important commitments to sound environmental policy binding on all member states of the Community. Article 65 of the Revised Treaty is entitled 'Environmental Protection'. Article 65(1) provides that the policies of the Community shall be implemented in a manner that ensures the prudent and rational management of the resources of the Member States. Further, by virtue of art 65(1)(a) the Community shall promote measures to ensure among other things the preservation, protection and improvement of the quality of the environment.[76]

[152] Returning to the main legislative provisions that must be considered to determine the lawfulness of the PP Licence, these are located at ss 5 and 14 of the EP Act and s 35 of the PEP Act. These enactments are clearly laid down with a view to carrying out the important obligations to protect the environment set out in the Constitution and to uphold the high constitutional values placed on the protection of the environment in Guyana. Section 5 provides:

> 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 from the Agency before approving or determining any matter in respect of which an environmental authorisation is required under this Act.

[153] Section 14 provides as follows:

> (1) A public authority shall not give development consent in any matter where an environmental authorization is required unless such authorization has been issued and any development consent given by

[75] Winston Anderson and David Barrio Lamarche, *Ensuring Environmental Access Rights in the Caribbean Analysis of Selected Case Law* (Caribbean Court of Justice Academy for Law and United Nations Economic Commission for Latin America and the Caribbean 2018) 13.
[76] See also the Charter of Civil Society for the Caribbean Community (CARICOM Secretariat, 1997) art XXIII – Environmental Rights.

any public authority shall be subject to the terms of the environmental authorisation issued by the Agency.

(2) Where an environmental authorisation is cancelled or suspended, the development consent issued by the public authority shall be suspended until and unless a new environmental authorisation is issued or the suspension of the environmental authorisation is revoked.

[154] Section 35 of the PEP Act provides:

35. (1) Subject to section 36-

(a) where an application is duly made under section 34(1), the Minister shall grant the petroleum production licence applied for on such conditions as are necessary to give effect to the application and the requirements of this Act; and

(b) where an application is duly made under section 34(2), the Minister may grant, on such conditions as the Minister determines, or refuse to grant the petroleum production licence applied for.

(2) Conditions necessary to give effect to a petroleum agreement, entered into by the applicant for a licence shall be included in any licence granted to the applicant under subsection (1).

[155] Much of the argument before the Court surrounded the question whether an environmental permit approves a project or a specific applicant who is undertaking a project. As both Saunders P and Anderson J have pointed out, the two concepts ought not to be bifurcated and examined in isolation. The following provisions of the EP Act support this approach. For the purposes of Part IV, 'developer' has been defined at s 10 as 'the applicant for environmental authorisation for a project…'[77]and 'project' has been defined also at s 10 as 'the execution of construction works or other installations or schemes… any interference with any ecosystem or any other activity in the natural surroundings or landscape including those involving the extraction of natural resources, or any project listed in the Fourth Schedule and shall include public and private projects'[78].

[77] Cap 20:05.
[78] ibid.

[156] It must be further noted that by virtue of s 11, a developer of any project listed in the Fourth Schedule, or any project which may significantly affect the environment, shall apply to the EP Agency for an environmental permit. It is in this context that the EP Act requires an environmental impact assessment to be carried out in accordance with s 11(4). Pursuant to s 12(1), the EP Agency shall approve or reject the project after taking into account, among other things, the environmental impact assessment. Additionally, s 13(1) requires the decision by the EP Agency to issue an environmental permit for a project to be subject to conditions which are necessary to protect human health and the environment and sets out certain implied conditions which each environmental permit shall contain. Indeed, each environmental permit shall contain the implied conditions and obligations placed on the developer set out in s 13(1)(b)(c) and (d).

[157] It is also important to observe that by virtue of s 13(2) of the EP Act, the EP Agency shall not issue an environmental permit unless the EP Agency 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.

[158] In considering the interpretation of the relevant statutory provisions, the Court of Appeal considered that the EP Act was to be read as a whole, and that a court in carrying out its task of statutory interpretation should give effect to every word of the statute. The court stated that it was bound to give consistent, harmonious, and sensible effect to all of the parts of a statute, as far as possible. The court observed that throughout the EP Act, and in particular, ss 10(a), 10(c), 12, 13(1), and 14(1) the drafters of the legislation consistently referred to the 'project' as being the subject of the environmental permit or authorisation. The court further noted that this position became clearer on a perusal of reg 17(2)(b) of the Environmental Protection (Authorisations) Regulations which states:

> 17. (1) An application for an environmental authorisation shall be made to the Agency pursuant to section 11, 19 or 21 of the Act.
>
> (2) An application for an environmental authorisation -
>
> (a) …
> (b) shall be in respect of one project or facility;
> (c) …

[159] The Court of Appeal came to the conclusion at [43] that:

> … the construction contended for by the Appellant, if upheld by this Court would mean that every licencee holder, transferee or assignee of a licence would be required to apply for and obtain a separate environmental authorization in respect of the same activity or project. This interpretation not only defeats the purpose of the enactment but places a very strenuous interpretation on the Act. It will make what appears to be a clear and simple process cumbersome. The Act does not envisage a multiplicity of applications for permits in respect of one project in the circumstances of this case. It is our view that the environmental permit is issued for a project and not for a specific company.

[160] I agree. Both Saunders P and Anderson J have set out compelling reasons why the inclusion of CNOOC and Hess did not invalidate the PP Licence, and it is therefore not necessary to repeat them. It has been recognised that the obligations undertaken in connection with the PP Licence by the added respondents are joint and several. There is nothing in the EP Act or in any relevant legislation, eg, s 35 of the PEP Act, to suggest that in those circumstances, CNOOC and Hess each had a separate obligation to apply for and obtain an environmental permit. Since ExxonMobil is the developer carrying out the activities under the PP Licence, it is ExxonMobil that must comply with the environmental permit and with the implied conditions set out at s 13(1) (b) (c) and (d). Should ExxonMobil breach any of the requirements and obligations of the environmental permit, it is ExxonMobil that will be liable under the EP Act.[79] Should CNOOC or Hess engage in any these activities that significantly impact the environment (in the absence of the relevant environmental authorisation) their actions would amount to a breach of the EP Act.

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[79] Note that Hess and CNOOC may also have liability for any environmental harm due to the joint and separate liability imposed by the Petroleum Agreement between the Added Respondents, as alluded by Anderson J at [83].

[161] Accordingly, I am of the view that the respondent issued the PP Licence lawfully and in accordance with the provisions of the EP Act even though only ExxonMobil was granted an environmental permit. The objectives of the EP Act, particularly the environmental protection and the sustainable development and use of the natural resources of Guyana, are fully satisfied. There is no increased risk of harm to the environment by the inclusion of CNOOC and Hess in the PP Licence.

[162] I wish to add that Anderson J has correctly observed that constitutional arguments do not feature in the written submissions or the pleadings in this appeal. It was only in opening his oral arguments to the Court, that Counsel for the appellant, Mr Jairam SC, made reference to certain constitutional provisions. It is also recognised that the issue of Guyana's international obligations regarding the protection of the environment has not been argued before the Court. Nevertheless, I think it important to make some brief observations on these issues.

[163] First, it is important to highlight once more the key role played by the Constitution and the relevant international obligations of Guyana when the issue of statutory interpretation arises before the courts of Guyana. It is apposite to repeat the important dicta of Jamadar J in the case of *OO v BK* at [169] and [170]:

> [169] Courts in Barbados therefore have a continuing responsibility to ensure that statutes adhere to and are consistent with, so far as is appropriate, the core values, principles, and commitments contained in both the Constitution and in ratified treaties. These philosophical/policy and jurisprudential perspectives are voices of the law that must never be brushed aside, but rather honoured in their application.
>
> [170] The application of these overarching approaches to statutory interpretation in this case has been demonstrated by Rajnauth-Lee J, and I will not burden this opinion with repeating those proofs. What I will say however, is that in constitutional democratic states such as Barbados, these approaches to statutory interpretation are not peripheral, but are rather central and paramount.

[164] Second, it is apt to remind that the decisions, actions and conduct of public officials that impact the environment should at all times be guided by the principles, values

and commitments contained in the Constitution and in the international obligations to which Guyana has agreed. This approach finds support from the Report of the United Nations Conference on the Environment and Development (Rio de Janeiro, 3-14 June 1992) Rio Declaration on Environment and Development ('the Rio Declaration') that requires that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and should not be considered in isolation from it.[80]

Conclusion

[165] During the oral arguments of Mr Luckhoo SC for the respondent, in discussions with the Court, it was observed that there were three essential watchdogs that are concerned with the protection, conservation and management of the environment – the EP Agency, the Minister of Natural Resources, and the Public. As Saunders P has noted, the Appellant as a member of the public has played a key role in advancing environmental law in Guyana through the pursuit of this matter. In this context, it is important to observe that the Rio Declaration[81] places emphasis on the role of the public in the decision-making process. Principle 10 states that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, and the opportunity to participate in decision-making processes. It also calls for States to facilitate and encourage public awareness and participation by making information widely available.

[166] In the circumstances, I agree that we should order that each party bear their own costs in this Court.

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[80] (Adopted 14 June 1992) (1992) 31 ILM 874, principle 4.
[81] ibid.

Disposition

[167] The following are the orders of the Court:

1. The appeal is dismissed;
2. The Claims of the Appellant against the Respondent, including the claim of the Appellant made pursuant to ss 4(1) and (5) of the Time Limit for Judicial Decisions Act, Cap 3:13, are dismissed; and
3. The parties to bear their own costs in this Court.

/s/ A Saunders

Mr Justice A Saunders (President)

/s/ W Anderson

Mr Justice Anderson

/s/ M Rajnauth-Lee

Mme Justice Rajnauth-Lee

/s/ D Barrow

Mr Justice Barrow

/s/ A Burgess

Mr Justice Burgess