**2022-HC-DEM-CIV-FDA-47**

**IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE**

**REGULAR JURISDICTION**

**BETWEEN:**

**GLENN LALL**

**Applicant**

**-and-**

**THE ATTORNEY-GENERAL OF GUYANA**

**Respondent**

**-and-**

**ESSO EXPLORATION AND PRODUCTION (GUYANA) LIMITED**

**Added Respondent**

## WRITTEN SUBMISSIONS OF THE ADDED RESPONDENT

***Are the proceedings as filed in the Fixed Date Application maintainable by the Applicant?***

1. The Applicant in his written submissions to the Added Respondent has conflated two separate legal issues: (1) whether the proceedings as filed are in law justiciable and if not, (2) whether it is permissible that the proceedings should be or can be converted to judicial review proceedings (which is an entirely separate issue and will be addressed separately).

2. The proceedings before the Court are private law proceedings for Declaratory reliefs as set out at paragraphs 1(a) - (q)[1] of the Fixed Date

[1] Applicant has stated that he will no longer be pursuing Declarations at paragraphs (l) and (m).

Application ("the FDA") brought in the regular jurisdiction of the High Court.

3. There is not one single prayer for relief set out in the FDA which seeks a Declaration as to any act or omission of any of the Ministers. The Declarations sought refer solely to the validity of various articles of the Petroleum Agreement entered into by Esso Exploration and Production (Guyana) Limited, CNOOC Petroleum Guyana Limited and Hess Petroleum Guyana Limited (the "Contractors") and the Government of Guyana, as represented by the Minister responsible for petroleum, the Minister of Natural Resources ("the **Petroleum Agreement")**, and Declarations as to the validity of Order No. 10 of 2016 (which will be addressed separately). The FDA is purely an attack on the validity of the Petroleum Agreement and the Order No 10 of 2016 made consequent upon it. Further, the ***Information for Court Use*** filed by the Applicant's Counsel dated 12 January, 2022, states that the proceeding is brought in the Court's ***Regular Jurisdiction***. It does not tick any of the boxes on the Form designated ***Proceeding for Judicial Review***, or ***Proceeding under the Constitution***, or ***Proceeding for Administrative Orders***. Instead, it ticks the box describing the describing the FDA as an ***Other Proceeding***. Thus, the proceedings before the Court are clearly private law proceedings brought in the regular jurisdiction of the Court, for Declarations that several aspects of a private contract are unlawful.

4. The primary issue raised by the Added Respondent in paragraphs 8 and 9 of the Affidavit in Defence is a challenge to the jurisdiction of the Court to grant the reliefs sought in the present private law proceedings brought by Applicant, in his private capacity, for Declaratory relief alleging breach of public rights without claiming any special loss or damage or injury suffered over and above the public. There is no assertion of any infringement of the Applicant's private rights whereby the Applicant alleges he suffered special loss or damage.

5. As the Applicant does not allege he has suffered any special loss or damage, he is disentitled to Declaratory relief in private law. – See **The Declaratory Judgment**, Zamir & Woolf, Sweet & Maxwell 2nd edition, at para. 2.25.

6. The principles applicable to Declaratory relief in Private Law proceedings are discussed in **Zamir & Woolf (*supra*):):**

> 5.12 "**The need for rights to be infringed.**
> The law today is that a plaintiff will only have *locus standi* in private law proceedings for declaratory relief not involving any public law element if he can establish that his rights are either being infringed or are threatened with infringement by the defendant. This was clearly established by the House of Lords in Gouriet."

7. The author accepted and discussed the principles set out by the House of Lords in **Gouriet v. Union of Post Office Workers** [1977] 3 ALL ER 70

> 5.18 "In Gouriet a number of issues were considered by the House of Lords, two of which are particularly relevant in the present context. The first is whether a member of the public who claims no interest beyond that of any other member of the public is entitled to bring proceedings in his own name for the purpose of preventing a threatened wrong to the public generally and not by relator proceedings at the suit of the Attorney-General…"
>
> Lord Wilberforce went on to say
>
> > "I shall content myself with saying that, in my opinion, there is no support in authority for the proposition that declaratory relief can be granted unless the plaintiff, in proper proceedings, in which there is a dispute between the plaintiff and the defendant concerning their legal respective rights or liabilities either asserts a legal right which is denied or threatened, or claims immunity from some claim of the defendant against him or claims that the defendant is infringing or threatens to infringe some public right so as to inflict special damage on the plaintiff."
>
> 5.19 Lord Diplock also examined the position in depth and in doing so also dealt with the question of jurisdiction and *locus standi*, saying that:

> "[T]he jurisdiction of a civil court to grant remedies in private law is confined to the grant of remedies to litigants whose rights in private law have been infringed or are threatened with infringement. To extend that jurisdiction to the grant of remedies for unlawful conduct which does not infringe any rights of the plaintiff in private law, is to move out of the field of private law into that of public law with which analogies may be deceptive and where different principles apply."

8. In **Gouriet,** Diplock, LJ observed at p.96 [letter f]

> "Mr. Gouriet does not base his claim to either form of relief on the ground that any private legal right either of his own or of any other individual would be infringed if the Post Office were to suspend for a week transmission of postal packets between England and South Africa …."

And at p.100 [letter b]

> "The only kinds of rights with which courts of justice are concerned are legal rights and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event."

9. For the court to entertain Declaratory relief in private law proceedings, the Applicant must show that an act or omission had infringed or threatened to infringe any right of the Applicant derived from private law.

10. From the foregoing, it is pellucid that the legal basis on which the Application has been premised is confused. The Applicant admits (see **para. 3.23** of Applicant's Written Submissions to Added Respondent) (which is an accurate statement) that "*the present proceedings were made by way of a private claim under an FDA*." However, the Declaratory reliefs

the Applicant seeks in the FDA do not assert any infringement of the Applicant's private rights, which is a prerequisite to entitlement to Declaratory relief in private law proceedings. Rather, the Applicant claims Declaratory relief alleging breach of public law rights. Accordingly, it would appear that the Applicant has sought to bring private law proceedings seeking public law relief without asserting any infringement of the Applicant's rights. This is not a permissible cause of action.

11. In **para. 3.0** of the Written Submissions to the Added Respondent, in addressing whether the Applicant has *locus standi* to initiate this action in private law proceedings (which are the only proceedings presently before the court), the Applicant appears to have cited authorities applicable to the principles of standing in judicial review within the public law jurisdiction and has thus confused these principles with *locus standi* in private law proceedings for Declaratory relief in the regular jurisdiction.

12. The authorities cited by Applicant (See 3.2, 3.10, 3.11, 3.12, 3.13, 3.14, 3.15, 3.16, 3.17, 3.18) are inapposite as regards "standing" in private law proceedings in the regular jurisdiction as they relate to standing in judicial review (public law) proceedings. Thus, the authorities are inapplicable and are irrelevant to the principles which obtain in proceedings as to the right to Declaratory relief in private law proceedings.

13. In an effort to maintain entitlement to the reliefs in the proceedings **as filed before the court in its present form**, at **para 1.1** of his Written Submissions to the Added Respondent, the Applicant describes the Declaratory relief sought as being in respect of "*ultra vires* acts done by the Minister of Natural Resources and the Minister of Finance acting on behalf of the Government of Guyana". This is an obvious attempt to avoid the consequences of having commenced his FDA as a simple private law proceeding in the regular jurisdiction of the High Court attacking the validity of several aspects of Article 15 of the Petroleum Agreement, rather

than an application for Judicial Review or a Constitutional proceeding in the Constitutional and Administrative Division of the High Court.

14. It is noteworthy that the Applicant (at **para. 4.6** of his Written Submissions to the First-Named Respondent) admits and therefore acknowledges that in Guyana, public law cases are dealt with by the Constitutional/Administrative Division of the High Court (Practice Direction 2011 ss. 3 and 5 are referenced). The Applicant cites ***Fundamentals of Caribbean Constitutional Law*** by Tracy Robinson, Arif Bulkan, and Adrian Saunders, quoting Saunders at pp. 212 para. 5-003 –

> "[I]n Guyana, the judiciary has set aside a division of the High Court to be called the Constitutional/Administrative Law division [emphasis mine]. This division is intended to deal with all cases have [sic] a 'public law element', namely, those concerning acts and omissions of public officials and authorities and involving the interpretation or application of the Constitution."

15. The Applicant is attempting to argue on the basis that his proceeding is in the public law jurisdiction; yet he has commenced the proceedings and they remain in the regular jurisdiction of the High Court.
16. The Applicant, not having asserted any infringement or threatened infringement of his private rights, is disentitled to the reliefs sought in the FDA.

***Whether proceedings may be converted to Judicial Review Proceedings***

17. It is apparent that the Applicant, though maintaining his right to the Declaratory reliefs sought in private law proceedings in the regular jurisdiction of the court as filed, is also, in the event that his proceedings prove misconceived, seeking to rely on the discretionary power of the court to convert the private law proceeding into a "Judicial Review Matter" (see

Affidavit in Reply, paragraph 15, and Applicant's Written Submissions to the Added Respondent **paras. 3.21 - 3.24**).

18. In Issue 3.B of the Written Submissions to the Added Respondent, the Applicant raises the issue as to "*[w]hether the matters can be converted under the Judicial Review Act, Cap 3:06.*"

19. The Applicant has not made any application for such conversion, but merely seeks to discuss whether conversion is possible as a matter of law.

20. It is acknowledged by the Applicant that the conversion of the proceedings pursuant to section 12 of the Judicial Review Act is discretionary (see **para. 3.22** of the Applicant's Written Submissions to the Added Respondent). However, despite the Applicant's express recognition that this is a discretionary power and not one that he can invoke as of right, the Applicant has failed to take even the most elementary steps of outlining anywhere in his Affidavit in Reply (his opportunity after the point was raised by the Added Respondent in its Affidavit in Defence) a specific request to convert the proceedings, the relevant factors the Court ought to take into account in exercising this discretion to convert the proceedings if so requested, and why the discretion ought to be exercised.

21. It is submitted that for the reasons set out below, the Court ought *not* to exercise its discretion to convert the proceedings into Judicial Review proceedings.

***The reliefs sought do not fall within the ambit of the Judicial Review Act***

22. The problem faced by the Applicant is that the proceedings filed in the regular jurisdiction of the court in private law proceedings seek specific Declaratory reliefs as to the validity of an Agreement, and do not seek any relief against any administrative act or omission of a Minister, public body, or public authority. section 3(1) of the Judicial Review Act provides that:

> "An application to the Court for relief against an administrative act or omission shall be made by way of an application for judicial review in accordance with this Act and with rules of court."

And section 3(2) further provides -

> "The act or omission against which relief is sought under subsection (1) must have a public element in the sense that it affects public law rights, obligations or expectations."

23. Nowhere in the 17 prayers for relief set out in the Applicant's FDA are any orders sought quashing any alleged act of a Minister, public body, or public authority, or prohibiting the Minister, public body, or public authority from doing any act, or requiring the Minister, public body, or public authority to do any specified act. The reliefs sought by the Applicant do not fall within the definition of an administrative act or omission as defined in section 2 of the Act[2] which section provides the fundamental basis underlying Judicial Review proceedings.

24. Furthermore, the remedies that the Court may grant by way of application for Judicial Review are specified in section 8(1) (a) – (d) of the Judicial Review Act (Certiorari, Prohibition, Mandamus, and other orders). The power to grant a Declaratory judgment is <u>in addition</u> or <u>alternatively</u> to those remedies set out in section 8(1)(a) – (d). In the FDA, the Applicant has not sought any of the remedies set out or even ones similar to those in section 8(1)(a)-(d); but has only sought Declaratory orders.

25. Thus, there being no remedies sought for Judicial Review as set out in section 8(1)(a)-(d), the private law proceeding[3] commenced by the

[2] Pursuant to Section 2 "administrative act or omission" means an act or omission of a Minister, public body, public authority, tribunal, board, committee, or any person or body, exercising, purporting exercise or failing to exercise any public power or duty conferred or imposed by the Constitution, any written law, instrument of incorporation, rules or bylaws of any corporate or incorporate body or under a non-statutory scheme that is funded out of monies appropriated by Parliament.

[3] Section 12 of the Judicial Review Act, 2010 refers to an "action" but since the advent of the CPR in 2016, it is submitted that the better term would be "proceeding".

Applicant is not one that may properly be converted pursuant to section 12 of the Judicial Review Act.

***Undue Delay by the Applicant***

26. Even if the Applicant was somehow entitled to relief under the Judicial Review Act, under section 21, he may nevertheless be refused relief if there has been undue delay in making the application for Judicial Review (if the proceedings are converted the proceedings will then constitute an application for judicial review) or that the grant of relief sought would cause undue hardship to or would substantially prejudice the right of any person or would be detrimental to good administration.

27. In considering whether the Court ought to exercise its discretion to convert the proceedings into Judicial Review proceedings, the delay by the Applicant in instituting the proceedings would be of foremost consideration.

28. The Petroleum Agreement which is subject of the FDA is dated 27th June, 2016, and the FDA itself was filed on 12th January, 2022, in excess of 5 years later. Section 21 of the Act states:

> "The Court may, if it thinks fit, refuse to grant any relief under this Act if it considers that there has been undue delay in making the application for judicial review, and that the grant of the relief sought would cause substantial hardship to, or would substantially prejudice the rights of, any person, or would be detrimental to good administration."

29. There would be no point in converting the proceedings if the delay of the Applicant would result in a refusal to grant relief under the Act.

30. The Added Respondent in its Affidavit in Defence at paragraphs 52-58 raised the issue of gross and undue delay of over 5 years after the entry into the Agreement to institute proceedings. Indeed, even if the Applicant argues that the Petroleum Agreement was not disclosed by the Ministry of Natural Resources until December, 2017, over 4 years elapsed between that

time and the issuance of the Applicant's challenge. The Applicant himself confirms that he has been familiar with the Petroleum Agreement and its terms, as he informs that over the past five years he has continuously published and questioned the legitimacy of the Petroleum Agreement and exercise of the Minister's powers (see para. 3.6 of the Applicant's Written Submissions).

31. During this period of time and consequent on the Petroleum Agreement's execution on the 17th June, 2016, the Added Respondent and its co-venturers have expended in excess of US$13 billion pursuant to the Petroleum Agreement and are presently engaged in carrying out one of the most significant worldwide investments in petroleum exploration, development, and production activities, which are occurring in the Stabroek Block, located in the Exclusive Economic Zone of the Co-operative Republic of Guyana.

32. The Added Respondent has also applied for (and expects to obtain) necessary Government approvals for the Uaru Development Project ("**Uaru Project**") (together with all other projects, the "**Projects**").

33. Should the reliefs sought by the Applicant be granted, it would be inconceivable that the Projects could be carried out by the Added Respondent in the form designed pursuant to the Petroleum Agreement, resulting in potentially significant delays and in billions of US dollars in additional costs which could make the Projects commercially unviable or infeasible. This would be inherently unfair.

34. In response to the allegation of delay, the Applicant, in paragraph 54 of his Affidavit in Reply, raised tenuous excuses and has not condescended into any particulars or supporting facts generally claiming financial constraints despite stating in his affidavit in support of the FDA that he is a businessman, publisher, and managing director of the National Media and Publishing Company Limited. No details or particulars of any fruitless efforts to obtain legal representation are advanced and his expressed hope

that formal representations would settle the issues (see **para. 3.65(2) at p. 48** of the Applicant's Written Submissions to Added Respondent) is no excuse in respect of matters to which the Court ought to have regard.

35. Michael Fordham, QC in **Judicial Review Handbook**, 6th ed. refers to the cases of **R. v. London Borough of Bexley, ex parte Barnehurst Golf Club Limited;** [1992] COD 382 (fact that claimant trying to use political means of redress first is not a good reason for delay) and **R. v. London Borough of Redbridge, ex parte G;** [1991] COD 398 (claimant was not permitted to rely on his election to seek to persuade by political means first rather than seeking legal remedy) as a forceful rebuttal of the Applicant's latter excuse (he was hoping that renegotiation would settle the issue). Dr. I.P. Massey, in **Administrative Law**, Eastern Book Company, at p. 277 observes –

> "For the application of the doctrine of laches, no distinction is made between petitions for the enforcement of fundamental rights and for other purposes. Unfortunately the courts do not take into consideration the time taken in pursuing non-legal remedies for the application of this doctrine. Therefore, if a person who has been denied [a] licence proceeds with the matter through his political representative...instead of rushing through the expensive and dilatory judicial process, the time thus consumed will not be considered an excusable delay."

36. The learned author cites the authority of **Gandinagar Motor Transport v. The State of Bombay**, AIR 1954 Bom. 202 per Changla, CJ. –

> "The first objection is to delay. The order which was challenged was passed on 15-1-1953, and the petition challenging it was preferred to this Court on 11-5-1953. The explanation that is given by Mr. Gamadia on behalf of the petitioners for this delay is that on 19-2-1953 the petitioners made a representation to Government to reconsider their decision and the Minister concerned rejected that

representation on 28-3-1953, and the petitioners received the final order of Government on 3-4-1953. Now we have had occasion to point out that the only delay this court will excuse in presenting a petition is the delay which is caused by the petitioner pursuing a legal remedy which is given to him. In this particular case the petitioner did not pursue a legal remedy. The remedy he pursued was extra-legal or extra-judicial."

37. Simply stated, the febrile and tenuous excuse put forward by the Applicant that he was hoping and waiting on a political solution can have no influence with the court, especially when he has done nothing for nearly 5 years!

38. It logically follows that if Applicant's delay ought to deprive the Applicant in any event of Judicial Review remedies, the Court ought at the outset to refuse any consideration of conversion of the proceedings.

39. Judicial Review is a discretionary jurisdiction (See **Judicial Remedies in Public Law, 5th edition by Lewis** at 12-001). Delay in bringing a claim is a well recognised ground for refusing a remedy. The court will not assist a Claimant who sleeps on his rights (See **Lewis** at 12-009).

40. With regard to the relief being detrimental to good administration, as stated by **Lewis** at 12-010, relevant considerations are the length of the delay, the extent and effect of the decision under challenge and the impact if it were to be reopened.

41. The fact that individuals may have taken decisions and acted on the basis of the decision now challenged was considered relevant in **R v Newbury District Council Ex P Chieveley Parish Council** [1999] PL CR 51 [66]-[67] where a planning permission was challenged in respect of which individuals may have taken decisions.

42. The following speech from **R. v Newbury District Council ex parte Chievely Parish Council** [*supra*] was expressly commended in the case of

**R. v. North West Leicestershire District Council et anor, ex parte Moses;** [2000] AER (D) 526 per Simon Brown, LJ –

> "It is important to good administration that, once granted, a permission should not readily be invalidated. As confirmed in the House of Lords, s. 31(6) recognises that there is an interest in good administration independent of hardship or prejudice to the rights of third parties. The court is entitled to look at the interest of good administration independently of those other matters. It is important that citizens know where they stand and how they can order their affairs in the light of the relevant decision…"

43. A remedy may also be refused where it would cause substantial hardship or prejudice to the rights of others and **Lewis** at **12-011** gives examples of developments and contracts entered into with third parties to carry out developments contemplated by a challenged planning permission:

**[12-011]**

> "In one case [**R v Swale Ex p. B.C, Royal Protection of Birds** 1991 2 Admin. LR 790], a conservation body brought a challenge out of time to the granting of planning permission to reclaim mudflats near the mouth of the Medway river. In reliance on the permission, the port authority had entered into a dredging contract with another company. The benefit of that contract would be lost and the spoil dredged from the channel would either have to be disposed of at sea (not on the mudflats) or stored, both of which would lead to substantially higher costs. The overall development, of which the land reclamation scheme formed a part, would be delayed resulting in further substantial losses. A remedy was therefore refused, because of the substantial prejudice that would be caused. Similarly, the court refused to quash a planning permission where there had been a substantial delay in bringing a claim for judicial review and there would be adverse financial consequences to the developer."

**[12-012]**

> "The courts have a discretion to refuse relief even if the claim was made promptly [**Ex p. O'Malley 1997 10 Admin. LR 265 @ [291G]-[292B]]**. The courts have a broad discretion in relation to remedies and may still need to balance the interests of the claimant and the requirements of good administration and the effects of the

grant of relief on third parties even where the claimant has made the judicial review claim within time. In one case a claimant challenged a decision of a local authority to dispose of housing stock on a housing estate as there had been a failure to comply with the relevant statutory requirements on consultation. The courts refused to grant relief notwithstanding the illegality. The implementation of the scheme had already begun and there was a substantial risk that the scheme would collapse if judicial review were granted."

44. **In the Judicial Review Handbook, Michael Fordham,** 5th edition 26.4 the author observes;

> **"Hardship, prejudice and detriment.** In any case of lack of promptness or of undue delay, a key justification for refusing (1) permission or (2) a remedy at the substantive hearing is the likelihood that granting judicial review would cause substantial hardship or prejudice to a person, or detriment to good administration."

45. In **R v Secretary of State for Trade and Industry Ex p Greenpeace Ltd** 1998] Env LR 415 the Courts -- in dealing with a petroleum licence -- considered that the licensees had accepted the risks of the venture in question on the strength of what must have seemed a firm decision to grant licences (See **Fordham**, 5th edition 26.4.2).

46. The issue of undue delay and the necessity for Judicial Review proceedings to be brought promptly was considered at the stage of an application for leave to institute Judicial Review proceedings. Greenpeace challenged licences issued to oil companies on April 7th 1997 on the basis that the government erroneously failed to consider directives for the protection of coral reefs which applied to the entire continental shelf and not only UK territorial waters. Even though the proceedings were brought within 3 months, the court found that they had not been brought "promptly" having regard to all the circumstances including the interests of third parties including the oil companies.

Laws J made the following observations:

at page 422

> "I certainly accept (and Mr. Pleming Q.C. for the applicants did not contend the contrary) that it should now be regarded as elementary that a judicial review applicant can by no means sit on his hands for three months."

Page 424

> "It is that a judicial review applicant must move against the substantive act or decision which is the real basis of his complaint. If, after that act has been done, he takes no steps but merely waits until something consequential and dependent upon it takes place and then challenges that, he runs the risk of being put out of court for being too late."

> "The rule of law is not threatened, but strengthened, by such a discipline. It invokes public confidence and engages the law in the practical world."

Page 425

> "The court will first have to consider whether it is in truth a case where the applicant ought to have moved sooner in order to bring forward his real complaint in proceedings. If the answer is that he could and should have done so, that will be a powerful reason for giving the proceedings the quietus."

Page 438

> "The courts have very firmly stated that a judicial review applicant must proceed with particular urgency where third party interest are involved. The respondents cite R. v ITC, ex p. TVNI Ltd (CA. unreported, June 19, 1991); R. v. Swale B.C. ex p. Furneaux [1994] 2 All E.R 652 at 658e; and R. v. Avon C.C., ex p Adams [1994] Env. L.R. 442 at 448, a case to which I have already referred in another context. With respect I need not, I think, set out any of the passages relied on; the principle is plainly established. I consider that it applies with particular force in proceedings brought by a public interest plaintiff, who must act as a friend of the court. In the present case, the applicants have not in my judgment had any specific regard to the interests of the oil companies steps taken by them after April 7, 1997. They have not moved with any urgency in light of those interests."

Page 440

> "[T]here is…every detriment to good administration, if the legal system is seen to contemplate and accept challenges of the validity of this licensing process at a stage when licensees have accepted the risks of a venture on the faith of what must have seemed a firm decision to grant the licences in question…the promotion of this challenge now would generate a severe and undesirable uncertainty within the whole process of the licensing regime, and potentially within other analogous systems."

And at page 441

> "The real judgment that has to be made as to the impact of the public interest depends on consideration I have already canvassed. For reasons I have given at length, the public interest decisively required this challenge to be brought much earlier than it has been."

47. While the Judicial Review Act contains no express deadline for instituting proceedings, section 21, as stated above, gives the Court power to refuse relief in cases of undue delay. Moreover, Judicial Review is a discretionary remedy and therefore promptitude is vital. In the present circumstances, it would be difficult to envisage the court excusing delay by an Applicant for 5 years! The almost inescapable conclusion is that the Applicant, having delayed for more than 5 years, and having opted to institute his proceeding in the regular private law jurisdiction of the Court, cannot *then* pray in aid section 12 of the Judicial Review Act to circumvent the formidable obstacle of lateness.

***Locus Standi***

48. Even if the declarations sought were in respect of administrative acts or omissions (which they are not) and were sought in addition to or in the

alternative to the prerogative remedies as required in Section 8(1)(a) - (c) of the Judicial Review Act, the courts have determined standing in respect of declarations differently than standing in respect of other administrative orders.

49. In **Attorney General v. Martinus Francois**, LC 2004 CA 3, Civil Appeal No. 37 of 2003, St. Lucia, Rawlins J at [147] observed

> **"Locus standi for declaratory relief**
>
> It will be recalled, of course, that a person who applies for a declaration must have a personal legal right or interest which the alleged illegal action or decision infringes or threatens to infringe. The rationale for this is in the private nature of declaratory relief. It is a private law relief that was adapted to public law procedures. Lord Diplock expressed the rationale for the requirement of a personal legal right or interest in **Gouriet v Union of Post Office Workers** [1978] A.C. 435, at page 501. He stated:
>
> > "But the jurisdiction of the Court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of any one else.'
> >
> > It is this that explains the difference in the approach of the Courts to standing in cases involving declaratory and injunctive relief, and cases that involve the strict prerogative remedies of prohibition, certiorari and mandamus.""

50. The Eastern Caribbean Supreme Court Civil Procedure Rules, similar to the Guyana Civil Procedure Rules, maintain a distinction between declarations and other prerogative remedies.[4] In *Francois*, Rawlins J at paragraphs [149]

---

[4] Part 56.7(1) of the ECCPR states "An application for an administrative order must be made by fixed date claim in Form 2 identifying whether the application is for

(a) A declaration;
(b) Judicial review;
(c) Relief under the relevant Constitution; or
(d) For some other administrative order (naming it); and must identify the nature of any relief sought."

Rule 56.01(1) of the Guyana Civil Procedure Rules states:
"This part deals with proceedings for administrative orders where the relief sought is for,

- [152] considered that the Applicant, a tax payer and a citizen with no personal interest in the outcome, did not have *locus standi* to begin proceedings for Declaratory orders notwithstanding that the applicable Civil Procedure Rules permitted judicial review proceedings in the public interest.

51. The Applicant's submissions at **paragraph 3.3** of the Written Submissions to Added Respondent relying on Section 4(1)(b) of the Judicial Review Act and the cases cited in support premise the standing of the Applicant on the basis of public interest. Under Section 7(1) of the Judicial Review Act, where an application for Judicial Review under 4(1)(b) is made, a procedure is set out for publication by the Registrar giving notice of the application. The purpose of the notice is set out in Section 7(2) of the Act providing for an invitation to any person with a more direct interest to file a similar application or to be joined within a specified time. Section 7(3) of the Act sets out the criteria for the court to determine whether a subsequent applicant has a more direct interest in the matter and whether the first applicant possesses any special expertise or ability to enhance the presentation of the case. This procedure having not been followed, and no application for conversion having been made to date, is yet an additional reason why the court ought not to exercise its discretion to convert the proceedings to Judicial Review Proceedings.

52. In the present proceedings if the Court agrees that for the reasons submitted the Applicant is disentitled to Declaratory reliefs in private law, the Court

---

(a) Judicial review under the Judicial Review Act, Chapter 3:06, including an order for
   (i) Certiorari, for quashing unlawful acts;
   (ii) Prohibition, for prohibiting unlawful acts;
   (iii) Mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case; or
   (iv) Such other relief, directions or writs as the Court considers just and as the circumstances warrant.
(b) A declaration against a party that is the State, a Court, a tribunal or other public body;
(c) …
(d) …"

ought not to exercise its discretion to convert the proceedings to Judicial Review Proceedings.

***Submissions on the Substantive Issues***

***If this Court agrees with the challenge to the proceedings as filed and that the proceedings cannot or ought not to be converted, the FDA should be dismissed. The Added Respondent will also address the substantive issues below and establish that the Applicant is not entitled to the relief sought if the matter were to proceed.***

**Factual Background**

53. The Added Respondent is a party to the Petroleum Agreement.

Article 2.1 of the Petroleum Agreement states:

> "This Agreement constitutes an agreement made under section 10 of the Act consistent with the Act and the Regulations, and is a production sharing agreement, the objective of which is the exploration for development and production of Petroleum in the Contract Area by the Contractor subject to the terms hereof and the provisions of the Act and Regulations under which the Contractor shall have an economic interest in the development of Petroleum from the Contract Area."

The Act being referred to in the aforementioned paragraph is the Petroleum (Exploration and Production) Act 1986 ("PEPA").

54. Pursuant to the Petroleum Agreement, certain tax treatments are made applicable to the Added Respondent, the remaining Contractors, their affiliate companies, and their non-resident sub-contractors.

55. As was noted at paragraphs 35, 36, and 37 of the Affidavit in Defence of the Added Respondent, one of the central features of the global petroleum industry, both in the prospecting for, development, and production of petroleum is that most activities are carried out through specialist sub-contractors and affiliated companies, which are an integral part of petroleum operations, which operations, as stated in the long title to the Act, are governed by the PEPA. The use of these sub-contractors and affiliated companies often allows operators of petroleum projects to utilize their technology and know-how, achieve synergies and cost-effective operations that could not otherwise be achieved and certainly not with the substantial savings in costs and efficiency that these produce, especially in an ultra-deep water environment such as Guyana's offshore oil wells.

56. These sub-contractors and affiliated companies, whose presence is vital for the above-stated reasons, require fiscal incentives for their operations. Such fiscal incentives were contractually agreed between the Government of Guyana and the Contractors in the Petroleum Agreement entered into pursuant to the PEPA.

57. Such a contractually-agreed incentive for affiliates and sub-contractors who, as set out above, perform vital work, is industry standard across the global petroleum industry (see paragraphs 37 and 38 of the Added Respondent's Affidavit in Defence).

58. The Contractors' affiliates and sub-contractors are currently playing an active role in petroleum operations taking place in Guyana's Exclusive Economic Zone within the Stabroek Block. Presently, the Contractors have four approved and active petroleum projects:

- Liza Phase 1 Development Project ("**Liza Phase 1 Project**")
- Liza Phase 2 Development Project ("**Liza Phase 2 Project**")
- Payara Development Project ("**Payara Project**")
- Yellowtail Development Project ("**Yellowtail Project**")

Additionally, the Added Respondent has applied for (and expects to obtain) necessary Government approvals for the Uaru Development Project ("**Uaru Project**") (together with all other projects, the "**Projects**"). The Projects together represent one of the most significant worldwide investments in petroleum exploration, development, and production activities. They are anticipated to have a transformative effect over Guyana's economy. The use of affiliates and sub-contractors in the course of the Projects is vital to and an intrinsic part of the efficient and cost-effective prospecting for and production of petroleum.

59. The relationship between the Contractors and the Government of Guyana vis-à-vis each of the Projects is governed by the Petroleum Agreement.

***The Applicant's Submissions***

60. The Applicant argues that:

    (a) The Petroleum Agreement violates the PEPA and the FAAA; and

    (b) The sub-articles of Article 15 of the Petroleum Agreement complained of, and the exercise of the Minister's powers in agreeing to the said sub-articles are *ultra vires*.

61. At **paras. 3.26 and 3.27** of his Written Submissions to the Added Respondent, the Applicant sets out his definition of "*ultra vires*". While this definition is, for the most part, uncontroversial, it bears repeating that the Applicant has stated "*[t]he doctrine of ultra vires is regarded as the 'juristic basis' for court's review of the actions, omissions and decisions of public authority, bodies and persons*" in the context of a claim which, as currently pleaded, has been made under private law proceedings.

62. The task for the court in evaluating whether Ministerial conduct is "*ultra vires*" "*is essentially one of construing the content and scope of the*

*instrument conferring the duty or power upon the decision-maker*" (**De Smith's Judicial Review, para. 5-002**). The scope of the review will be determined mainly by the wording of the power and the context in which it was exercised (**Secretary of State for Education and Science v Tameside MBC [1977] A.C. 1014, 1047**).

***Ground 2.2 of the FDA alleges that Articles 15.1, 15.10, 15.11 and 15.12(ii) violate sections 10 and 51 of the PEPA by purporting to extend concessions to persons other than the licensees.***

63. At paragraphs 1(c) and 1(o) of the FDA, the Applicant also seeks Declarations that Articles 15.4 and 15.13 violate sections 10 and 51 of the PEPA.

64. The Applicant's Written Submissions make no attempt to construe the relevant statutory provisions in order to reach this conclusion.

65. The PEPA was enacted on 14th June 1986. Section 10 of the PEPA empowers the Minister to enter into an agreement with any person with respect to all or any of the following matters:

> "(a) the grant to that person or any other person (including a body corporate to be formed), identified in the agreement, of a license;
>
> (b) the conditions to be included in the license as granted or renewed;
>
> (c) the procedure to be followed by the Minister while exercising any discretion conferred upon him by or under this Act and the manner in which the discretion may be exercised;
>
> (d) any matter incidental or connected with the foregoing."

It should be noted that the foregoing section, and in particular subsection (d) confers broad discretion on the Minister.

66. Section 51(1) of the Act authorises the Minister assigned responsibility for Finance to "by order, which shall be subject to affirmative resolution of the National Assembly, direct that any or all of the written laws mentioned in subsection (2) shall not apply to, **or *in relation to***, a licensee where the licensee has entered into a production sharing agreement with the Government of Guyana" [*emphasis ours*].

67. As shown below, the Petroleum Agreement is entirely consistent with and does not violate sections 10 and 51 of the PEPA.

***Section 10***

68. At **para. 3.60** of his Written Submissions to Added Respondent, the Applicant interprets section 10 of the PEPA as requiring the beneficiaries of remissions, concessions, or waivers to be identified in the Agreement. This is a fundamentally incorrect interpretation of section 10 which at 10(a) requires *the person who is to be granted a licence* to be identified in the Agreement. Section 10(d) permits the Minister to enter into an Agreement with respect to any matter incidental or connected with the foregoing (the grant of a licence, conditions to be included in the licence, the procedure to be followed by the Minister in exercising and discretion under the Act and the manner in which the discretion shall be exercised). The grants of waivers, concessions, or remissions which are specifically addressed in section 51 of PEPA are indeed incidental and / or connected to the grant of a licence and may properly be the subject of a Petroleum Agreement.

***Section 51 of the PEPA***

69. The Applicant's written submissions have ignored or given no recognition to the wording of section 51 of the PEPA that the written laws 'shall not apply to, **or *in relation to***, a licensee'.

70. In Statutory Interpretation there is a presumption that every word in an enactment is intended to have a meaning.

In **Bennion, Baily and Norbury on Statutory Interpretation 8th Edition** at [21.2] the authors state:

> "Given the presumption that the legislature does nothing in vain, the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded. This applies a fortiori to a longer passage, such as a subsection or section."

In **The King against the Inhabitants of Great Bolton** [1828] 8 B&C 70, Lord Tenterden C.J. applying the above principle stated:

> "The safest course in this case is to give effect to the particular words of the enacting clause. Where the Legislature in the same sentence uses different words, we must presume that they were used in order to express different ideas."

71. It can only be that the insertion of the words "or in relation to" is intended to extend the power of the Minister to not apply any or all of certain written laws beyond the Licensee.

72. According to the **Cambridge English Dictionary**,[5] the words 'in relation to something' mean 'in connection with something'. **Webster's New Twentieth Century Dictionary of the English Language**, 2nd ed. defines "relation" as "3. connection or mode of connection" and "6. [pl] the connections between or among persons in business or private affairs…"

73. There are a number of judicial statements in the decisions of Courts of the Commonwealth which establish the following points of principle:

> The words **"in relation to"** are not only of wide import but are words of **connection** and the presence of such words require a nexus

[5] https://dictionary.cambridge.org/dictionary/english/in-relation-to (Accessed 7/8/2022)

between two subject matters or entities. However, the connection or relationship should not be remote or vague. The degree of connection will obviously depend on the context in which the words appear or operate whether in an agreement or statutory provision.

**Australian Cases**

74. The foregoing principles have been pronounced upon at the highest judicial level in Australia in the case of **PMT Partners Pty Ltd (In Liq) v Australian National Parks & Wildlife Service (1995) 184 CLR 301** where in delivering the judgement of the High Court presided over by Brennan CJ it was stated at paragraph 26 as follows:

> "Inevitably, the closeness of the relationship required by the expression "**in or in relation to**" in s 48 of the Act - indeed, in any instrument - must be ascertained by reference to the nature and purpose of the provision in question and the context in which it appears."

And at paragraph 65 as follows:

> "The connection which is required by the phrase "**in relation to**" is a question of degree. There must be some "**association**" which is "**relevant**" or "**appropriate**". The question of the relevance or appropriateness of the connection is a question which cannot be divorced from the particular statutory context."

75. Subsequently, in the case of **Australian Competition and Consumer Commission v Maritime Union of Australia and others [2001] 187 ALR 487** the Federal Court of Australia in dealing with the meaning of the words "**in relation to**" referred to the decision in the **PMT** case cited above and stated at paragraph 68 as follows:

> "It may be accepted that there will always be a question of degree involved where the issue is the relationship between two subject matters. The words "**in relation to**" are wide words which do no more, at least without reference to context, than signify the need for there to be some relationship or connection between two subject matters."

**English Cases**

76. Similar principles to those stated above have been enunciated in the English cases within the last couple of years. In the case of **Re National Crime Agency [2020] 1 WLR 3224** the English High Court in exercising an appellate jurisdiction in a case dealing with disclosure orders in relation to a money laundering investigation stated at **paragraph 50** per Davis LJ as follows:

> **"The words "in relation to" invariably are words of connection. But there can, in my opinion, be no set meaning as to the ambit and reach of that phrase. It will depend on the particular context, be it statutory or contractual, in which those words appear. As always, context is all."**

77. Further in the recent case of **Burnford v Automobile Association Developments Limited [2022] EWHC 368** Matthews J pronounced upon the meaning of the words "**in relation to**" at **paragraph 122** in the following terms:

> **"I accept that the words "in relation to" are words of connection, but it does not follow that the connection can be to any degree whatever. The degree of connection intended will depend on the context in which the words operate."**

78. The authority of the Minister to make an order to modify tax laws in accordance with section 51 of the PEPA by the amending Act 4 of 1992 evinces parliament's intention to recognize by this amendment the practice in production sharing agreements in the oil and gas sector. Evidence of such practice is set out at paragraphs 35- 38 of the Affidavit in Defence of the Added Respondent. While the Applicant in his Affidavit in Reply to the Added Respondent at paragraph 41 asserts that the Court "ought not to rely" on the Added Respondent's evidence of such practice as "a significant

factor in interpreting the words", the Applicant has not advanced any argument that the averments of Mr. Routledge are not reflective of the features of the petroleum industry or that some other features are applicable to the industry

79. Thus, the Court should consider Mr. Routledge's description of the way the upstream petroleum industry works through production sharing agreements in making a purposive and contextual interpretation of the legislation.

80. A purposive and contextual interpretation of section 51 of the PEPA and in particular the interpretation of the words "to, ***or in relation to,*** a licensee" must be intended to identify and benefit a group of persons other than the Licensee (but nevertheless connected to the Licensee). In the oil and gas industry, sub-contractors and affiliates are an integral part of petroleum operations requiring specialized services which they provide to Licensees (see **35 paras. and 36** of the Affidavit in Defence of Added Respondent).

81. In **R (Quintaville) v Secretary of State for Health [2003] UKHL 13**, Lord Bingham warned against an excessive focus on a literal approach to the provisions giving rise to the difficulty, which he said would encourage immense prolixity in drafting. He continued -

> *"It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will. Because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute [...] The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the historical context of the situation which led to the enactment."*

Lord Bingham's dicta in **Quintaville** have been applied in the Caribbean Court of Justice in **Smith v Sealy [2017] CCJ 13 (AJ)(Barbados)**.

82. In **R v Luckhurst [2022] UKSC 23**, the UK Supreme Court, in considering the meaning of legal expenses that "relate to an offence", noted at [23]:

> "The issue in this case is one of statutory interpretation so it is important at the outset to refer to the correct modern approach to statutory interpretation. In his restatement of the approach to statutory interpretation in **R (O) v Secretary of State for the Home Department [2022] UKSC 3; [2022] 2 WLR 343**, Lord Hodge (with whom Lord Briggs, Lord Stephens and Lady Rose agreed) clarified, at paras 28-29, that statutory interpretation is concerned to identify the meaning of the words used by Parliament and that, in ascertaining that meaning, the context and purpose of the provision are important: see to similar effect, for example, **Uber BV v Aslam [2021] UKSC 5; [2021]** ICR 657, para 70; and **Rittson-Thomas v Oxfordshire County Council [2021] UKSC 13; [2022]** AC 129, para 33. Lord Hodge also made clear, at paras 30-32, that, in carrying out their interpretative role, the courts can look not only at the statute but also, for example, at the explanatory notes to the statute, at relevant reports (such as those of the Law Commission) and, within the parameters set by **Pepper v Hart [1993] AC 593**, at ministerial statements reported in Hansard."

83. The "contextual" construction of statute is supported in **Craies On Legislation**, 10th edition:

> "Subliminal application of both approaches
>
> 18.1.7 A large part of the reason why it has never been particularly helpful to argue either for literalism or for purposivism in a rigid way is that in reality judges construing legislation always have and always will instinctively look both at the strict and superficial meaning of the words used and at the underlying purpose of the legislation, normally as a single, and largely subliminal, mental process. It is only in the rare cases where there is a tension between the two that the court needs to turn its mind actively to which should prevail, and in that contest it is now possible to say that the

purposive interpretation will generally prevail where it provides a clear answer, but that otherwise the strict meaning will have to prevail, even if the court is uncomfortable with the result. The application of both approaches is very likely to be automatic and subconscious in many cases, but one can occasionally find it expressed.

This balancing process is not new. Consider, for example, the following passage of Horridge J. in *Newman Manufacturing Co v Marrable* –

> "I think that I ought to look at the object of this section. I think it was intended to protect the English button trade. To protect that trade against the importation of completed buttons it would only be necessary for the definition and the sub-section to use the word 'buttons'. But in my view the statute was directed against those who imported goods which were not quite buttons, but upon which the bulk of the work had been done abroad, and very little remained to be done by the manufacturer in England. I think that was the reason why the words 'buttons . . . whether finished or unfinished' were used in this section.
>
> In my judgment these articles were unfinished buttons; they were going to be buttons, and they were going to have a shank put into them. The insertion of that shank only involved one-seventh of the total cost of the finished button. This article with a hole ready to have a shank put into it was an unfinished button within the meaning of section 9 of the Finance Act, 1928. I think therefore that these articles were dutiable under the section, and that my judgment must be for the defendant.



So even in a taxing statute, where it is a long-established rule to begin by construing the statute strictly against the Crown, it has always been more important to apply common sense to construction of the intention of the statute and its overall purpose than to apply any strict rules.

Contextual construction

18.1.7.1 The subliminal approach described above can perhaps best be described as giving a contextual construction to legislation, in the same way that we read and hear everything written and said in its context. The concept of context is increasingly frequently being expressed as the key to the approach that judges take to construction.

The purpose of the use of context is not to remove the clear and literal meaning of the words used by parliament but for the purpose of elucidation of construction of the legislation where there may be any doubt as to its meaning."

And at 20.1.20

> "Use of context
>
> An obvious but important rule for approaching the construction of a piece of legislation is to look at the provision concerned in the context of the legislation as a whole. This is a rule of ancient origin, and one which owes its authority to common sense.
>
> As Coke said –
>
> > "The office of a good expositor of an Act of Parliament is to make construction on all parts together, and not of one part only by itself *nemo enim aliquam partem recte intelligere potest antequam totum iterum atque iterum perlegerit".*
> >
> > It is the most natural and genuine exposition of a statute to construe one part of a statute by another part of the same statute, for that best expresseth the meaning of the makers . . . and this exposition is *ex visceribus actus."*
>
> As in the case of all these rules, however, the use of context is designed only for the elucidation of what the legislature has said where there is any doubt about its meaning. It is not a method of changing or undermining the clear meaning of words used."

84. The extension of the power of the Minister to provide that certain written laws shall not apply to, *or in relation to,* a licensee clearly evinces an intention of the legislature, even on a literal interpretation, that the non-application of the laws is intended to apply to and be extended beyond a licensee. The reference to a contextual approach to construction is only if it may be considered that there was any ambiguity or uncertainty as to the meaning of the words "or in relation to".

85. The PEPA is an Act to make provision with respect to prospecting for and production of petroleum and for matters connected therewith.[6] Petroleum operations, as evinced in the Affidavit of the Added Respondent, are carried out by the licensee itself as well as by persons and entities beyond the licensee.

86. At **para. 3.61** of his Written Submissions, the Applicant submits that "in relation to" should be read in the context of the empowering and interpreting sections of the PEPA but offers no comment on or explanation of how such contextual interpretation assists in ascertaining the meaning of the words. As section 51 extends the non-application of the written laws beyond the 'licensee', the definitions section of the PEPA in respect of "licensee" and "holder" relied on by the Applicant (Submissions of Applicant at paragraph 3.32) do not at all assist in the construction of the words.

87. Further, the Applicant in the last sentence of **para. 3.61** claims that the attempt to extend the Legislature's definition and treatment of Licensee under the PEPA to other classes of persons is contrary to section 10 of the PEPA which requires the beneficiaries of remissions, concessions, and waivers to be identified. It is respectfully submitted that section 10 of the PEPA simply authorises the Minister to enter into Agreements with persons whereby persons may be granted a licence, the conditions to be contained in the licence, the procedure to be followed by the Minister in exercising any discretion, the manner in which the discretion is to be exercised, and any matter incidental to or connected with the previous matters. Nowhere does section 10 require the beneficiaries of remissions, concessions, and waivers to be specifically identified.

88. At **para. 3.62** of his Written Submissions to the Added Respondent and in his Affidavit in Reply to the Added Respondent, the Applicant seeks to rely on "*the Hansard of the parliamentary debate on the Petroleum exploration*

[6] See the Long Title of the Act quoted at pp 38-39 infra.

*[sic] Act*," which, according to the Applicant "*records the minister as stating 'that the bill also make provision for the grant in appropriate cases of tax concessions and exemptions to holders of petroleum prospecting and production licenses and it also makes provisions for the remission of royalties in certain cases and, where applicable, the deferment of the payment of royalty.*"

89. It is commonly accepted in law that words or passages in a statute derive their meaning from their context. External aids may provide the setting in which the legislation was enacted, but they must be used with circumspection.

90. In *Pepper v Hart*, the House of Lords set three conditions on the use of Hansard as an aid to interpretation. First, the legislative provision must be ambiguous, obscure, or, on a conventional interpretation, lead to absurdity. None apply to the provisions under consideration here. Second, the material must be a statement or include one or more statements by a minister or other promoter of the Bill. Third, the statement must be clear and unequivocal on the point of interpretation which the court is considering (**Pepper v Hart [1993] AC 592**). The section of Hansard relied upon by the Applicant is far from clear and unequivocal on the point of interpretation which the court is considering. For example, simply because the Minister stated that there would be tax concessions and exemptions to holders of licences does not and cannot automatically exclude that such concessions and exemptions would and could be made available to a wider category of persons.

91. In fact, the observations referred to during the debate are that petroleum agreements are intended to encourage the development of commercial findings which would support a wide and liberal interpretation of "to, or in relation to, a licensee" as advocated by the Added Respondent.

92. In any case, the Applicant's attempted use of the Hansard in this proceeding is improper and ought not to be allowed by the Court. The Applicant has not in either of the two lengthy Affidavits filed by him in this proceeding

exhibited a copy of the Hansard (or that excerpt from the proceedings in the National Assembly on the 14th day of April, 1986 thereto). The simple effect of this is that the excerpt from the Hansard is not in evidence and therefore its contents cannot be relied upon in this proceeding. The Applicant cannot seek to invoke judicial notice of the Hansard. Section 24 of the Evidence Act, Cap. 5:03 of the laws of Guyana provides as follows:-

> "Every judge shall take judicial notice of the following facts…
>
> …the general course of proceeding and privileges of the National Assembly, and the date and place of its sittings, but **not transactions in its journals or minutes of proceedings**…" (our emphasis)

93. It is respectfully submitted that what the Applicant is attempting to do, by introducing the minutes of the proceedings of the National Assembly that day, precisely what section 24 prohibits. The Applicant cannot ask the Court to take judicial notice of the Hansard or its contents, so that if he has failed to introduce it in the legally admissible way, that is an end of the matter.

**Articles 15.1, 15.11 and 15.12 of the Petroleum Agreement extend tax exemptions to either or all of the Contractors, Affiliated Companies, Sub-Contractors, or Non-Resident Sub-Contractors.**

94. It is submitted that Minister's exercise of discretion to grant the exemptions set out in Article 15 of the Petroleum Agreement was not *ultra vires*. The legitimate use of discretion was set out at paras 30 – 41 of the Added Respondent's Affidavit in Defence.

95. As submitted above, when the canons of construction are applied to the meaning of "*in relation to*", this leads to the conclusion that "*in relation to*" a licensee means related entities or persons involved in the course of petroleum operations with a licensee. In particular, this is reflective of the

operations and conduct of the global petroleum industry. Affiliated Companies and Non-Resident Sub-Contractors are unquestionably "*related to*" licensees in the sense that they are inextricably linked with them in the conduct of petroleum operations pursuant to the licences held by licensees.

96. Having regard to the aforementioned judicial statements and guidance on the words **"in relation to",** it is submitted that those words which appear both in paragraph 3 of **Order No. 10 of 2016** as well as in **Section 51(1) of the PEPA** must be interpreted as including those entities which provide services **in connection with** the business and operations of the licensee. The words of the section are sufficiently wide to encompass not only the 3 entities to whom the petroleum license was granted but also extend to non-resident subcontractors and affiliated entities who are connected to and provide services to Esso, CNOOC the Contractors (Esso, CNOOC and Hess). This is because those subcontractors and affiliated entities form an integral part of the exploration and production of petroleum business being conducted by the 3 holders of the license. In other words, there is a clear and undeniable connection to a significant degree between the holder of the petroleum license and the subcontractors and affiliated entities.

97. Quite apart from the foregoing, it is submitted that a perusal of **Article 15 of the Petroleum Agreement** clearly indicates that it provides for an extension of concessions in the realm of tax to affiliated companies or non-resident subcontractors. In that regard, it is to be noted that at **Articles 15.2, 15.10, 15.11 and 15.12** there is repeated reference to affiliated companies and non-resident subcontractors. That terminology makes it very clear that it was contemplated that the tax concessions should be conferred upon and extended to those entities. That is because those entities are not only related to but also inextricably connected to the business of the Added Respondent and its other two partners who hold the license. The foregoing is clearly established as set out in the preceding paragraph.

98. This must have been Parliament's intention. The Applicant's interpretation would deny the words "*in relation to*" *effet utile*, and yet the Applicant offers no alternative interpretation as to what the words "*in relation to*" could mean.

***Ground 2.5 of the FDA alleges that Sections 49 and 51 of the PEPA violate the Financial Administration (and Audit) Act ('FAAA')***

99. The grounds do not state on what basis it is alleged that section 49 violates the FAAA but simply states that the section is *ultra vires* subsections 1A and 1B of Section 6 of the FAAA and is therefore null, void and of no legal effect. This argument is repeated by the Applicant at **para. 3.36** of his Written Submissions to Added Respondent.

The Applicant alleges that section 51 of PEPA is neither a tax act nor a subsidiary legislation.

100. An important part of the Applicant's definition of "*ultra vires*" at **para. 3.28** of the Applicant's Written Submissions is: "*any instrument, legislation, act or decision will be regarded as ultra vires if it is incompatible with the limits imposed by a superior element of the law in its effect or purpose*." A key factor in the assessment of the scope of "*ultra vires*" is a superior element of law. A piece of primary legislation shall not be interpreted so as to be inconsistent with other statutes. Where there is such an inconsistency, the court would strive to provide a harmonious interpretation such that each piece of primary legislation has a separate effect and neither is redundant or nullified.

101. The Applicant is asking the Court for a Declaration that section 49 of the PEPA violates section 6 (1) of the FAAA. In his Written Submissions to Added Respondent, at **para. 3.36** the Applicant expands this to submit that section 6 [of the FAAA] predates the PEPA and that in any case *the PEPA is not a tax act and any law purporting to remit any sum due to the revenue would therefore violate section 6(1)*. While the Applicant does not

expressly state the precise consequence of this, it is a reasonable inference that he wishes the Court to declare any such law invalid. He also gives evidence at paragraph 16 of the Affidavit in support of his FDA that "[S]ection 51 of the Petroleum Exploration and Production Act [the PEPA] is itself unlawful **since it violates section 6 of the Financial Administration and Audit Act** [FAAA]…"]…."

102. It is respectfully submitted that the only power a Court may have to strike down an Act of Parliament is where the Act is inconsistent with any provision(s) of the Constitution. This is because of **Article 65** of the **Constitution of Guyana** which provides as follows:-

> "Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Guyana."

103. This has been judicially described as conferring upon Parliament sovereign authority to enact legislation – see **Ibralebbe v The Queen** [1964] AC 900 per Radcliffe, VC at p. 923 –

> "The words 'peace, order and good government' connote in British constitutional language, the widest law making powers appropriate to a Sovereign."

104. This sovereign legislative power of Parliament is subject only to the Constitution and its provisions. The controlling words of Article 65 say just that. In the case of **Collymore and Abraham v. Attorney-General** [1967] 12 WIR 5, the Court of Appeal of Trinidad and Tobago considered whether Parliament was sovereign and whether and under what circumstances a court could strike down legislation. Wooding, CJ in his seminal ruling stated at p. 8 (letter D) –

> "Section 36 of the Constitution provides that '*subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of [Trinidad and Tobago*']. In my judgment, the section means what it says. And what it says, and

says very clearly, is that the power and authority of Parliament to make laws are subject to its provisions. Parliament may therefore be sovereign within the limits set, but if and whenever it should seek to make any law as the Constitution forbids it will be acting *ultra vires*."

105. Contrary to the Applicant's contention, any Act of Parliament (including the PEPA) will only be regarded as liable to be struck down if it is incompatible with the provisions of the Constitution - *not* for being allegedly in contravention of another Act.

106. The Applicant has also prayed at paras. (a), (b), (c), (d), (f), (g), (h), (i), (j), (k), (n), (o) of the reliefs in his FDA, for Declarations that several sub-articles of Article 15 of the Petroleum Agreement are ultra vires sections 10 and 51 of the PEPA and section 6(1) of the FAAA.

107. At paragraph (p) of the FDA, Applicant also seeks a Declaration that Order 10/2016 ("Section 51 Order)" made under section 51 of the PEPA is unlawful, null and void, and at paragraph (q) he seeks a Declaration that if the Section 51 Order is valid, it is only applicable to benefit the Contractors, not their sub-contractors, affiliated companies, etc.

108. The fiscal concessions (remissions, etc.) set out in Article 15 are not created by Article 15 as this is a contractual document (albeit one entered into between the Guyana Government and the Contractors) and does not have the force of law. It is only a law which can create the promised fiscal concessions. This is effected by a modification of the several tax laws set out in section 51(2) of the PEPA, which is itself done through a Ministerial Order issued in accordance with section 51, and which has been duly approved by a resolution of the National Assembly.

109. The fiscal concessions in Article 15 are therefore created by the Section 51 Order made under or in accordance with section 51(1) of the PEPA.

110. This means that while on the face of paragraphs (a) - (d) and (f) – (p) of the reliefs prayed in the FDA, the Applicant is attacking Article 15 (and its several sub-articles), and before he can obtain those reliefs, the Court would have to find that section 51 of the PEPA, and the Section 51 Order which was made pursuant to it, are unlawful, null and void.

111. However, as stated above, following ***Collymore and Abraham v. the Attorney-General***, the only basis on which section 51 of the PEPA (and the Section 51 Order which is made thereunder) can be voided is if it is shown to be inconsistent with some provision of *the Constitution.* Nowhere in his FDA or his Written Submissions has the Applicant made any such claim, and accordingly, the Declarations sought by him in this regard ought to be refused.

112. Further, the FAAA and PEPA are Acts of Parliament of equal status. The Applicant submits (see **para. 3.36** of the Written Submissions to Added Respondents) that section 6 of the FAAA was in existence by virtue of Act 39 of 1961 when the PEPA was enacted. However, it is important to note that although the FAAA is a statute which was originally enacted in 1962, the relevant provision in **section 6 (1)** set out above was enacted by an amendment as recently as 2003. In that regard it is to be noted that **section 51 of the PEPA** which was enacted by **Act 3 of 1986** preceded **section 6 (1) of the FAAA** in its present form.

113. Further, Parliament is at all times presumed to know the state of the law when legislation is enacted.

(See **Craies on Legislation – A Practitioner's Guide The Nature, Process, Effect and Interpretation of Legislation**, Sweet & Maxwell, 10th edn. at 2020.1.37 –

> "In construing legislation, the Courts will 'assume that the legislature knows the existing state of the law'."

And see also –

**Young v. The Mayor and Corporation of Royal Leamington Spa** (Privy Council (1883) 8 App.Cas. 517 @ 526, 527) where **Blackburn, J.** observed:

> "We ought in general, in construing an Act of Parliament, to assume that the legislature knows the existing state of the law."
>
> "A Court of law has only to inquire, what has the legislature thought fit to enact?"

114. The FAAA cannot have the effect of invalidating a subsequent Act of equal status. In any event, there is no inconsistency between the two Acts.

115. The Applicant asserts that the PEPA is not a 'tax Act' without submitting any authority on what is a 'tax Act'. It appears from the submission of the Applicant at paragraph 3.36 that, for an Act to be a "tax Act", the Act would have to impose a tax, rather than simply deal with taxation measures. It is submitted that the Applicant's interpretation of what amounts to a "tax Act" is unduly narrow and cannot reflect Parliament's intention in the FAAA for the following reasons:

(a) This interpretation would render the FAAA and the PEPA inconsistent with each other. As primary legislation of equal stature, it cannot be the case that Parliament intended for their provisions to be inconsistent. Accordingly, a harmonious interpretation must be strived for.

(b) The Applicant states that the FAAA arose "*to regulate the receipt control and disbursement of public monies*." However, the FAAA does not define a "tax Act" and does not specify that this definition would lay out the parameters of what is, or is not, a "tax Act".

(c) The Applicant's narrow interpretation of the FAAA would further appear to undermine the notion of parliamentary sovereignty. Subject to the parameters of the Constitution, Parliament may make or unmake any law. On the Applicant's interpretation, Parliament would be

restricted from addressing tax measures in primary legislation based on an undefined term ("*tax Act*") in the FAAA. This cannot be correct. Parliament is free to include tax measures in any and all types of primary legislation, and the fact that tax measures are addressed in such primary legislation would make that legislation a "tax Act".

No doubt a law imposing tax is a "tax Act" but such imposition laws are not the only legislation which may fall within the genus "*tax Act*".

116. To the best of the Added Respondent's knowledge, "tax Act" is not defined as a matter of the law of Guyana. In the absence of a restrictive definition of "tax Act" in the FAAA, it is submitted that any enactment which addresses tax matters can and should appropriately be described as a tax Act. The Interpretation and General Clauses Act, Cap. 2:01 defines an "Act" as meaning "any Act of Parliament…" Accordingly, a tax Act is simply an Act of Parliament that has provisions that deal with tax measures in some manner.

117. Part VI of the PEPA under which Section 51 is found is headed "MODIFICATION OF TAX LAWS" which styles and describes the legislation as a tax Act.

118. Subsection (1B) of the FAAA requires that the Act under which the subsidiary legislation is made must expressly permit the Minister to provide for such remission, concession, or waiver. Section 51, under which the Section 51 Order 10 0f 2016 is made, so provides.

119. The Written Submissions by the Applicant to Added Respondent make a number of inapposite arguments. The Applicant argues that the court's attention should be drawn to section 6 (1C) of the FAAA. Section 6 (1C) of the FAAA is an exception to the requirement for a remission to be provided for in a tax Act or subsidiary legislation. In circumstances where the relevant remissions were provided for in the Tax Order, section 6 (1C) of the FAAA respectfully is not relevant to the Court's analysis.

120. At **para. 3.50** of his Written Submissions to Added Respondent et seq. (D. Issue: Whether the Petroleum Exploration and Production Agreement is a Tax Act) the Applicant seeks to argue that the PEPA is not a "tax Act" based on recourse to Commonwealth authority which suggests that taxing statutes should be interpreted strictly. The issue as to whether a tax act should be interpreted strictly is irrelevant to the determination of what is a "tax act".

121. The shift in the courts' approach to the interpretation of taxing statutes (see, for example **Barclays Mercantile Business Financial Ltd v Mawson [2004] UKHL 51, [2005] 1 AC 684; UBS AG v HMRC; DB Group Services (UK) ltd v HMRC [2016] USC 13, [2015] 1 WLR 1005**) is as a response to aggressive and artificial tax avoidance schemes. In **Barclays** and **UBS**, the court adopted a purposive approach to taxing statutes in order to circumvent tax avoidance schemes which circumvented the spirit of the law. The Applicant's reference to the authorities of the Indian courts is the same.

122. The question of whether the PEPA is a tax Act is not an issue of interpretation relating to the correct interpretation of taxing statutes which the Contractors have sought to avoid. Rather, the PEPA and the Tax Order 10 of 2016 provide a clear and unambiguous remission. For the Applicant's arguments to be apposite, it would have to project an entirely different scenario, where the Contractors, their Affiliate Companies, and their Non-Resident Sub-Contractors were seeking to circumvent legislation attempting to tax them. Here, the Tax Order specifies that the remissions will be granted to *and in relation to* the licensees.

123. The Applicant further argues that the long title of the PEPA demonstrates that it is not a "tax Act". This is incorrect. As the Applicant notes, the long title of the PEPA states:

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

124. Taxation of petroleum operations is a key matter connected with prospecting for and production of petroleum, and it is industry-standard in the petroleum industry that fiscal advantages and incentives are offered by States in order to entice investment in, and extraction of, their petroleum resources. It is for this precise reason that the PEPA does address remission of taxation.

125. The Applicant contends at paragraph 3.47 of the Applicant's submissions, that:

> "The intention of Parliament in in (sic) enacting section 51 of the PEPA was not to modify the Acts identified in subsection (2) thereof, but to allow for their disapplication."

126. Section 51 follows a clear and express heading which states "Modification of Tax Laws". Further, the marginal note to section 51 states "Order to modify tax laws in respect of a licensee". In this regard, section 57(3) of the Interpretation and General Clauses Act requires Courts to construe marginal notes and "to give them effects as part of the written law". Accordingly, the foregoing submission by the Applicant is wholly misconceived and devoid of merit.

127. Further, the FAAA was originally enacted on 1st January 1962. The only relevant provision for the purposes of this case is **section 6** which has been amended from time to time. The first material amendment which is relevant to this case occurred on 22nd August 2003, the National Assembly enacted the **Fiscal Enactment (Amendments)(No. 2) Act** which *inter alia* repealed and replaced **section 6 of the FAAA**. That provision was subsequently amended but the relevant subsections now provide as follows:

> **(1) Save as may be expressly provided by any law for the time being in force, no expenditure involving a charge on the revenue shall be incurred; nor shall any sum due to the revenue be remitted, unless the Minister is**

**empowered by the specific provisions of the relevant tax Act to permit the remission or by Order or other subsidiary legislation made under such Act.**

**(1A)**

**Except as provided in subsection (1C) and (1CC),)** [7]**, no remission, concession, or waiver of tax is valid unless the remission is expressly provided for in a tax Act or subsidiary legislation.**

**(1B)**

**No remission, concession, or waiver of tax by Order or other subsidiary legislation is valid unless the Act under which the subsidiary legislation is made expressly permits the Minister to provide such a remission, concession, or waiver.**

128. First, we turn to consider **section 6(1)** of the FAAA which states as follows:

**<u>Save as may be expressly provided by any law for the time being in force</u>, no expenditure involving a charge on the revenue shall be incurred; nor shall any sum due to the revenue be remitted, unless the Minister is empowered by the specific provisions of the relevant tax Act to permit the remission or by Order or other subsidiary legislation made under such Act.**



129. As shown at page 40 above, section 51 of the PEPA was in force before section 6 (1) of the FAAA in the format set out above was enacted. It is

[7] The exceptions provided for in subsections (1C) and (1CC) do not apply and are therefore not relevant to these proceedings.

important to point out that although the FAAA is a statute which was originally enacted in 1962, the relevant provision in section 6 (1) set out above was enacted by an amendment in 2003. In that regard it is to be noted that section 51 of the PEPA which was enacted by Act 3 of 1986 preceded section 6 (1) of the FAAA in the format set out above. This means therefore that section 51 of the PEPA was a "law for the time being in force" at the time section 6 (1) of the FAAA in format set out above was enacted. Accordingly, the power of the Minister under section 51 of the PEPA was neither abrogated nor diminished by section 6 of the FAAA. Accordingly, the Added Respondent respectfully submits that it is pellucid that the Minister was empowered to make orders under section 51 of the PEPA and any such order does not amount to a violation of section 6 of the FAAA.

130. Secondly, it should be pointed out that apart from the foregoing, subsection (1) on the one hand and subsections (1A) and (1B) on the other hand deal with two different situations, which the Applicant has failed to recognize. Where Parliament enacts 3 different subsections, it is the Court's duty to identify the purpose and meaning of each provision. Further, it is important that the separate meanings should not be conflated because phraseology used in the 3 subsections appear at first glance to be similar. Indeed, quite to the contrary, there are 2 relevant presumptions of statutory interpretation which have to be considered. They are:

1. Parliament does not act in vain so that each subsection is presumed to address a different subject matter and have a different meaning; and
2. Where Parliament uses different words or phrases in legislation, it is presumed that Parliament intended that these different words or phrases would have a different meaning.

131. In support of the foregoing submissions, we refer to [21.2] of **Bennion, Baily and Norbury on Statutory Interpretation** and **The King against the Inhabitants of Great Bolton** mentioned at page 24 above.

Additionally, In **Bennion, Baily and Norbury on Statutory Interpretation 8th Edition at [21.3]** the authors state under the heading "Presumption that different words have different meanings" as follows:

> **"...different words or phrases are used to denote a different meaning unless the context otherwise requires. It is generally presumed that the drafter did not indulge in elegant variation, but kept to a particular term when wishing to convey a particular meaning.**
>
> **EXAMPLE**
>
> **In Trustee Solutions v Drubery Lewison J considering the phrases 'notice under hand' and 'notice in writing' held that the former phrase meant a signed notice and said:**
>
> > **'One would naturally expect the two different phrases to have different meanings'"**

132. Having regard to the foregoing, it is submitted that where Parliament has used different phrases in 3 subsections such as "relevant tax Act", "tax Act" and "the Act", the court must recognize and give effect to the different meanings intended by Parliament.

133. It is in the context of the aforementioned learning that we first turn to consider **section 6(1) of the FAAA.** The relevant words of that subsection are:

> **"nor shall any sum due to the revenue be remitted, unless the Minister is empowered by the specific provisions of the relevant tax Act to permit the remission or by Order or other subsidiary legislation made under such Act."**

134. That provision therefore provides for the exercise of the power of remission where **a sum is already due** under a particular Act. For the lawful exercise

of the power of remission of the taxes already due under a particular tax Act, the Minister must have an express power to make the remission under that act (being the relevant tax Act) or under subsidiary legislation made under that tax Act.

135. However, **subsections (1A) and (1B)** are different and use different words and phrases. They do not deal with the power to remit taxes already due. The relevant words used in **subsection (1A)** are as follows:

> **"no remission, concession, or waiver of tax is valid unless the remission is expressly provided for in a tax Act or subsidiary legislation."**

136. Having regard to those words, it is submitted that the general power to remit, concede or waive taxes (being those which may be due or not) must be provided for either **"in a tax Act"** or in **"subsidiary legislation".** The term **"subsidiary legislation"** in **subsection (1A)** is not followed by the words **"made under such Act"** as appears in **subsection (1)**. The importance of the inclusion of those words in **subsection (1)** and the omission of those words in **subsection (1A)** cannot be overemphasized. The subsidiary legislation referred to in **subsection (1A)** is not limited to **subsidiary legislation made under a tax** act but to **"subsidiary legislation"** generally.

137. **Subsection (1B)** goes on to provide the relevant condition precedent for the validity of the remission, concession, or waiver of tax under **subsidiary legislation** mentioned in **subsection (1A)** in the following terms:

> **"No remission, concession, or waiver of tax by Order or other subsidiary legislation is valid unless the Act under which the subsidiary legislation is made expressly permits the Minister to provide such a remission, concession, or waiver."**

138. The sole condition precedent to the lawful exercise of the power of remission is that the Order or other subsidiary legislation will only be valid if **"the Act"** (not **"the tax Act")** under which the subsidiary legislation is made expressly empowers the Minister to provide the remission, concession or waiver.

139. Having regard to the foregoing, there are 3 points of conclusive importance that cannot be overemphasised. First, the Section 51 Order (No. 10 of 2016) is subsidiary legislation in its own right. Second, that Order is made under an Act, which expressly permits the Minister to provide a remission, concession, or waiver of taxes, and the section which so empowers the Minister is Section 51 of the PEPA which has been referred to repeatedly. Third, the foregoing is best exemplified by the clear statement appearing at the very top of the **Section 51 Order:**

> **"In exercise of the power conferred upon me by Section 51 of the Petroleum (Exploration and Production) Act, I make the following orders"**

140. The order is thereafter signed by the Minister of Finance. Accordingly, the Section 51 Order is subsidiary legislation which has been made pursuant to the power expressly granted to the Minister by **section 51 of the PEPA.**


***Ground 2.6 of the FDA Alleges that the Section 51 Order is ultra vires, unlawful, null, void and of no legal effect***

141. At Ground 2.6(t), the Applicant alleges that the Section 51 Order is made under the PEPA which is not a tax act or other subsidiary legislation.

On 2nd August 2016, the Minister of Finance executed the Section 51 Order which specifically cites that it was made pursuant to **section 51 of the PEPA**:

> **2. In this Order-**
>
> **"Agreement" means the Petroleum Agreement between the Government of Guyana of the one part and Esso Exploration and Production Limited, CNOOCNexen Petroleum Guyana Limited and Hess Guyana Exploration Limited of the other part dated 27 June 2016 concerning the Stabroek Block, Offshore Guyana, which is a production sharing agreement;**
>
> **"Licencees" means Esso Exploration and Production Limited, CNOOCNexen Petroleum Guyana Limited and Hess Guyana Exploration Limited. Any reference to one Licensee shall be a reference to all of them and vice versa.**
>
> **3. For the purpose of giving effect to the Agreement, if so required by those provisions, any or all of the written laws mentioned in section 51 (2) of the Act shall not apply to or in relation to the Licensees or, as the case may be, shall so apply to the Licensees with all the adaptations, exceptions, modifications and qualifications to those laws as, at the date of this Order, are set out in the Agreement.**

142. The Section 51 Order was the instrument by which the Petroleum Agreement was embodied into the laws of Guyana by way of subsidiary legislation as has been recognized at paragraph 3.43 on page 37 of the Applicant's Submissions. It cannot be overemphasized that the Petroleum Agreement is therefore founded upon the laws of Guyana and the conduct of the Minister pursuant to that subsidiary legislation is empowered by the

laws of Guyana. Accordingly, the whole thrust of the Appellant's challenge invoking the ultra vires doctrine has to be considered in this context.

143. The Section 51 Order provides that the laws set out in section 51(2) of the PEPA do not apply to the Contractors. Paragraph 3 of the Order states:

> *"For the purpose of giving effect to the Agreement [the Petroleum Agreement] if so required by those provisions, any or all of the written laws mentioned in section 51(2) of the [Petroleum] Act shall not apply to or in relation to the Licensees or, as the case may be, shall so apply to the Licensees with all the adaptations, exceptions, modifications and qualifications to those laws as, at the date of this Order, are set out in the Agreement."*

144. It is difficult to understand the submission of the Applicant (to the Added Respondent **para. 3.43**) that the Order is *ultra vires* when the Order is made under the PEPA which specifically provides for the making of the Order. Section 51 of PEPA specifically authorizes the Minister responsible for finance by order to direct that any or all of the written laws shall not apply to, or in relation to, a licensee. The authority of the Minister to make the Order comes from the PEPA. The Order was then made and affirmed by the National Assembly in accordance with the PEPA.

145. The Applicant finds himself in the unenviable position that unless the Order can be determined to be *ultra vires* under the Act pursuant to which it is made (PEPA) there can be no legitimate challenge to the concessions, waivers or remissions. The Order can only be challenged under the Act under which it is made.

146. It has already been submitted that the FAAA does not govern the PEPA and is not a superior act but that in any event the remissions, concessions, or waivers pursuant to the Order made under the PEPA are in compliance with the FAAA Section 6 (1A) as the remission, concession or waiver is provided for in a tax Act or subsidiary legislation.

***Ground 2.3 of the FDA alleges that Articles 15.1, 15.4, 15.5, 15.7, 15.9, 15.10, 15.11 and 15.12 of the Petroleum Agreement violate section 6 of the Financial Administration (and Audit) Act.***

***Articles 15.4 and 15.5***

147. The Applicant states "*it is unknown to our tax laws for the government to pay the taxes of a taxpayer as Article 15.4 purports to do*". For the reasons set out **at paras 17 - 18** of the Added Respondent's Affidavit in Defence, the Applicant has misconstrued the operation of Article 15.4 of the Petroleum Agreement. The Added Respondent agrees with the submission of the Applicant at paragraph 6.4 of his Written Submission to the First Respondent that "the payment of tax by the GOG on behalf of the Contractor is not a waiver, remission or concession",

148. Articles 15.4 and 15.5 provide as a term of the Petroleum Agreement for the amount equivalent to the tax assessed to be paid directly to the appropriate authority (the Commissioner General, Guyana Revenue Authority) by the Minister. There is no waiver, remission, or concession of taxes. The Applicant has cited no authority which prohibits such contractual agreement between parties.

***Article 15.7***

149. Pursuant to Article 15.7 of the Petroleum Agreement, subject to the conditions of section 49 of the PEPA, the Minister may remit, in whole or in part, or defer payment of, any royalties payable by the Contractor. Article 15.7 is consistent with Section 49 of the PEPA under which the Petroleum Agreement is made.

150. For the reasons set out above, Article 15.7 does not violate the FAAA.

***Articles 15.1, 15.9, 15.10, 15.11 and 15.12***

151. Pursuant to Article 15.1 of the Petroleum Agreement, the Contractors, and their Affiliated Companies (as defined in the Petroleum Agreement)[8] are entitled to certain tax exemptions in respect of income derived from Petroleum Operations or in respect of any property held, transactions undertaken or activities performed for any purpose authorised or contemplated in the Petroleum Agreement.

Pursuant to Article 15.9 of the Petroleum Agreement, the Contractor is exempted from the Property Tax Act.

Pursuant to Article 15.10 of the Petroleum Agreement, the provisions of section 10(b) of the Corporation Tax Act shall not apply to the Contractor with respect to any payments made to any Affiliated Companies or Non-Resident Sub-Contractors (as defined in the Petroleum Agreement).[9]

Article 15.11 of the Petroleum Agreement provides that there shall be no tax, duty, fee, withholding, charge or other impost applicable on interest payments, dividends, deemed dividends, transfer of profits or deemed remittance of profits from the Contractor's, Affiliated Companies' or Non-Resident Sub-Contractor's branch(es) in Guyana to their foreign or head office(s) or to Affiliated Companies.

Article 15.12 of the Petroleum Agreement provides that the expatriate companies of the Contractor, its Affiliate Companies and Non-Resident Sub-Contractors shall be liable to pay personal income tax in Guyana on income earned in Guyana, but expatriate employees shall not be liable for



---

[8] Petroleum Agreement, Article 1.1 defines "Affiliated Companies" as, in relation to the Contractor, a company or corporation: (i) which is, directly or indirectly controlled by the Contractor; (ii) which directly or indirectly, controls the Contractor; or (iii) which is, directly or indirectly, controlled by a company or corporation that also, directly or indirectly, controls the Contractor.

[9] Article 1.1 of the Petroleum Agreement defines "Non-Resident Sub-Contractor" as a Sub-Contractor the control and management of whose business are exercised outside Guyana. A "Sub-Contractor" is also defined in Article 1.1 as any company or entity which provides services to the Contractor in connection with Petroleum Operations.

personal income tax in Guyana for 183 days or fewer on a cumulative basis in the tax year of assessment.

152. First, the Applicant's apparent attempt to characterize the remissions as being contained in the Petroleum Agreement is misguided. While the Petroleum Agreement records the tax exemptions granted to the Contractor, Affiliated Companies, Sub-Contractors, and/or Non-Resident Sub-Contractors, the exemptions were, in fact, granted pursuant to the Section 51 Order, which was made under the PEPA. Accordingly, the Minister was empowered by the specific provisions of the PEPA to permit the remission by the Section 51 Order. The Petroleum Agreement and in particular Article 15 only follow or repeat the provisions of the Section 51 Order which is made in accordance with section 51 of the PEPA.

153. Secondly, for the reasons set out above, the above articles of the Petroleum Agreement are intra vires the PEPA under which the Agreement was made and cannot be declared to be violative of the FAAA.

***Ground 2.4 of the FDA alleges that Article 15.12 of the Petroleum Agreement violates the Constitution of the Co-operative Republic of Guyana and Prevention of Discrimination Act, Cap. 99:08***

154. At paragraph 1.1 on page 7 of his written submissions which are addressed to the Added Respondent, the Applicant expressly abandoned the Declaratory relief sought in relation to the Constitution and the Prevention of Discrimination Act. Accordingly, the Applicant's grounds of challenge to the provisions of the Petroleum Agreement are now limited to the provisions of the PEPA and the FAA.

155. In his Written Submissions to the Added Respondent, the Applicant alleges that the Minister has "*further discriminated in favour of expatriate employees in granting concessions not available to Guyanese.*" For the avoidance of doubt, the Added Respondent rejects this assertion as baseless,

but does not seek to make detailed submissions thereon on the basis that the Applicant is no longer pursuing the Declarations pertaining to alleged discrimination.

## CONCLUSION

156. For the reasons advanced above and summarised below, the Court should dismiss the FDA in its entirety:

(1) The proceedings before the Court are private law proceedings for Declaratory reliefs as set out at paragraphs 1(a) - (q) of the FDA. which was brought in the regular jurisdiction of the High Court. The Court has no jurisdiction to grant the reliefs sought as the FDA alleges breach of public rights without claiming infringement of Applicant's private rights whereby he has suffered any special loss, damage or injury over and above that of the public.

(2) The Court ought not to exercise its undoubted discretion to convert the Applicant's private law proceedings into Judicial Review proceedings for the following reasons:-

- The reliefs sought do not fall within the ambit of the Judicial Review Act.
- Judicial Review remedies are discretionary and the Applicant is guilty of such gross, inordinate, and unexplained delay of over or certainly almost 5 years which would make it unfair, as well as highly detrimental to due or good administration to grant the reliefs sought at this time.
- The Applicant is disentitled from seeking Declaratory relief in either private law or Judicial Review proceedings as he has shown no special loss or damage which is a prerequisite to such relief in either category of proceedings.

(3) Section 51 (1) of the PEPA includes the words "or in relation to" immediately after the word "licensee". In statutory interpretation, there is a presumption that every word in an enactment is intended

to have a meaning. So the words "*in relation to*" must be given a meaning. This is the duty of a court considering the matter. The insertion of the words "or in relation to" in section 51(1) of the PEPA is intended to extend the power of the Minister to dis-apply any or all of certain written laws beyond the Licensee. The words **"in relation to"** are not only of wide import but are words of **connection** and the presence of such words require a nexus between two subject matters or entities. If a purposive or contextual approach to construction of section of the Petroleum Act is taken, the context is the normal or usual practice or practices undergirding the global petroleum industry. The evidence is that the use of sub-contractors, affiliated companies, and such is vital to achieving efficient cost-effective petroleum operations. This is universal practice. So if the words are words of connection intended to associate or connect two separate entities which must necessarily be closely related, it is very logical to construe them as extending the tax modifications granted to one entity – licensees – to other closely/intimately related entities – subcontractors and affiliated companies. Especially where production sharing agreements such as the Petroleum Agreement at issue here require such an interpretation and approach in order to function effectively.

(4) The Applicant seeks Declarations that sections 49 and 51 of the PEPA violate section 6 of the FAAA and are presumably, null and void. However, Article 65 of the Constitution of Guyana grants Parliament the sole monopoly on enacting legislation for Guyana, and so Parliament in its legislative function is sovereign save and except where the Acts it enacts conflict with the Constitution. As the Applicant does not allege any breach of the Constitution by sections 49 and 51 of the PEPA, the court has no jurisdiction to grant the reliefs the Applicant seeks.

(5) The Applicant alleges at Ground 2.6 of the FDA that the Section 51 Order (Order 10 of 2016) is ultra vires, unlawful, null, void and of no legal effect. However, the Section 51 Order is made under the PEPA which specifically provides for the making of the Order. The authority of the Minister to make the Section 51 Order comes from the PEPA. The Section 51 Order was then made and affirmed by the National Assembly in accordance with the PEPA. The doctrine of ultra vires requires that unless the Order can be determined to be *ultra vires* the Act under which it is made (the PEPA) there can be no legitimate challenge to the concessions, waivers or remissions. The Section 51 Order can only be challenged under the ultra vires doctrine if it can be shown to contravene or exceed the scope of the Act under which it is made.

(6) The Applicant at Ground 2.3 of his FDA alleges that Articles 15.1, 15.4, 15.5, 15.7, 15.9, 15.10, 15.11 and 15.12 of the Petroleum Agreement violate section 6 of the Financial Administration (and Audit) Act.

***Articles 15.4 and 15.5***

The Applicant states "*it is unknown to our tax laws for the government to pay the taxes of a taxpayer as Article 15.4 purports to do*". Articles 15.4 and 15.5 provide as a term of the Petroleum Agreement for the amount equivalent to the tax assessed to be paid directly to the appropriate authority (the Commissioner General, Guyana Revenue Authority) by the Minister. There is no waiver, remission or concession of taxes. The Applicant has cited no authority which prohibits such contractual agreement between parties.

***Article 15.7***

Pursuant to Article 15.7 of the Petroleum Agreement, subject to the conditions of section 49 of the PEPA, the Minister may remit, in whole or in part, or defer payment of, any royalties payable by the Contractor. Article 15.7 is consistent with Section 49 of the PEPA under which the Petroleum Agreement is made.

***Articles 15.1, 15.9, 15.10, 15.11 and 15.12***

Pursuant to Article 15.1 of the Petroleum Agreement, the Contractors, and their Affiliated Companies are entitled to certain tax exemptions in respect of income derived from Petroleum Operations or in respect of any property held, transactions undertaken or activities performed for any purpose authorised or contemplated in the Petroleum Agreement.

Pursuant to Article 15.9 of the Petroleum Agreement, the Contractor is exempted from the Property Tax Act.

Pursuant to Article 15.10 of the Petroleum Agreement, the provisions of section 10(b) of the Corporation Tax Act shall not apply to the Contractor with respect to any payments made to any Affiliated Companies or Non-Resident Sub-Contractors.

Article 15.11 of the Petroleum Agreement provides that there shall be no tax, duty, fee, withholding, charge or other impost applicable on interest payments, dividends, deemed dividends, transfer of profits or deemed remittance of profits from the Contractor's, Affiliated Companies' or Non-Resident Sub-Contractor's branch(es) in Guyana to their foreign or head office(s) or to Affiliated Companies.



Article 15.12 of the Petroleum Agreement provides that the expatriate companies of the Contractor, its Affiliate Companies and Non-Resident Sub-Contractors shall be liable to pay personal

income tax in Guyana on income earned in Guyana, but expatriate employees shall not be liable for personal income tax in Guyana for 183 days or fewer on a cumulative basis in the tax year of assessment.

Firstly, the Applicant is misconceived in characterising the remissions as being contained in the Petroleum Agreement. While the Petroleum Agreement records the tax exemptions granted to the Contractor, Affiliated Companies, Sub-Contractors, and/or Non-Resident Sub-Contractors, the exemptions were, in fact, granted pursuant to the Section 51 Order, which was made under the PEPA which is an Act of Parliament. Accordingly, the Minister was empowered by the specific provisions of the PEPA to permit the remission by the section 51 Order. The Petroleum Agreement and in particular Article 15 only follow or repeat the provisions of the Section 51 Order which is made in accordance with section 51 of the PEPA.

Secondly, for the reasons set out above, the above articles of the Petroleum Agreement are *intra vires* the PEPA under which the Agreement was made and therefore cannot be declared to be violative of the FAAA, and in particular the tax exemptions in Article 15 reflect and are given legislative effect by the provisions of the Order which is made pursuant to section 51 of the PEPA.

152. Based on the foregoing. the prayers for the reliefs sought by the Applicant at paragraphs 1 (a) to (s) in his FDA dated the 12th day of January, 2022, ought to be refused, with Costs.

Respectfully submitted:

**Andrew M.F. Pollard, SC.**

**Edward A. Luckhoo, SC.**

Dated the 2nd day of August, 2022.

**2022-HC-DEM-CIV-FDA-47**

**IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE**

**REGULAR JURISDICTION**

**BETWEEN:**

**GLENN LALL**

**Applicant**

**-and-**

**THE ATTORNEY-GENERAL OF GUYANA**

**Respondent**

**-and-**

**ESSO EXPLORATION AND PRODUCTION (GUYANA) LIMITED**

**Added Respondent**

---

**WRITTEN SUBMISSIONS BY COUNSEL FOR ADDED RESPONDENT**

---

**Andrew M.F. Pollard, SC,**
Messrs. **Hughes, Fields & Stoby,**
62 Hadfield and Cross Streets,
Werk-en-Rust,
Georgetown.
Tel: +592-227-7814
Email: amfpollard@gmail.com

**Edward A. Luckhoo, SC,**
Messrs. **Luckhoo & Luckhoo,**
Lot 1 Croal Street,
Stabroek,
**Georgetown.**
Tel: +592-226-9370
Email: luckhoo@solutions2000.net

**2022-HC-DEM-CIV-FDA-47**

**IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE**

**REGULAR JURISDICTION**

**BETWEEN:**

**GLENN LALL**

**Applicant**

**-and-**

**THE ATTORNEY-GENERAL OF GUYANA**

**Respondent**

**-and-**

**ESSO EXPLORATION AND PRODUCTION (GUYANA) LIMITED**

**Added Respondent**

## LIST OF AUTHORITIES OF THE ADDED RESPONDENT

1. The Declaratory Judgment, Zamir & Woolf 2nd edn– paras 2.25, 5.12, 5.18, 5.19
2. Gouriet v Union of Post Office Workers [1977] 3 All ER 70
3. Judicial Review Handbook by Michael Fordham QC, 6th edn
4. Administrative Law by Dr. I.P. Massey -p. 277
5. Judicial Remedies in Public Law by Sir Clive Lewis, 5th edn, paras 12-001, 12-009 - 12-012
6. R. v. North West Leicestershire District Council et anor, ex parte Moses; [2000] AER (D) 526
7. Judicial Review Handbook by Michael Fordham QC, 5th edn para 26.4, 26.4.2
8. R v Secretary of State for Trade and Industry ex p Greenpeace Ltd [1998] Env LR 415
9. Attorney General v Martinus Francois LC 2004 CA 3, Civil Appeal No. 37 of 2003, St. Lucia

10. De Smith's Judicial Review para. 5-002
11. Secretary of State for Education and Science v Tameside MBC [1977] AC 1014
12. Bennion, Baily and Norbury on Statutory Interpretation 8th edn. Para 21.2
13. The King against the Inhabitants of Great Bolton [1828] 8 B&C 70
14. Cambridge English Dictionary (https://dictionary.cambridge.org/dictionary/english/in-relation-to)
15. Webster's New Twentieth Century Dictionary of the English Language 2nd Edn
16. PMT Partners Pty Ltd (In Liq) v Australian National Parks & Wildlife Service (1995) 184 CLR 301
17. Australian Competition and Consumer Commission v Maritime Union of Australia and others [2001] 187 ALR 487
18. Re National Crime Agency [2020] 1 WLR 3224
19. Burnford v Automobile Association Developments Limited [2022] EWHC 368
20. R (Quintaville) v Secretary of State for Health [2003] UKHL 13
21. Smith v Sealy [2017] CCJ 13 (AJ)
22. R v Luckhurst [2022] UKSC 23,
23. Craies on Legislation 10th edn paras 18.1.7, 20.1.20, p 794
24. Pepper v Hart [1993] AC 592
25. Ibralebbe v The Queen [1964] AC 900
26. Collymore and Abraham v Attorney General [1967] 12 WIR 5
27. Young v the Mayor and Corporation of Royal Leamington Spa (1883) 8 App.Cas. 517
28. Barclays Mercantile Business Financial Ltd v Maswson [2004] UKHL 51, [2005] 1 AC 684
29. UBS AG v HMRC; DB Group Services (UK) ltd v HMRC [2016] UKSC 13, [2016] 1 WLR 1005

**2022-HC-DEM-CIV-FDA-47**

**IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE**

**REGULAR JURISDICTION**

**BETWEEN:**

**GLENN LALL**

**Applicant**

**-and-**

**THE ATTORNEY-GENERAL OF GUYANA**

**Respondent**

**-and-**

**ESSO EXPLORATION AND PRODUCTION (GUYANA) LIMITED**

**Added Respondent**

**LIST OF AUTHORITIES OF THE ADDED RESPONDENT**