IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No. GYCV2017/009
GY Civil Appeal No. 56 of 2011

BETWEEN

WAYNE VIEIRA **APPELLANT**

AND

GUYANA GEOLOGY AND MINES COMMISSION **RESPONDENT**

Before The Right Honourable and The Honourables

Sir Dennis Byron, President
Mr. Justice Wit
Mr. Justice Hayton
Mme. Justice Rajnauth-Lee
Mr. Justice Barrow

Appearances

Ms. Jamela A. Ali and Mr. Sanjeev J. Datadin for the Appellant

Mr. Nikhil Ramkarran for the Respondent

JUDGMENT
Of
The President and Justices Wit, Hayton, Rajnauth-Lee and Barrow

Delivered by
The Honourable Mr. Justice Denys Barrow
on the 7th day of December 2017

[1] This appeal raises the question whether an officer of a statutory corporation, the Guyana Geology and Mines Commission[1] ("the Commission"), the respondent,

[1] Established by the Guyana Geology and Mines Commission Act 1979 (now CAP 66:02).

lawfully exercised the power conferred upon the officer by statute to impose a sanction, when he imposed the sanction to vindicate a requirement contained in another statute.

[2] The power to impose a sanction is conferred upon a mines officer by the Mining Regulations made under the **Mining Act 20/1989** (now CAP 65:01), which fell under the portfolio responsibility of the Prime Minister as the Minister Responsible for Mines and Minerals. The statute which the mines officer acted to vindicate, the **Amerindian Act 2006** (now CAP 29:01)**,** is administered by a separate authority, the Ministry of Amerindian Affairs.

The Cease Work Order

[3] The mines officer issued an order, dated 26th November 2010, to Wayne Vieira, the appellant, under regulation 98 of the Mining Regulations, the relevant portion of which provides as follows:

> "The Commissioner, officer appointed by him or the mines officer may, where it appears to him absolutely necessary to do so for the maintenance of the public peace or the protection of the interests of the state or of private persons, order that all work shall cease on a claim, either generally or by any particular person or persons and thereupon work shall be discontinued accordingly."

[4] The order, called a Cease Work Order or CWO, directed the appellant to cease all work until further order on the lands that had been assigned to him for mining because it appeared to the mines officer,[2]

> "to be absolutely necessary for the maintenance of the public peace and for the protection of the interest of the STATE or of the private persons that all work cease on the …[material] tracts of STATE LAND …"

[5] By a letter also dated 26th November 2010, the Commissioner informed the appellant that:

[2] It will be noted that the power to issue the order is given to the specified officers and not the Commission but the distinction has been disregarded in these proceedings.

> "This CWO has been issued because of the current absence of an agreement (as our records reflect) between yourself and the Village Council of Chinese Landing/Tassawini as is required by section 48 of the Amerindian Act."

Section 48(1)(f) of that Act states that a miner shall reach agreement with the Village Council on the amount of tribute to be paid.

[6] It was, therefore, specifically because the appellant did not have an agreement with the Village Council that the mines officer and Commission imposed the sanction. The appellant succeeded before Insanally J in the High Court but lost in the Court of Appeal on his motion to quash the decision to issue the CWO on the ground that it was "unreasonable, without authority, arbitrary, capricious, unlawful, unconstitutional, made without or in excess of jurisdiction, in breach of natural justice, biased, made without due process of law, ultra vires, null, void and of no legal effect."

The trigger for the decision

[7] There is no dispute as to the facts that led to the decision and how the non-existence of a section 48 agreement became the trigger for the Commission's decision. Those facts serve, as well, to establish the situation or circumstances that existed when the mines officer decided that it was 'absolutely necessary' to order that all work shall cease, to protect the interest of the state or private persons.

[8] Vieira deposed that the day before the CWO was issued the Prime Minister, with whom Vieira had previously engaged, called Vieira on the telephone and told him he must pay to the Village Council a tribute of 10%. Vieira stated that the Prime Minister gave no reason for this decision. In response, Vieira said he protested that the Prime Minister had previously stated in writing that miners such as Vieira should pay 7%, and told the Prime Minister that he (Vieira) was holding funds to make payment to the Village Council at this rate, but that no one would accept the

payment from him – neither the Amerindians nor the Ministry of Amerindian Affairs.

[9] The following day the CWO was served. There was no warning. The case for the Commission was that it would have been a waste of time to give the appellant an opportunity to be heard because the appellant, having spent over two years trying to get an agreement with the Village Council and having had two meetings with the Prime Minister and meetings with others, should have seen this coming.[3]

Background facts

[10] In the courts below and in their written submissions before this Court[4], counsel for the Commission maintained that the background facts, on which the appellant relied to show his good faith and how wrongly he had been treated, were irrelevant. The position argued for the Commission in the High Court was that Vieira did not have an agreement with the Village Council and it was axiomatic that the Commission was then obliged to suspend his operations.[5] This stance accurately reflects the decision-making process of the issuing mines officer, who clearly did not consider the background facts and who repeatedly declared in his affidavit in answer to the Motion that he had no knowledge of matters and that the stated matters were immaterial. On the appellant's case, the mines officer and the Commission were legally bound to consider those facts.

[11] The background begins in the year 1995, when Vieira purchased rights to land for the purposes of mining gold and precious stones. The land was situated in the Tassawini area of the Northwest Mining District. The Commission issued him with a Prospecting Licence and later re-issued him with 4 Medium Scale Mining Permits ('MSMPs') between 1998 and 2001. These gave Vieira exclusive rights to occupy

[3] Skeleton Arguments for the Commission (Court of Appeal), Record of Appeal, page 25, at [47] and [51].
[4] Submissions on Behalf of the Respondent, Record of Appeal, page 351 at [1.11].
[5] The Written Submissions on Behalf of the Respondent (High Court), Record of Appeal, page 141.

and mine gold and precious stones for profit. It was not disputed that since 1995, Vieira has been compliant with all the terms and conditions in the MSMPs.

[12] Vieira claimed he expended large sums of money between 1995 and 2010 to conduct alluvial mining, including for the purchase of heavy duty equipment. He also secured foreign investors who expended large sums on building infrastructure, roads, airstrip, buildings, camps and on prospecting, with a view to converting the MSMPs to Large Scale Mining Permits to enable large scale production of gold by foreign investors.

[13] By agreement dated 29 August 1999, between Vieira and the Chinese Landing Village Council, Vieira received exclusive permission to work, and in return agreed to provide them with employment, training, medical services as well as payment of royalty for gold production of alluvials. The agreement also set out a dispute resolution procedure. The agreement was the result of the recommendation and approval of the then Prime Minister, dated 17 July 1998, that Vieira pay 1% as tribute. The Commission did not dispute that Vieira complied with all the terms of the Agreement but claimed lack of knowledge of the arrangements and contended that the fact of the Agreement and compliance with it were immaterial.

[14] In 2009, Vieira made several attempts to secure a new agreement with the Village Council and in April 2009 the Council signed a permission letter for him to work, for one month, at the increased rate of 7%. They agreed that a written agreement was to be prepared but the Village Council subsequently refused to sign a new agreement. Notwithstanding, the Village Council received tribute/royalties from Vieira between April and July 2009.

[15] By letter dated 9 June 2009 and copied to the Minister of Amerindian Affairs and to Vieira's foreign investor, the Village Council told Vieira that it had decided not to grant him permission to work in Tassawini and that he should cease working and remove his equipment. In the period following this letter Vieira sought the Prime

Minister's intervention and that of the Minister of Amerindian Affairs, informing them of the Village Council's refusal to sign the agreement and the desire of persons from the Council to collect cash without issuing a receipt.

[16] Up to 15 November 2010, Vieira made several written and oral complaints to the Commission that the village councilors were unlawfully mining gold from the area of his mines. This was confirmed by the Commission, yet the alleged illegal mining was permitted to continue. The alleged illegality was further perpetuated by the Council and its agents when permission was given to other miners to extract gold in exchange for royalties. This conduct, Vieira submitted, was unlawful as the Council did not have a Permit to mine gold and under s 113 of the Mining Act it was unlawful for them to mine lands within the area covered by his lawfully issued MSMPs.

[17] On 26 November 2010, as mentioned, the CWO to Vieira was issued, ordering him to cease work.

The issues

[18] Three issues for this Court's determination were identified. The first was whether the power given in regulation 98 could lawfully have been used to enforce the provisions of the Amerindian Act.

[19] The second issue arises from the fact that the Amerindian Act which the CWO was issued to enforce, although enacted in 2006, did not come into force until the passage of a validation Act on 1 December 2010[6]. That Act deemed that the Amerindian Act had come into force on 14 March 2006. Therefore, at the time of the issuance of the CWO, the Act was not in force. There has been considerable argument on the effect of the deemed retroactivity, including whether it validated the issuing of the CWO.

[6] The Amerindian Act 2006 (Validation of Commencement) Act 2010.

[20] The third issue arises from Vieira's submission that the Chinese Landing Village Council had no authority to enforce the relevant provisions of the Amerindian Act, because it would have had to have title to the lands where his mines were located and it did not have this. Vieira contended that the burden imposed by law on the Commission to show cause why the order absolute of certiorari ought not to be granted, obliged the Commission to produce evidence, which they failed to do, that Vieira's mines were on lands for which the Chinese Landing Village Council of Tassawini held title. Counsel for the Commission argued that Vieira should not be permitted to take this point for the first time on the present appeal.

The lawfulness of the exercise of the power

[21] The question whether the mines officer lawfully exercised the power to impose a sanction by doing so to vindicate the requirement, contained in the **Amerindian Act 2006**, that a miner must enter into an agreement with a Village as to the tribute he must pay, is a precedent issue. It is only if the mines officer acted within the power given to him by subordinate legislation that the second and third issues arise for consideration.

The power to make regulations

[22] The foundation of Vieira's claim was that the legislature did not give power to the Commission to issue a CWO in aid of or for enforcement of other legislation. The Court of Appeal reversed the finding of the High Court that the sanction provided by regulation 98 to issue a CWO can only be invoked for violations of the Mining Act and not for violations of those sections of the Amerindian Act relating to mining.[7] It was surprising that at no stage did anyone consider the source and the scope of the power to make regulations or examine regulation 98 in its context to see if this indicated how the regulation was intended to operate and be applied.

[7] Judgment of the Court of Appeal at [13], Record of Appeal, page 43.

[23] The power to make regulations is given in section 135(1) of the Mining Act in language that is very apposite to the present inquiry, by providing:

> "The Minister may make regulations for carrying out the purposes of this Act."

In sub-section (2) power is given to make regulations for particular matters specified in a list of thirty-one matters, including the procedure for the determination of disputes (section 135(2)(zd)). Quite simply, it follows that the Minister had no power to make regulations for carrying out the purposes of any other Act.

[24] In the Mining Regulations CAP 65:01, regulation 98 falls under Part XI, Determination of Disputes, which comprises regulations 81 to 100. This Part contains general provisions as to the determination of disputes in the first instance by the Commissioner, an officer appointed by him, or the mines officer of the mining district in which the dispute arises. Regulation 81 identifies the character of the disputes that fall under this part of the Act as "*all disputes by way of opposition to the issue of any licence, and all disputes as to what land is or is not lawfully occupied or has or has not been lawfully located, or any other disputes arising under these regulations…*". The following regulations under Part XI deal with the making of complaints, issues of procedure, the powers of the Commissioner and the enforcement of decisions.

[25] It is in this context that regulation 98 empowered the Commissioner to order work to cease, that is to issue a CWO. This power was not given to the Commission as a body. It was given to specified officers and was to be exercised only where it appeared to be *absolutely necessary* for the maintenance of the public peace or for the protection of the interests of the State or private persons. There was nothing in regulation 98 which authorized the exercise of any power to enforce the provisions

of the Amerindian Act[8] and there could not have been, because that would have been beyond the power of the Minister to make regulations for carrying out the purposes of the Mining Act. This limitation, however, does not prevent a dispute arising under the Amerindian Act in a proper case from also being presented to the Commission as a dispute falling under regulation 81 of the Mining Regulations. This was not such a case.

[26] We therefore conclude that the CWO was issued in excess of the power conferred on the mines officer and, thus, invalidly.

The requirement of "absolutely necessary"

[27] In addition to our determination that it was beyond the power of the mines officer to issue the CWO for the purpose he did, we would expand briefly on our advertence to the requirement that the power can be used only when it appears absolutely necessary, to which, again surprisingly, no one paid any attention until counsel responded to this court's inquiry. Counsel for the respondent was valiant in arguing that it was absolutely necessary to issue the CWO but there was no evidence showing circumstances that made it necessary. As previously observed, no consideration was given to whether there was any necessity for the order; the mines officer and Commission clearly proceeded on the basis that the issuance of the order was automatic and ordained by law.

[28] The Court of Appeal validated this approach by finding that there was no error in the failure to hold a natural-justice hearing because there was nothing for the Commission to consider and no need to hold a discussion, given that Vieira could not produce a written agreement with the Village Council.[9] On the court's view the issuing of the CWO was automatic because the decision to issue that order was a straightforward administrative response. The court decided:

[8] Sections 48(3) and 51 of the Amerindian Act both provide a mechanism to overcome a failure of a miner and a village to agree on the tribute to be paid so there does not appear to be a gap in providing for the interests of the Amerindians.
[9] Ibid at [19], Record of Appeal, page 46.

> "…[the Commission] was clearly not an arbiter of contested issues between itself and …[Vieira]. It was not for them to exercise a judicial function by holding the scales evenly between itself and …[Vieira]. Their function was purely administrative in following the directions of Parliament. … According to one learned author, the issuance of the Cease Work Order was a "fixed and unalterable determination by the provisions of statute."[10]

[29] With respect, this view was erroneous. In the adjudicative context in which the power in regulation 98 is given, the issue of a CWO is a prohibition. There must be an absolute necessity for its issue and the person against whom it is sought must be notified of the proposed CWO and given the opportunity to oppose its issue. If Vieira had been given the opportunity to be heard, as he should have been given, he would certainly have had the right to demand that the mines officer must first satisfy himself of the absolute necessity before he could issue the order. As we have indicated, a heavy measure such as a CWO cannot be issued without considering the factual circumstances: it cannot be a template decision.

Disposition

[30] We therefore conclude that the decision of the mines officer to issue the CWO cannot stand, because it was beyond his power to issue the order for carrying out the purpose of a statute other than the Mining Act and, further, he completely failed to consider whether it was absolutely necessary to issue the order.

[31] It is unnecessary to engage with the question of the retrospectivity of the Amerindian Act since, even if that Act had been in force at the time the CWO was wrongfully issued, it would have made no difference, with the result that the issue of retrospectivity is irrelevant.

[32] Accordingly, we decide the learned trial judge was correct in making an order quashing the CWO and we restore her decision and order, including costs. We

[10] Ibid.

award costs in this Court and the Court of Appeal to the appellant. Costs in the Court of Appeal were quantified at $200,000.00 and we adopt that figure. We award costs in this Court at the agreed rate of basic costs for two counsel, along with disbursements.

/s/ CMD Byron

The Rt. Hon. Sir Dennis Byron, President

/S/ J Wit	**/s/ D Hayton**
The Hon. Mr. Justice J. Wit	**The Hon. Mr. Justice D. Hayton**
/s/ M Rajnauth-Lee	**/s/ D Barrow**
The Hon. Mme. Justice M. Rajnauth-Lee	**The Hon. Mr. Justice D. Barrow**