

**IN THE CARIBBEAN COURT OF JUSTICE  
Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF  
THE COOPERATIVE REPUBLIC OF GUYANA**

**CCJ Appeal No. CV 006 of 2012  
GY Civil Appeal No. 4 of 2009**

**BETWEEN**

**THE COMMISSIONER OF THE GUYANA  
GEOLOGY AND MINES COMMISSION**

**APPELLANT**

**AND**

**PHARSALUS INC**

**RESPONDENT**

**Before The Honourables**

**Mr Justice R Nelson  
Mr Justice A Saunders  
Mr Justice J Wit  
Mr Justice D Hayton  
Mr Justice W Anderson**

**Appearances**

**Mr Hari Ramkarran SC, Mr Fitz Peters and Mr Kamal Ramkarran for the  
Appellant**

**Mr Sanjeev J Datadin, Mr Charles Ramson, Mr C V Satram and Mr Arun G  
Gajraj for the Respondent**

**JUDGMENT**

**of**

**Justices Nelson, Saunders, Wit, Hayton and Anderson**

**Delivered by**

**The Honourable Mr Justice Hayton**

**on the 30th day of October 2013**

[1] The course that these proceedings have taken in the High Court and the Court of Appeal has led to a most unsatisfactory position, the respondent, Pharsalus Inc (“Pharsalus”), having brought proceedings against the Commissioner (“the Commissioner”) of the Guyana Geology and Mines Commission (“the Commission”), when the Commissioner was not the proper defendant. Two actors, Pharsalus and the Commissioner, were onstage before the courts but three actors were offstage, namely, a competitor of Pharsalus, Stratagold Guyana Inc (“Stratagold”), the Minister for Mines and Minerals (“the Minister”) and the Commission itself. This led to many difficulties as to fact-finding (especially as the makers of affidavits were not cross-examined) and, in particular, as to the relevant background for construction of documents of particular significance in the mining industry.

[2] As Lord Hoffmann stated in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,<sup>1</sup>

The meaning which a document (or other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are unambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax.

Without having a full understanding of the background with regard to the realities of the mining industry in Guyana it is difficult to construe the relevant documents with any confidence in the correctness of any construction that is adopted. It is to

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<sup>1</sup> [1998] 1 WLR 896,913.

be hoped that steps will be taken to ensure that in future the terms of survey permits and prospecting licences – and exclusions therefrom – will be drafted more carefully and precisely.

- [3] Having fully considered the submissions of the parties, this Court will allow the appeal and reject Pharsalus' claim to have the Commission grant it a uranium prospecting licence over an area of 11,450 acres over which Stratagold had a gold-mining licence. The Court will, however, order the Commissioner to be replaced as defendant by the Commission. This allows Pharsalus to pursue to trial on their merits its order nisi claims challenging the intention of the Commission to extend the gold-mining licence of Stratagold over the 11,450 acres to cover prospecting for uranium.

#### **A tale of two mining companies**

- [4] On January 26, 2006, under s 30 of the Mining Act 1989, Cap 65:01, the Commission, with the approval of the Minister, duly granted Stratagold a Prospecting Licence (the Licence"). In granting the rights conferred by s 32(1) of the Act, the Licence granted Stratagold "the exclusive right to occupy and for the purpose of prospecting for Gold and Valuable Minerals" the area of about 11,450 acres specified in Annexe 1 of the Licence, "save and except all lands lawfully held or occupied." Under s 32(2) if the holder of a licence "in the course of the exercise of [its] rights....discovers evidence indicating the existence of any other mineral" in its prospecting area, and no prospecting licence has already been granted in respect of that mineral, it can apply to the Commission for the

inclusion in its licence of the other mineral. In 2007 Stratagold made such an application to amend its Licence by including prospecting for radioactive minerals and rare earth elements. This led the Commission to publish in the Official Gazette of June 23, 2007 a Notice of Intention (dated June 19, 2007) indicating its intention to grant such an amendment to Stratagold's Licence. Strong objection was taken to this by Pharsalus.

[5] On April 4, 2006 Pharsalus had applied under s 97 of the Mining Act to the Minister for a grant to it of a Survey Permit ("the Permit") in respect of radioactive minerals, rare earth elements and bauxite within a specified area of 987,024 acres, which the parties agreed covered the area within Stratagold's Licence. On February 26, 2007 the Minister duly granted the Permit conferring on Pharsalus "the exclusive right to occupy the Area [of 987,024 acres] and conduct geological and geophysical surveys for radioactive minerals, rare earth elements and bauxite (save and except such portions of the Area as was lawfully occupied or applied for by persons other than the Permittee previous to April 4, 2006 and all navigable rivers)". The Permit was signed by the Minister and by Mr Dominic O'Sullivan as a director of Pharsalus accepting the Permission on the terms and conditions therein. The signature of the Commissioner then simply appeared under "Recorded".

[6] By clause 2 of the Permit,

During the duration of the Permission, the Permittee shall have the right to apply to the Guyana Geology and Mines Commission for, and shall be granted, a maximum of twenty Prospecting Licences for radioactive minerals and rare earth elements PROVIDED THAT (i) such grant shall be subject to the Permittee having satisfied the requirements of the said

Work Program for the Geological and Geophysical Survey, and (ii) satisfactory proof has been furnished to the Minister of financial resources and technical capability, along with approved work program for each Prospecting Licence Application. The Guyana Geology and Mines Commission shall treat such applications on a priority basis.

[7] On June 21, 2007 Pharsalus wrote to the Commissioner complaining of Stratagold searching for uranium within Pharsalus' Permit area and seeking confirmation that the Commission would not derogate from Pharsalus' clause 2 rights by acceding to any application by Stratagold to extend its Licence to cover radioactive minerals and rare earth elements. No reply was received. As noted above, the Commission had on June 19, 2007 formally indicated its intention to grant such an extension. Upon discovering this, Pharsalus by letter of July 7, 2007 took advantage of its rights under clause 2 by duly making an application to the Commission under the appropriate ss 29 and 30 of the Mining Act for a prospecting licence to cover a specified area of about 11,450 acres described in precisely the same terms as the 11,450 acres specified in Stratagold's Licence. On July 10, 2007 Pharsalus formally lodged with the Commission its Notice of Opposition to the Commission's Notice of Intention to grant an amendment to Stratagold's Licence, alleging that Stratagold's Licence area fell within the area over which it had a Permit with its advantageous clause 2 rights.

[8] On July 16, 2007 Stratagold lodged with the Commission and served on Pharsalus its Answer to Opposition, alleging that the land within its Licence was excluded from the rights under Pharsalus' Permit. On July 30, 2007 the Minister (who was also the Prime Minister) chaired a meeting of representatives from Stratagold, Pharsalus and the Commission. The Minister declared that he was in agreement

with the Commission's recommendation that Stratagold's Licence be amended to include radioactive minerals and rare earth elements. This necessarily involved rejection of Pharsalus' application for a prospecting licence for such minerals and elements over the same area of land. This led Pharsalus to initiate legal proceedings against the Commissioner claiming that it, not Stratagold, should be granted a prospecting licence over the relevant 11,450 acres for such minerals and elements.

### **The legal proceedings below**

- [9] On August 9, 2007 Pharsalus brought proceedings against the Commissioner, the chief executive officer of the Commission. It applied by a Notice of Motion supported by an affidavit of Mr Dominic O'Sullivan, a director of Pharsalus, alleging that the area within Stratagold's Licence fell within the scope of Pharsalus' Permit. It sought three orders or rules nisi for certiorari, prohibition and mandamus against the Commissioner to show cause why (1) the Commission's intention to grant an amended Licence to Stratagold should not be quashed, (2) the Commissioner should not be prohibited from so amending the Licence and (3) the Commissioner should not be ordered to rescind the Commission's Notice of Intention to grant the amended Licence. It also sought a fourth order, an order nisi of mandamus "directed to the Commission (sic) compelling him (sic) to grant" Pharsalus its requested prospecting licence unless contrary cause should be shown.

[10] On August 10, 2007 Roy J, upon an ex parte application on behalf of Pharsalus, granted those four orders nisi and adjourned the matter to August 22. On August 17, in response to Stratagold's application by summons of August 16, Roy J, under Order 14.14 of the Rules of the High Court and/or the inherent jurisdiction, granted leave to Stratagold to intervene as an added respondent. He also gave it leave to file and serve an answer to Pharsalus' affidavit in support of its Motion, the matter to be adjourned to August 22. Further adjournments then occurred but Stratagold did not take advantage of the leave granted to it on August 17. An Affidavit in Answer was filed on September 19, 2007 on behalf of the Commissioner by Mr Kampta Persaud, Manager of the Commission. Pursuant to an October 15, 2007 application by Pharsalus, Roy J on December 14, 2007 made an order for Stratagold to disclose findings of experts in reports submitted to the Commission in support of its application for an amended prospecting licence, but Stratagold successfully appealed against this to the Full Court.

[11] Thus matters did not proceed to trial while time drifted by. On July 22, 2008, however, the Commissioner filed a Notice of Motion (with a supporting July 22 affidavit of Mr Kampta Persaud) to discharge all the orders nisi made by Roy J. The basis for this was that such orders could not be made against the Commissioner because only the Commission with the approval of the Minister could grant or refuse an application for a prospecting licence or an amendment thereof. Moreover, in respect of the mandamus application to compel the grant of a prospecting licence to Pharsalus it was alleged that there was no evidence of the required demand and refusal thereof to found such an action, while non-disclosure

by Pharsalus of a material fact precluded the grant of relief to it. On October 3, 2008 an affidavit in answer was filed by Mr Dominic O'Sullivan.

[12] On December 15 2008 Chang CJ (Ag) heard the Motion and discharged all the orders nisi on the basis of the affidavit evidence without any oral examination of the makers of the affidavits. He held<sup>2</sup> that Roy J had improperly made orders against the Commissioner who could not be called upon to answer for acts reserved to the Commission. Moreover, in respect of the mandamus order sought to compel the grant of a prospecting licence to Pharsalus over the 11,450 acres within Stratagold's Licence, he held<sup>3</sup> that the order nisi must be discharged for both material non-disclosure and the absence of the requisite demand and refusal required to found a mandamus order. Chang CJ (Ag) also observed<sup>4</sup> that Pharsalus could not have had a legitimate expectation that the Commissioner or the Commission would grant the prospecting licence sought by Pharsalus in the light of its alleged rights granted by the Minister under clause 2 of its Permit: the Commission had given no specific assurances to Pharsalus. Furthermore, he pointed out<sup>5</sup> that the area of land covered by Stratagold's Licence, and in respect of which Pharsalus was seeking a prospecting licence for radioactive minerals and rare earth elements, was expressly excluded from the area covered by the Survey Permit granted to Pharsalus, so that there could be no legitimate expectation in respect of that land.

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<sup>2</sup> See *In the matter of an application by Pharsalus Inc*, High Court, Guyana, 15 December 2008 p 11.

<sup>3</sup> *ibid* pp 12 and 14.

<sup>4</sup> *ibid* p15.

<sup>5</sup> *ibid* p 16.

- [13] On January 12, 2009 Pharsalus filed an appeal which the Court of Appeal heard on January 31, 2011 and February 7, 2011. On February 16, 2012 the majority of the Court of Appeal (Singh C (Ag) and Patterson J) not only allowed the appeal against the discharge by Chang CJ (Ag) of the orders nisi of Roy J but made those four orders absolute.
- [14] The dissenting judge, Cummings-Edwards JA, would have upheld the orders of Chang CJ (Ag), though<sup>6</sup> rejecting his view that there had not been a sufficient demand and refusal to enable an order of mandamus to be made in respect of the licence sought by Pharsalus. Otherwise, she held<sup>7</sup> that the orders could not be made against the Commissioner; they ought to have been directed to the Minister and the Commission. She came to the same conclusion as Chang CJ (Ag) on rejection of Pharsalus' legitimate expectation claim and for the same reasons.<sup>8</sup>
- [15] Singh C (Ag), with whom Patterson J concurred, took a different approach from the literal geographical approach of Chang CJ (Ag) and Cummings-Edwards JA to the construction of Pharsalus' Permit. He took a commercial purposive approach in construing Pharsalus' "exclusive right to occupy the Area and conduct geological and geophysical surveys for radioactive minerals, rare earth elements and bauxite (save and except such portions of the Area as was lawfully occupied for or applied for by persons other than the Permittee previous to April 4 2006)". He considered<sup>9</sup> that, by necessary implication, the exception was to be

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<sup>6</sup> See *Pharsalus Inc v The Commissioner of Guyana Geology and Mines Commission* Civil Appeal No 4 of 2008 Court of Appeal, Guyana, 16 February 2012, Dissenting Judgment of Mrs Justice Yonette Cummings-Edwards [53].

<sup>7</sup> *ibid* [36].

<sup>8</sup> *ibid* [61], [68] and [72].

<sup>9</sup> See *Pharsalus Inc v The Commissioner of the Guyana and Mines Commission* Civil Appeal No 4 of 2009 Court of Appeal, Guyana, 16 February 2012 [93].

restricted to land occupied or applied for in relation to the *same* minerals and elements for which Pharsalus was granted an exclusive right.

[16] Thus, if a number of companies within Pharsalus' huge Permit area of about 987,024 acres already had pre April 4, 2006 survey permits or prospecting licences entitling them to occupy land for purposes of surveying or prospecting for gold and valuable minerals only, Pharsalus could still exercise its surveying rights over such land for the purpose of discovering radioactive minerals and rare earth elements and then, under clause 2 of its Permit, seek prospecting licences in respect of such minerals and elements actually discovered. Indeed, he pointed out that this is envisaged by s 26(2) of the Mining Act which states "A licence with respect to any mineral shall not be granted to an applicant in respect of any parcel which is subject to another licence with respect to the same mineral, but licences with respect to different minerals may be given to different persons in relation to the whole or part of the same parcel". Thus, Pharsalus could have a prospecting licence for radioactive minerals over the same land in respect of which Stratagold had a prospecting licence for gold.

[17] Singh C (Ag) held<sup>10</sup> that there had been sufficient demand and refusal to support an order of mandamus for the grant to Pharsalus of a prospecting licence for radioactive minerals and rare earth elements over the area in respect of which Stratagold had a Licence for prospecting for gold. He then held<sup>11</sup> in reliance upon the Permit that, on the basis of assurances made by the Commission, Pharsalus had a legitimate expectation that in dealing with Pharsalus' application for a

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<sup>10</sup> *ibid* [35]-[41].

<sup>11</sup> *ibid* [48], [50] and [53].

prospecting licence in respect of radioactive minerals and rare earth elements the Commission would, under clause 2 of the Permit, give Pharsalus priority over any other applications and grant such a licence. He further held<sup>12</sup> that the Commissioner was the alter ego of the Commission so that the proceedings had been properly brought against the Commissioner. Finally, he considered<sup>13</sup> that there had been no discovery of radioactive minerals and rare earth elements to justify Stratagold's application for an extension of its Licence.

[18] Singh C (Ag) then directed<sup>14</sup> the four orders nisi of Roy J to "be made absolute forthwith" despite conflicting affidavit evidence and a lack of evidence as to satisfaction of requirements set out in clause 2 of the Permit. While we commend attempts to save time and expense, the short-cut adopted by Singh C (Ag) should only be taken in clear cases where counsel are agreeable to such a course or where no reasonable counsel could fairly object to such a course. On his view of the law and the facts Singh C (Ag) should have simply allowed the appeal and set aside the orders of Chang CJ (Ag) that had discharged all four orders nisi of Roy J. Those orders nisi could then have proceeded to trial on the merits.

### **The issues before the Caribbean Court of Justice**

**(a) Was the Commissioner the proper defendant as the alter ego of the Commission?**

[19] All the reliefs were sought against the Commissioner, though note that the fourth order nisi was "directed to the Commission (sic)" to compel "him" (sic) to grant a

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<sup>12</sup> *ibid* [82] and [90].

<sup>13</sup> *ibid* [95]-[98].

<sup>14</sup> *ibid* [99].

uranium prospecting licence to Pharsalus. Was, the Commissioner, however, the proper defendant as the alter ego of the Commission, so that he could make decisions for the Commission as to the grant or rejection of prospecting licences as demanded by Pharsalus?

[20] The Commission, which is a body corporate, is authorised by s 5(1) of the Guyana Geology and Mines Commission Act 1979, Cap 65:09, (“the GGMCA”) to employ “a Commissioner, a Secretary and such other officers and other employees as the Commission considers necessary for the purpose of carrying out its functions”. By s 5(2) “The Commissioner shall be the chief executive officer of the Commission, and, subject to any general or special directions of the Commission, shall be responsible for the execution of the policy of the Commission and answerable therefor to the Commission”. By paragraph 1 of the First Schedule the Commission consists of (a) the Chairman appointed by the Minister but, otherwise the Minister shall be the Chairman, (b) the Commissioner and (c) not more than twelve persons appointed by the Minister. A core function of the Commission under s 4(1)(a) is to promote interest in mining and mineral exploration and the development of the mineral potential of Guyana e.g. via the grant of prospecting licences.

[21] By s 30(1) of the Mining Act “the Commission may, with the approval of the Minister, grant on such conditions as it determines, or refuse to grant, a prospecting licence” and by s 30(2) “no prospecting licence... shall be granted to an applicant unless the Commission is satisfied” of certain specified matters. It is to be noted that under s 4(5) of the GGMCA “[w]here the exercise of any function

by the Commission under this Act or any other law is subject to the approval of the Minister, it shall not be necessary to obtain that approval if the Minister is the Chairman of the Commission”. Evidence was not provided as to whether the Minister, who was also the Prime Minister, was or was not Chairman of the Commission.

[22] By s 32(2) of the Mining Act when a licensee (like Stratagold), in the course of exercising its rights under its licence for one mineral, “discovers evidence” indicating the existence of another mineral in its prospecting area it may apply to the Commission for the inclusion in its licence of the other mineral, assuming no other person had been granted a licence in respect of such mineral. By s 32(3) the Commission, with the approval of the Minister, can amend the licence to include the other mineral.

[23] Section 116(1)<sup>15</sup> of the Mining Act expressly enables the Minister by instrument to delegate any function conferred on him by the Act (not being any function relating to the hearing of appeals or the making of subsidiary legislation) to the Commission or any member thereof or the Commissioner. Under s 116(2) the Commission may by resolution delegate to any member thereof or the Commissioner any function conferred on it by the Act (not being a function delegated to it by the Minister). No evidence was provided of any delegation to the Commissioner of the Commission’s key powers to grant or refuse applications for prospecting licences or amendments or renewals thereof.

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<sup>15</sup> The Chief Parliamentary Counsel of Guyana has confirmed that section 116 is the relevant section when in certain paper copies of the Mining Act, including the copy relied upon by counsel, the section appears as section 117.

[24] Indeed, s 4(1) of the Mining Regulations, which gives the Commissioner a large variety of powers, presupposes that the Commission will decide whether or not to grant prospecting licences and “if an application is *granted* the Commissioner, any officer of the Department of Geological Surveys and Mines appointed by the Minister, or the mines officer shall.... *issue* a prospecting licence to the applicant in Form 1 of the First Schedule.”

[25] In this statutory scheme we agree with Cummings-Edwards JA and Chang CJ (Ag) that where the granting or refusing of licences is a primary function of the Commission and there is no administrative necessity for the Commissioner to have such powers, there is no scope for regarding the Commissioner as the alter ego of the Commission on the basis of the *Carltona* principle developed from *Carltona Ltd v Commissioners of Works*.<sup>16</sup> As Lord Phillips has stated,<sup>17</sup>

That principle enables officials in a government department to act in their minister’s name without any express delegation of authority to perform any particular action. It is enough that the action in question falls within the general authority that the officials of a department enjoy to carry on the business of the department on behalf of the minister. Whether a power or a duty is one that a minister must exercise personally or whether it is one that he can leave to his department to exercise on his behalf depends upon the facts of the particular case. There is no difficulty in applying the *Carltona* principle in circumstances where the nature of the power or duty conferred on the minister is such that it is obvious that it will not be exercised by him in person.

[26] Nevertheless, accepting that the *Carltona* principle can extend to the current quasi-governmental situation, it is certainly not obvious that the Commission’s powers to grant or refuse prospecting licences will not be exercised by the Commission,

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<sup>16</sup> [1943] 2 All ER 560. The case was concerned with extensive government powers to requisition property in wartime.

<sup>17</sup> *Marshall v Deputy Governor of Bermuda* [2010] UKPC 9, (2010) 77 WIR 182 [47].

but by the Commissioner acting on his own initiative. It is to be noted that such licences are of such special economic significance for Guyana that the approval of the Minister is needed for the grant of licences by the Commission, though it was contemplated in s 4(5) and the First Schedule of the GGMCA that such Minister could very well be Chairman of the Commission, in which event his specific approval would not be needed.

**(b) Can mandamus be ordered to give effect to a substantive legitimate expectation?**

[27] We agree with all members of the Court of Appeal that no formalistic demand and rejection of the demand are needed to found an order for mandamus. It is the substance of the matter that is important. Here it is clear from Pharsalus' letter of application of July 7, 2007 and its Notice of Opposition of July 10, 2007 that it wanted a prospecting licence for radioactive materials and rare earth elements in respect of the specified 11,450 acres and did not want Stratagold to have such a licence. It is also clear that the Commission and the Minister wanted Stratagold to have such licence, thereby rejecting Pharsalus' demand for such licence.

[28] Singh C (Ag) most exceptionally gave effect to a specific substantive legitimate expectation in ordering the Commissioner as the alter ego of the Commission to grant Pharsalus the prospecting licence that it had applied for in the exercise of its rights under clause 2 of its Permit. Since under s 30(1) of the Mining Act the Minister's approval would be necessary for such a grant but the Minister was not a party to the proceedings, it appears that Singh C (Ag), in the absence of evidence, must have assumed that the Minister was the Chairman of the

Commission so as to make it unnecessary to obtain the Minister's approval by virtue of s 4(5) of the GGMCA.

[29] It is most unusual, indeed, for substantive legitimate expectations to be recognised because they lead to a body, whose function is to act in the public interest, being required to make a particular decision rather than merely restricting how a body should proceed to come to a decision of its own. The courts recognise that, while the claimant and the public have an interest in persons being able to rely upon legal certainty and fair, good governance, authorities like the Commission and the Minister normally have to be allowed discretionary leeway in the developing public interest to formulate and re-formulate policy, balancing competing interests across a wide spectrum and deciding the content and pace of change<sup>18</sup>. Indeed, Stratagold in its January 2006 Licence had expectations of being able to extend its Licence under s 32(2) of the Mining Act if, in the course of exercising its rights under the Licence, it discovered some other minerals, and may not have thought that Pharsalus' subsequent Permit affected such expectations on the basis that it appeared to it that its Licence area was excluded from the area covered by the Permit.

[30] To ascertain whether a substantive legitimate expectation has arisen the courts focus upon not what the claimant subjectively expects but upon what the claimant is entitled to expect as a result of "a specific undertaking, directed to a particular individual or group, by which the relevant policy's continuance is assured,"<sup>19</sup> so that the defendant's conduct is "equivalent to a breach of contract or breach of

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<sup>18</sup> *R (Batt Murphy) v Independent Assessor* [2008] EWCA Civ 755 [41].

<sup>19</sup> *ibid* [43].

representation.”<sup>20</sup> There needs to be “a clear and unambiguous representation, devoid of relevant qualification”<sup>21</sup> so that effect can be given to such representation, it being clearly unfair to the representee in all the circumstances for the court to allow this representation to be defeated by the public interest (which is never static) in changing the policy reflected in the representation.

[31] This undertaking or representation needs to be made by the decision-maker who will be required to implement the undertaking or representation. Here the Commission gave no such undertaking or representation. Its chief officer merely recorded the fact of a grant of a survey permit to Pharsalus by the Minister that contained the Minister’s undertakings or representations in clause 2 of the Permit. Thus the terms of the Permit cannot give rise to any legitimate expectation against the Commission which has not been shown to have directed its mind to the issues.

[32] Even if the Commission had made itself a party to the representations in clause 2 and even if the Minister had been the Chairman of the Commission (as to which no proof was tendered), the representations were not unambiguous if it came to determining whether there had been a breach of them. Pharsalus appears to have expected that whenever it came up with an application to the Commission for a prospecting licence for radioactive minerals and rare earth elements within its Permit area it would automatically succeed (up to a maximum of twenty licences), subject to (what appeared to it to be) straightforward requirements for satisfying the Minister and the Commission set out in clause 2 of its Permit. This overlooks

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<sup>20</sup> *ibid* [43].

<sup>21</sup> *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453 [73]; *R v Inland Revenue Commissioners ex p IMK Underwriting Agencies Ltd* [1990] 1 WLR 1545, 1569.

the ambiguity over the extent of exclusions from the Permit area and over the Commission needing to treat Pharsalus' applications "on a priority basis", which could mean dealing with them as soon as possible, rather than await their turn in the queue, or that in the case of competing contemporaneous applications Pharsalus' application should prevail. It also overlooks the discretion, arguably accorded to the Commission and the Minister to refuse some applications in respect of the huge Permit area of 987,024 acres, so long as over the relevant period other applications up to an aggregate of twenty succeed. Very significantly, no individualised assurance was given to Pharsalus in respect of a specific application for a prospecting licence over a specific area. In any event, because of conflicting affidavit evidence there was no clear evidence that "satisfactory proof has been furnished to the Minister of financial resources and technical ability, along with approved work program".

[33] It follows that Pharsalus had no substantive legitimate expectation entitling it to the order of mandamus sought even if its clause 2 rights extended to the area of 11,450 acres in respect of which Stratagold had its Licence. Thus we need come to no decision as to whether or not its clause 2 rights did so extend. While Pharsalus is not entitled to the realisation of a substantive legitimate expectation entitling it to the licence it sought, it will next be seen that it is entitled to have heard on the merits its application for judicial review questioning the lawfulness or fairness of the Commission's intent to grant to Stratagold an extension of the latter's Licence to cover radioactive minerals and rare earth elements in that area.

**(c) Should Roy J's first three orders nisi of certiorari, prohibition and mandamus be upheld?**

[34] In order for Pharsalus to stop the grant of an extension of Stratagold's Licence, it is compelled to fall back on it being unlawful or unfair for the Commission to grant to Stratagold an extension to cover radioactive minerals and rare earth elements on the basis that the requirements in s 32(2) of the Mining Act have not been satisfied. It submits that in the course of the exercise of its rights under the licence Stratagold has not "discovered" evidence indicating the existence of a mineral not included in its Licence since there was earlier clear evidence of radioactive minerals and rare earth elements in the area covered by the Licence. As to the precise meaning of "discover" and whether, in fact, there had been a discovery by Stratagold in the course of its prospecting for gold there is, however, a clear dispute between the parties where adjudicating that dispute on affidavit evidence without cross examination is unsatisfactory and where, as recorded in [10] above, Stratagold had chosen not to become a respondent after having obtained leave for that purpose and had refused to disclose alleged material documents. Nevertheless, the majority of the Court of Appeal<sup>22</sup> considered that Stratagold had not complied with the requirements for an extension of its Licence, so that if Pharsalus' legitimate expectation claim had failed, Pharsalus' other claims would have succeeded.

[35] Prima facie the above dispute requires that the orders nisi should proceed to trial on the merits and not be discharged. Does it matter that the sole defendant was

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<sup>22</sup> See *Pharsalus Inc v The Commissioner of the Guyana and Mines Commission* Civil Appeal No 4 of 2009 Court of Appeal, Guyana, 16 February 2012 [95]-[98].

the Commissioner? It would not be proper to have the Minister as defendant when - unless he is Chairman of the Commission - he only comes into the picture for providing an approval to an earlier decision of the Commission before it can go ahead and grant a licence. The Commission, however, as the initial decision-maker is the key actor and it is the Commission that Pharsalus does not want to make a positive decision in favour of Stratagold to be put forward for approval by the Minister if not being Chairman. The Commission is thus the proper sole defendant for the scrutiny of its decision-making process when orders are sought to prevent it making a decision. Its interests, however, were fully furthered by the Commissioner and by the affidavits of its Manager, Mr Persaud, so that the issue arises whether this Court should simply order the Commissioner to be replaced as defendant by the Commission under the powers found in Order 14.14 of the Rules of the High Court, ss 7(1)(a) and 7(2) of the Court of Appeal Act, Cap 3:01, and s 11(6) of the Caribbean Court of Justice Act 2004 discussed by de la Bastide PCCJ in *Sheermohamed v S A Nabi and Sons Ltd.*<sup>23</sup> In the particular circumstances of this case we consider it just to order the Commissioner to be replaced as defendant by the Commission so that the first three orders nisi of Roy J stand and there can be a trial on their merits with the Commission as defendant in place of the Commissioner.

### **Disposition of the proceedings**

[36] The majority of the Court of Appeal made all four nisi orders of Roy J absolute so that Pharsalus obtained a uranium licence over the 11,450 acres area and so that

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<sup>23</sup> [2011] CCJ 7 (AJ), (2011) 78 WIR 364 [30]-[36].

Stratagold's Licence could not be extended to uranium in that area. This Court discharges the fourth order nisi of Roy J but allows his first three orders nisi to stand, and orders the Commissioner to be replaced by the Commission as defendant subject to those orders. Thus this Court holds that Pharsalus has no entitlement by way of a substantive legitimate expectation to a uranium licence over the 11,450 acres area, but it can still apply to be granted one if it can, pursuant to its three nisi orders, prevent the Commission going ahead with its intent to extend Stratagold's Licence to uranium. This will enable Pharsalus' claims to be heard at a trial on the merits of its case affording the opportunity for fuller evidence than was available so far in these proceedings.

[37] After full consideration of the most appropriate order to make as to costs in the unusual circumstances of this case, this Court orders that there should be no order as to costs except for the discharge of the costs orders below in the Court of Appeal and the High Court.

/s/ R Nelson

**The Hon Mr Justice R Nelson**

/s/ A Saunders

**The Hon Mr Justice A Saunders**

/s/ J Wit

**The Hon Mr Justice J Wit**

/s/ D Hayton

**The Hon Mr Justice D Hayton**

/s/ W Anderson

**The Hon Mr Justice W Anderson**

