Easter Term

[2020] UKPC 13

Privy Council Appeal No 0068 of 2018

JUDGMENT

The Minister of Energy and Energy Affairs (Respondent) vMaharaj and another (Appellants) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Hodge

Lord Lloyd-Jones

Lord Briggs

Lord Sales

Lord Hamblen

JUDGMENT GIVEN ON

11 May 2020

Heard on 2 April 2020

Appellants	Respondent
Peter Knox QC	Thomas Roe QC
Ramesh L Maharaj SC	
Robert Strang	
(Instructed by BDB Pitmans LLP)	(Instructed by Charles Russell Speechlys LLP (London))

LORD SALES:

1.

This appeal concerns two cases involving the suspension of licences for retail marketing of petrol. The appellants contend that the respondent Minister, who purported to suspend their licences, had no legal power to do so. Alternatively, they say that the Minister acted unfairly or in breach of their legitimate expectations as to procedure by the manner in which he effected the suspension. The appellants claim damages for loss they have suffered as a result of the suspension and what they say amounted in substance to an unlawful revocation of the licences.

The Petroleum Act and the Petroleum Regulations

2.

The Petroleum Act (Act 46 of 1969; Chapter 62.01)(or "the Act") is the statute which governs the regulation and licensing of all "petroleum operations" in Trinidad and Tobago which, as defined in the Act, cover the whole range of operations relating to the various phases of the petroleum industry, from exploration for oil and gas, through refining and production of petroleum products, to wholesale supply and the retail sale of petrol. Section 29 confers power on the President to make regulations as necessary or expedient for carrying out the purposes of the Act. Pursuant to that power, the President has promulgated the Petroleum Regulations ("the Regulations").

3.

Section 5(1) of the Act provides, in relevant part, "[s]ubject to this Act, the Minister is charged with the general administration of this Act …". However, the Act also assigns certain functions to the President.

4.

Section 6(1) of the Act provides that, subject to the Act, no person shall engage in petroleum operations on land or in a submarine area unless he first obtains a licence as provided for in the Act or the Regulations. The Regulations make detailed provision regarding various types of licence for different kinds of petroleum operations, including in relation to competitive bidding for certain licences, the duration of licences and the fees payable in respect of them.

5.

As appears from the scheme of the Act and the Regulations, they contemplate and are designed to cater for and encourage major and also less substantial infrastructure investments by private operators. So, for example, the term for which an Exploration and Production (Private Petroleum Rights) Licence may be granted is 20 years, subject to renewals for successive periods of 20 years (regulation 13(2)); the term for which an Exploration and Production (Public Petroleum Rights) Licence may be granted is six years, with the possibility of renewal for a term not exceeding 25 years, according to the discretion of the Minister (regulation 13(3)-(5)); and the term for which licences for refining, pipeline or petrochemical operations may be granted is 20 years, subject to renewals for successive periods not exceeding ten years (regulation 15(1)). Towards the other end of the range of petroleum operations, regulation 15(2) provides:

"In the case of marketing licences granted in respect of wholesale transactions, the original period shall be ten years, in the case of peddling and retail transactions one year, and in the case of bunkering ten years. The licences shall be renewed for successive periods each of ten years, one year and ten years, respectively."

6.

Regulation 16 provides that for the purpose of regulation 15, all renewals shall be upon such terms and conditions as may be agreed at the time of the renewal. Regulation 23(1) provides that "[e]ach licence shall contain such terms and conditions as the Minister may, subject to the provisions of the Act and these Regulations, consider necessary". Regulation 24 provides that "[i]f a licence is not executed within one hundred and eighty days of the approval of the application, the right of the applicant to such licence shall be deemed to have lapsed, unless the delay is not due to the fault of the applicant".

7.

The Regulations make provision for certain terms and conditions to be incorporated in licences. Regulation 42 sets out general obligations of a licensee, including that he shall carry out his

operations with due diligence and act in accordance with sound petroleum industry practice in the conduct of all operations, comply with all instructions issued from time to time by the Minister that are reasonably necessary for securing the health, safety and welfare of persons employed for the purpose of operations, and have regard at all times in the conduct of operations to the public interest and to the rights and interests of Trinidad and Tobago (regulation 42(2)(b), (k) and (m), respectively). Regulation 94 provides that a person who contravenes the Regulations is liable on summary conviction to a fine, except where the provision by or under which the offence is created provides the penalty to be imposed.

8.
Section 15 of the Act provides that an Exploration and Production (Public Petroleum Rights) Licence confers on the licensee the exclusive right in respect of the licensed area to search for, drill and get petroleum therein and to dispose of petroleum so obtained, subject to the terms of the licence. Section 16 provides that "[w]ithin two months after the expiration or sooner determination" of such a licence, and without payment of any compensation, the licensee shall among other things deliver up to the Minister in good order, repair and condition and fit for further utilisation all buildings, works and equipment, that is to say shall deliver to the Minister the infrastructure works the licensee has installed. The willingness of such a licensee to take the commercial risk of installing infrastructure from which the state will benefit will obviously be affected by the protections he may have regarding the termination or suspension of his licence.

9.
That is true for other licensees as well. In the case of licences for retail marketing of petrol at petrol stations such as are in issue on this appeal, the cost of maintaining a petrol station in good operational order will only be commercially viable if the licensee has a reasonable degree of assurance that his petrol station will remain open pursuant to the licence so that he is able to sell petrol to the public.

10.
Section 9(1) of the Act provides that where the Minister decides to grant a licence, he shall do so "in accordance with this Act and the Regulations and upon such terms and conditions as he considers appropriate".

11.
Sections 17 to 22 of the Act are provisions grouped together under the heading "Default and Disputes". Section 17 is central to this appeal. It provides:

"17(1) A licence shall contain appropriate sanctions including the revocation of the licence, in case of failure by a licensee to fulfil the obligations undertaken by him.

(2) The cases in which revocation of a licence are to be provided for therein in accordance with subsection (1) may include cases in which -

(a) there is failure on the part of an Exploration and Production Licensee to fulfil the work obligations concerning commencement of exploration operations and drilling as specified in the Regulations or failure to meet expense obligations within two consecutive three-year periods;

(b) there is failure on the part of an Exploration and Production Refining, Pipeline, Marketing or Petrochemical Licensee to execute such work obligations as shall have been undertaken by him, under the terms of his licence, within the time limits prescribed therein;

(c) there is breach of other terms and conditions contained in the licence in a material particular, the Minister being sole judge of such materiality;

(d) there is failure on the part of the licensee to make the payments stipulated as Minimum Payment, Rent, Royalty, Petroleum Impost or Taxes within three calendar months of the date on which such payments fall due;

(e) there is failure on the part of the licensee to pay any sum which may have been awarded against him in arbitration proceedings carried out in accordance with this Act within three months of the date fixed in the award, provided that notice shall have been duly given to him of his obligation to make such payment;

(f) the licensee becomes bankrupt or goes into voluntary or involuntary liquidation; or

(g) there is wilful misrepresentation by a licensee in any material particular in the process of applying for the licence.

(3) In cases falling under subsection (2)(c) the licence may provide that, if in the opinion of the Minister the breach committed is capable of remedy, the Minister shall, in giving notice require the licensee to remedy the breach and pay compensation therefor, within such time as the Minister may specify.

(4) Subject to subsection (5), where a licence is revoked under any provision contained therein, all rights, licences, privileges and powers conferred upon the licensee by that licence, and all grants and leases of State Lands held for the purpose of carrying out petroleum operations under that licence shall determine, if in each case other than that at subsection (2)(f)the Minister has given notice of noncompliance to the licensee reasonably in advance of such revocation specifying the particular ground of the exercise of the right of revocation.

(5) Such determination shall not affect any obligation or liability that may have been incurred by the terms of the licence.

(6) In the case of serious and repeated violations of any of the terms and the conditions of his licence or of any law or directions of the Minister, the President may order such of the operations provided for in the licence as he may think fit to be temporarily discontinued.

(7) For the purposes of this section, the Minister may authorise public officers and other persons to inspect and carry out studies regarding the manner in which operations provided for in any licence are being carried out, and to report to him thereon."

12.
Section 18 provides:

"18(1) Where in the case of revocation under a provision in the licence made in accordance with section 17(2)(c) or (g) but no other, a licensee is aggrieved by the decision of the Minister to revoke the licence, he may have recourse to arbitration in accordance with this Act.

(2) The licence may provide that in any particular case where it may be revoked and recourse to arbitration is had under subsection (1), revocation of the licence shall be of no effect, unless confirmed by the award of such arbitration, except that where it does not so provide the revocation shall take effect and all petroleum operations authorised by the licence shall cease, subject to the award."

13.
Section 19 provides for protection of the licensee in cases of force majeure. Section 20 provides, among other things, that any difference or dispute between a licensee and the Minister that is required under the Act or Regulations to be settled by arbitration shall be determined by arbitration, and that if a licensee proceeds otherwise than is provided in the Act, the Minister may apply to stay the proceedings. Section 22(1) and (2) provide:

"22(1) Except with the consent of the President the activities which have given rise to arbitration shall be discontinued, until the issue of any award.

(2) If the award recognises that the complaint was justified, provision shall be made therein for any necessary reparation in favour of the complainant."

14.
A further provision of the Act on which Mr Thomas Roe QC for the Minister placed reliance in his submissions is section 33. So far as relevant, that provides:

"33(1) Except as may be otherwise provided for by the licence, any permission, consent or authority granted under this Act and the Regulations or any Rules or Orders made thereunder -

(a) may be either general or specific;

(b) may be revoked or varied by the Minister;

(c) may be absolute or conditional;

(d) may be limited so as to expire on a specified date, unless renewed; and

(e) shall, except as otherwise provided in this Act or the Regulations, be published in such a way as in the opinion of the Minister to give any person entitled to the benefit of it an adequate opportunity of getting to know of it, unless in his opinion publication is not necessary for that purpose.

…

(4) Any document stating that any permission, consent, authority or direction is given under any of the provisions of this Act or the Regulations by the Minister, and purporting to be signed by him or, where section 5(2) applies, by his delegate, shall be evidence of the facts stated in the document."

The Interpretation Act, the Constitution and other relevant statutes

15.
In his submissions before the Board the Minister seeks to rely on section 45 of the Interpretation Act (Act 2 of 1962; Chapter 3.01), as he did in the courts below. The relevant provisions of the Interpretation Act are sections 2(1), 3 and 45(3)(b):

"2(1) Every provision of this Act extends and applies to every written law passed or made before or after the commencement of this Act, unless a contrary intention appears in this Act or the written law.

…

3. Nothing in this Act shall be construed as excluding the application to a written law of a rule of construction applicable thereto and not inconsistent with this Act.

…

45(3) Without prejudice to the generality of subsection (2), where a written law confers power -

…

(b) to grant a licence, State lease, permit, authority, approval or exemption, such power shall include power to refuse to make such grant, power to impose reasonable conditions subject to which such grant is made and power to suspend or cancel such grant; but nothing in this paragraph shall affect any right conferred by law on any person to appeal against any decision with respect to such grant; …"

16.
Reference should also be made to section 25 of the Environmental Management Act and section 45 of the Fire Service Act. Section 25 confers a power on the Environmental Management Authority to take appropriate measures to prevent or mitigate adverse effects from pollution on human health or the environment. Section 45 provides that in cases where he is concerned that there is a risk of fire on premises the Chief Fire Officer may apply to the court, including on a without notice basis if the danger is imminent, for an order to close the premises or for the cessation of any occupancy or business carried on there.

17.
Section 4(a) of the Constitution of the Republic of Trinidad and Tobago ("the Constitution"), in relevant part, recognises and declares as a fundamental human right and freedom "the right of the individual to … enjoyment of property and the right not to be deprived thereof except by due process of law".

The factual background

18.
The appellants are brothers, Adesh Maharaj ("Adesh") and Prakash Maharaj ("Prakash"). Each of them owned and operated a petrol service station business. Adesh's service station was located in King's Wharf, San Fernando ("the King's Wharf station"). Prakash's service station was located in Fyzabad ("the Fyzabad station"). Adesh and Prakash each received the petrol for their stations under petrol supply arrangements with the Trinidad and Tobago National Petroleum Company Ltd ("NP").

19.
In the late 1960s the appellants' father, Sookdeo Batton Maharaj ("Mr S B Maharaj") leased the King's Wharf station from NP and operated it under annual retail licences issued by the Minister. In March 2007 Mr S B Maharaj died and Adesh took over the operation of the station. Thereafter, until 2010, the Minister continued to issue annual licences in the name of S B Maharaj, but in the knowledge that the annual fee was paid by Adesh and that the licences were in fact to allow Adesh to operate the station. The licences were in standard form. They were expressed to be subject to conditions set out in them, including matters such as the location of gasoline pumps and storage places for the petrol and the keeping of accurate business records. There was a requirement that the licensee "shall comply with the provisions of the Act and Regulations and any rules or orders made thereunder". They also provided for the licences to expire on a specified date, but that they "may be renewed for successive periods of one year". The licences did not state that they were subject to any power of revocation or suspension on the part of the Minister.

20.

In 1996, Prakash, Adesh and their parents acquired the freehold of the Fyzabad station. From late 2000, Prakash became the NP authorised dealer for this station and paid for and was issued with annual retail licences in his name, on the same standard conditions as those issued to Mr S B Maharaj and Adesh.

21.
The Fyzabad station and the King's Wharf station were subject to regular routine inspections by both NP representatives and Ministry officials. Adesh and Prakash say that over the years they made changes to the petrol storage set-ups at their respective service stations which were known to NP and the Minister from their inspections. The Minister denies this.

22.
In 2010, the Minister decided that the terms and conditions of retail marketing licences needed to be reviewed. From that time, the Minister ceased to issue new licence documents. However, service station operators, including Adesh and Prakash, continued to pay their annual licence fees to the Minister. The Minister issued receipts acknowledging the payments, continued to carry out inspections and allowed the operators to continue trading as before.

23.
As regards the Fyzabad station, according to Mr Peter Knox QC for the appellants, in 2011 or 2012 Prakash paid the fee for a retail licence for the period to 1 May 2013 and he paid a further licence fee on 5 December 2012 for the continuation of that licence until 1 May 2014. It has not been agreed that the latter fee was for the period to 1 May 2014, so this is a matter which requires further examination. As regards the King's Wharf station, the agreed factual position is that the last licence fee was paid by Adesh on 31 December 2012, for a retail licence for the period to 31 December 2013.

24.
In June 2012 an informant alleged that Adesh and Prakash were involved in producing adulterated fuel and condensate made from natural gas and distributing it from their petrol stations. The Minister also came to suspect that they were involved in selling petroleum products available to them at subsidised rates for supply outside Trinidad and Tobago, in breach of the Regulations.

25.
On 28 November 2012, officials of the Minister and representatives of NP conducted an unannounced inspection at the Fyzabad station. They claimed that they found unauthorised storage facilities and evidence of adulterated fuel. At the end of the inspection, the officials ordered Prakash to close the station and security guards were put in place to enforce the closure. Since that time, Prakash has not been allowed further access to the Fyzabad station.

26.
On the evening of the same day, officials of the Minister, NP representatives and police carried out an inspection of Prakash's home, known as "Twister's Compound", at which they found other fuel storage tanks and evidence of fuel deliveries to fishing vessels. Prakash maintained that all this was above board and lawful; the storage tanks which were still usable contained diesel and kerosene for his private use.

27.
On 29 November 2012, representatives of NP carried out what Adesh believed was a routine inspection of the King's Wharf station. He was informed that the station passed the inspection. However, on the afternoon of 1 December 2012 officials of the Minister conducted a further inspection

of the station. They informed Adesh that the reason for this was that they had come across an unauthorised petroleum storage and distribution operation at Twister’s Compound and it was also suspected that Adesh had a pipe running from the station to the sea for the purpose of unauthorised export of petrol. The officials identified what they said were unauthorised storage facilities at the station and evidence of suspected spillage or improper disposal of petrol. At the end of the inspection, the senior official present, Mr Ramdahin, ordered Adesh to close the station until the Environmental Management Authority and the Fire Department had conducted inspections. Adesh was ordered off the site and has been denied access to it since then. He was told the environmental and fire inspections would take place on 4 December 2012, but the station remained closed after that date. Adesh’s attempts to contact Mr Ramdahin to obtain information about what was going on were unavailing. On 10 December 2012, Adesh managed to speak to Mr Ramdahin by telephone, who told Adesh that investigations were still in progress and the station would remain closed until they were completed.

28.
On 30 November and 1 December 2012, Ministry officials took samples from the Fyzabad station and Twister’s Compound with a view to carrying out further testing. Samples were also taken from the King’s Wharf station for testing.

29.
On 7 January 2013, Prakash received a notice of non-compliance from the Minister stated to be “in accordance with section 17 of the Petroleum Act”, which referred to the inspection on 28 November 2012 and listed six matters of complaint: unauthorised warehouse, unapproved petroleum storages, unsafe conditions at the station, unapproved modifications at the station, unauthorised petroleum fluids found at the station, and exposure of the Minister to liabilities in the case of a catastrophic accident at the station. The notice continued, “Following the detection of the above infractions, the service station in your presence was declared ‘unfit-for-continued’ operations [sic] on the same day and the service station was cordoned off and operations suspended pending outcome of further studies and investigations”.

30.
Adesh and Prakash have denied all the allegations against them. They say that the Minister was aware of the storage arrangements at the two service stations from previous routine inspections. The Minister denies this. In the event, Adesh and Prakash have not been charged with any offences in connection with the operation of their respective service stations.

31.
Adesh and Prakash sought legal advice. On 14 February 2013, Adesh and Prakash each sent a pre-action protocol letter to the Minister to challenge the lawfulness of the suspension of the operations of their respective petrol stations. There was no reply from the Minister.

32.
On 28 February 2013, Prakash commenced proceedings. In his application for judicial review he claimed, among other things, that the suspension of the operation of the Fyzabad station from 28 November 2012 was tantamount to suspension of his licence or was tantamount to revocation of the licence. He claimed that the Minister had no power under the Act to suspend or revoke his licence; in the alternative, he claimed that the Minister had behaved in a way which was procedurally unfair, in that he had not given him a fair opportunity to comment on the allegations against him before action was taken or to remedy the points of complaint in the notice of non-compliance. Prakash sought relief

including a declaration that the decision to suspend or revoke his licence was illegal, void and of no effect, an order of certiorari to quash the decision, an order of mandamus to compel the Minister to reinstate the licence, and damages. The application was supported by a detailed affidavit from Prakash.

33.

On 1 March 2013, Adesh commenced legal proceedings as well. The claims in his application were similar to those in Prakash's application. He also complained of unreasonable delay on the part of the Minister in completing his investigations. The application was supported by a detailed affidavit from Adesh.

34.

On 20 May 2013, Adesh was served with a notice of non-compliance from the Minister bearing the date 21 February 2013, purporting to be "in accordance with section 17 of the Petroleum Act", which referred to the inspection of the King's Wharf station on 1 December 2012 and gave notice of infractions in respect of four matters: unauthorised warehouse, unauthorised petroleum storages, unacceptable HSE (health, safety and environmental) risk management practices and questionable ability properly to manage the King's Wharf station.

35.

On 7 June 2013 the Minister filed a suite of affidavits in response to the applications for judicial review. On 27 June 2013 Gobin J granted permission for the applications to proceed to a substantive hearing. In due course, Prakash and Adesh responded in detail to the Minister's affidavits and to further evidence filed by the Minister relating to the results of the tests on fluids taken from the two service stations and Twister's Compound. On the affidavit evidence, there was a range of issues of fact in dispute between the parties which, if they were to be resolved, would have required oral evidence and cross-examination.

36.

It was only by letter dated 25 November 2013 from the Minister that Prakash was advised that the Minister had concluded his investigations and was provided with a report setting out findings made and invited to submit comments. Similarly, it was only by letter dated 26 November 2013 from the Minister that Adesh was advised that the Minister had concluded his investigations in relation to the King's Wharf station and was provided with a report setting out findings made and invited to submit comments.

37.

Both service stations have remained closed until now. Prakash and Adesh have not made applications to renew their licences beyond 31 December 2013 (Adesh) or, in Prakash's case, 1 May 2014 at the latest: see para 23 above.

38.

On 26 June 2014 the substantive hearing of the judicial review applications took place before Gobin J. In his written submissions for that hearing, the Minister took the position that neither Adesh nor Prakash were licence holders under the Act, and therefore they had no right to operate the service stations. In the alternative, the Minister contended that he had power under the Act to suspend the licences in the circumstances of each case, and that there had been no procedural unfairness.

39.

At the hearing before Gobin J, the parties agreed that the judge should not attempt to resolve the many disputed issues of fact to which the affidavit evidence gave rise, but rather should proceed on the basis that the issues for determination were purely legal ones. The Board considers that, as submitted by the Minister, the implication of this is that it falls to be assumed for the purposes of determining the appellants' claims that the Minister was justified in saying that there were grounds to suspect the appellants of having been conducting petroleum operations illegally, dangerously and in a manner potentially damaging to the environment. For his part, the Minister did not maintain in the proceedings that he was in a position to prove that the appellants had in fact been conducting petroleum operations in such a manner, which they denied. The question, therefore, is what powers did the Minister have in such circumstances? This was the question which Gobin J and the Court of Appeal addressed in their judgments.

40.
On 25 July 2014, Gobin J handed down judgment upholding the appellants' claims. She held that, since the Minister had accepted payment of licence fees by the appellants each year since 2010, they had a legitimate expectation that they would be issued with licence documents when the Minister resumed issuing such documents, and in the meantime the Minister was estopped from denying that they held licences. The delay in issuance of the licences was not due to the fault of the appellants, and the implication of regulation 24 of the Regulations was that they should not be prejudiced by delay for which the Minister was responsible. The appellants held what the judge described as, in a convenient shorthand expression, "de facto licences". Gobin J ruled that although the Minister sought to justify his actions as a suspension of the licences, he had in reality purported to revoke the licences. In any case, she held, on the basis of consideration of the regime in sections 17 to 22 of the Act, that in the absence of express terms in a licence providing for suspension or revocation of the licence, the Minister had no power to suspend or revoke it. The judge rejected the submission of the Minister that he had a general implied power to suspend the licences, given by the Petroleum Act or by section 45(3)(b) of the Interpretation Act. She considered that the existence of such a power was incompatible with the regime set out in the Petroleum Act. Therefore, the Minister's actions in each case to treat the licence as suspended or revoked were unlawful and void. In relation to pressing threats to the environment or public safety, the judge noted that there existed other powers to deal with those in the form of section 25 of the Environmental Management Act and section 45 of the Fire Services Act. Finally, Gobin J also held, in the alternative, that the decision to shut down the appellants' businesses was procedurally unfair. The judge made an order in each case which included declarations that the suspension and effective revocation of the licence was unlawful and void, that the appellant was entitled to the resumption of his operation under the de facto licence in existence at the time of the suspension and that the service of the non-compliance notice was procedurally unfair, and an order directing that damages be assessed.

41.
The Minister appealed. His appeal was allowed by the Court of Appeal by a majority (Archie CJ and Bereaux JA, Jamadar JA dissenting). All three judges agreed with Gobin J's ruling that the appellants were to be treated as having de facto licences. All three judges were of the view, contrary to that of Gobin J, that section 45(3) of the Interpretation Act had the effect that the Minister had an implied power to suspend each licence. In their view this was not excluded by the express statutory regime in sections 17 to 22 of the Petroleum Act. The question then became whether the Minister had exercised that power of suspension in a procedurally unfair manner. The majority held that there had been no procedural unfairness. The Minister had been entitled to act in the way he did because of the urgency of the threat he believed existed in the circumstances. In the view of Jamadar JA, however, there had

been procedural unfairness: even though in each case the Minister had good grounds for imposing an immediate suspension after the inspection of the service station by his officials, he should have given the appellants a prompt and reasonable opportunity to address the concerns which had been identified, but this had not been done. The Court of Appeal set aside the order made by Gobin J.

42.
The appellants now appeal to the Board. They accept that with the lapse of time since Gobin J made her order it is not practicable for them to seek restoration of the part of the order mandating the restoration of their licences. However, they say that they are entitled to claim damages for loss of their licences to the present time and for the loss of the opportunity to continue their service station operations on a licensed basis into the future.

Discussion

(1) The de facto licences and their terms

43.
The Board agrees with Gobin J and the Court of Appeal, and the Minister does not now dispute, that at the time the appellants' service stations were closed by the Minister they were to be regarded as having de facto retail petroleum marketing licences. By accepting licence fees paid by the appellants the Minister created a legitimate expectation on their part that they would be treated as licensees on the same terms as before for each period for which they tendered payment of the licence fee and such payment was accepted. The legitimate expectation was reinforced by the manner in which the Minister proceeded when he closed their service stations, by purporting to suspend their licences and sending notices of non-compliance which referred to the Act.

44.
The Minister contends that the effect of section 17(1) of the Act, read with the opening words of subsection (2) ("[t]he cases in which revocation of a licence are to be provided for … may include …": emphasis added), is that any licence issued under the Act must contain as a sanction a power of revocation. There is textual force in this contention. However, against this, it can be argued, as the appellants contend, that section 17(2) creates a wide discretion for the Minister as regards the cases in which a power of revocation might be stipulated in a licence (emphasising the words "may include" in that provision) and that it is possible to read the phrase in section 17(1) "shall contain appropriate sanctions including revocation of the licence" to mean that a licence shall contain appropriate sanctions, including revocation if that is thought appropriate as a sanction. There is also an argument that the context of section 17(1) and (2) in the Act supports such a reading of those provisions. The Act contemplates that, eg for major exploration and production licences, licence terms will reflect a commercial bargain between the state and a private undertaking which provides petroleum operations infrastructure, in which one would expect there to be full freedom of negotiation to arrive at a deal acceptable to both sides, which (if thought appropriate) might not include a power of revocation if other sanctions were considered sufficient. Also, in the context of such bargains between the state and private undertakings, and in light of the wide discretion set out in section 17(2) as to the matters in respect of which a power of revocation may be stipulated in a licence, it might be argued that it is difficult to see why section 17(1) and (2) should be read as creating an obligation on the Minister to write into a licence a power of revocation, when it appears that this obligation would be satisfied merely by including in the licence a purely formal term which stipulated that such a power will arise only in a particular circumstance which is highly unlikely to materialise.

45.

The interpretation of section 17(1) and (2) proposed by the Minister in these proceedings could give rise to difficult and complex legal issues. What was the effect of the retail marketing licences in fact issued by the Minister prior to 2010, which did not stipulate a power of revocation? Were they unlawful when granted and, if so, what is the significance of that in relation to the de facto licences in issue in these proceedings? Or were the previous licences somehow to be construed as including a power of revocation, or should the de facto licences now be so construed, and, if so, in exactly what circumstances did such power arise?

46.
In the event, the Board does not have to resolve this issue on the interpretation of section 17(1) and (2) of the Act. If the terms of the Act are subject to amendment in the future, it would be desirable for section 17 to be clarified as regards this point.

47.
The reason it is unnecessary to resolve this question of interpretation is that both sides on the appeal agree that the Minister purported only to suspend the appellants' de facto licences, rather than revoke them. Therefore the principal question for the Board is whether the Minister had any power to suspend the licences. For reasons given below, the Board concludes that he did not. The Board finds in each case that the purported suspension of the de facto licence by the Minister was ultra vires and unlawful. It also holds that each of Adesh and Prakash are entitled to damages pursuant to section 4(a) of the Constitution for the loss of the benefit of their de facto licences which resulted from their unlawful suspension by the Minister. This is sufficient to determine the appeals in favour of the appellants, without needing to examine other more complex permutations of the arguments on each side.

48.
The reason the Minister sought to contend that the licences should be read as including a power of revocation was to found a submission that such a power of revocation would impliedly include a power of suspension, as a lesser sanction. But, as is explained below, the Board finds that this submission is unsustainable. The reason the appellants sought to argue as part of their case that their de facto licences had been revoked as a matter of substance and without justification according to their presumed terms was to found a submission based on section 22(2) of the Act that they were entitled to claim damages as "necessary reparation" for the unjustified revocation of the licences, even though they had not sought to go to arbitration on that point. But even if that argument were correct, it would not give rise to any more extensive relief by way of damages than those to which the Board holds they are entitled under section 4(a) of the Constitution, so it is not necessary to analyse this point further.

(2) No power to suspend the licences

49.
The Minister submits that he had power to suspend the appellants' licences on four bases: (i) by implication from his general powers under the Petroleum Act, (ii) because section 45(3)(b) of the Interpretation Act imports such a power into the Petroleum Act, (iii) because the appellants' de facto licences are by virtue of section 17(1) and (2) of the Petroleum Act to be taken to include a power of revocation by the Minister for breach of their terms and conditions, and such power of revocation includes by necessary implication a power of suspension when a breach of the terms and conditions is suspected by the Minister on rational grounds, or (iv) because section 33(1) of the Petroleum Act confers a power of suspension on the Minister. Against this, the appellants seek to uphold the

reasoning of Gobin J at first instance in relation to her ruling that the Minister had no power to suspend their licences.

50.
In the judgment of the Board, none of the submissions for the Minister can be sustained. The conclusion reached by Gobin J on this issue was correct.

51.
As regards point (i), the general administrative power of the Minister under section 5(1) of the Act is stated to be subject to the other provisions of the Act. Sections 17 to 22 of the Act set out a special regime to deal with allegations of default in relation to a licence granted under the Act and how matters of dispute in relation to such allegations are to be addressed. This group of provisions constitutes a lex specialis for that subject matter which is incompatible with any general power of suspension for the Minister derived from section 5(1) or otherwise.

52.
Four points may be made. First, section 17(1) makes it clear that the licence itself should stipulate appropriate sanctions in case of failure by a licensee to fulfil the obligations undertaken by him, including (if thought appropriate) a power of suspension. Under the scheme of the Act, a licensee is entitled to look to the terms of the licence issued to him to know what power of revocation or power of suspension the licence may be subject to. Since the licence constitutes the basis of the licensee's commercial activity, he needs clear notice from the licence itself or from the express terms of the Act of the circumstances in which his rights to carry out his commercial operations under the licence may be suspended or terminated. If the Minister has not included any power of suspension in the licence, there is no scope to imply a general power of suspension arising outside the licence.

53.
Secondly, section 17(6) sets out a single express power of suspension in relation to a licence, using the phrase "temporarily discontinued". It is a power which arises in specific defined circumstances (namely, that there have in fact been serious and repeated violations of the terms of the licence, the law or directions) and is exercisable by the President, not the Minister. It is not compatible with this specific power of suspension that the Minister should be found to have, by implication, an additional power of suspension exercisable on the basis of mere suspicion of breach of the terms of the licence on a single occasion. This would undermine the specific statutory protections for a licensee enacted in section 17.

54.
Third, section 18(1) of the Act, and the subsequent provisions which regulate arbitration, provide for a specific form of relief in closely defined circumstances in cases of revocation. It is not consistent with this carefully laid out remedial scheme that there should exist alongside it a vague and essentially unregulated power for the Minister to suspend a licence in undefined circumstances, according to his perception of a risk of harm (as distinct from having to prove that there has actually been a breach of licence or the law by the licensee) and subject only to judicial review on standard grounds such as rationality.

55.
Fourth, the existence of avenues in the general law to take action in urgent cases where there is a perceived risk of harm means that it is not necessary to imply a wide power for the Minister to suspend licences into the Act: see section 25 of the Environmental Management Act and section 45 of the Fire Service Act. In addition, as Mr Knox submits on behalf of the appellants, since the terms of a

licence constitute legally binding obligations of a licensee, in cases of threatened breach of them it would be open to the Ministry to go to court to seek injunctive relief. In such a case, it would be the court which would regulate the action to be taken, reflecting its assessment of the requirements of justice in the circumstances, rather than leaving matters at the discretion of the Minister.

56.

In the Board's judgment, similar reasoning provides the answer to the Minister's point (ii), based on section 45(3)(b) of the Interpretation Act. That provision sets out a general rule for implication of terms in any statute or other form of written law, which by virtue of section 2(1) of that Act is excluded where a contrary intention appears from the specific statute (ie the relevant "written law") in relation to which it is sought to be implied. The lex specialis nature of the regime in sections 17 to 22 of the Petroleum Act demonstrates such a contrary intention. It would be inconsistent with that regime to construe the Petroleum Act as including a general power for the Minister to suspend a licence for petroleum operations to operate alongside it. That would undermine the policy apparent from section 17 of the Act that a licence should set out in clear terms the circumstances in which a licensee might lose the benefit of the licence and would also undermine the protections in relation to suspension written into section 17(6). Further, in relation to this latter point the appellants are entitled to rely on the general principles of construction of expressio unius exclusio alterius (specific mention of one thing indicates an intention to rule out others) and generalia specialibus non derogant (general provisions should not undermine the intended effect of provisions specifically drafted to deal with the particular case), which are preserved in relation to the Petroleum Act by virtue of section 3 of the Interpretation Act.

57.

The Board cannot accept the Minister's contention (point (iii) above) that a power of revocation of a licence imports a power to suspend it as well. A power of suspension according to the discretion of the Minister is different in kind from a power of revocation pursuant to the Act. The former cannot be regarded simply as a lesser type of the latter in order to say (as Mr Roe seeks to do) that the greater necessarily includes the lesser. If the Minister exercises a power of revocation under section 17 for breach of the terms of a licence (ie a case within section 17(2)(c)), the licensee is entitled under section 18(1) to have recourse to arbitration to seek to establish that the revocation was not justified and to claim reparation pursuant to section 22(2). In such a case the licensee could show that the revocation was not justified by showing that there had not in fact been a breach of the terms and conditions of the licence, so that section 17(2)(c) did not apply. By contrast, the Minister's submission is that he has a power to suspend a licence, thereby depriving the licensee of the benefit of it for the period of the suspension, merely on the basis that the Minister suspects that there has been a breach of the terms and conditions without being able to prove that there has been, and without the licensee being able to have recourse to the remedial regime laid down in sections 18 and following of the Act. The general law of contract also provides an analogy which supports the appellants' submissions on this point: a right for an innocent party to rescind a contract on the grounds of repudiatory breach by the other party does not include a right to suspend the contract, which is a very different kind of right.

58.

The Minister's submission based on section 33(1) of the Act (point (iv) above) was a last minute thought of Mr Roe, raised by him with Mr Knox on the evening before the hearing before the Board. It had not been mentioned in the courts below. However, it is a pure point of law and the Board gives permission to the Minister to raise it.

59.

The Board cannot accept this submission of the Minister. Section 33(1) draws a clear distinction between a licence, on the one hand, and any “permission, consent or authority granted under this Act” (which may include permission, consent or authority granted under a licence under the Act) on the other. It is only in relation to measures in this latter class of case that section 33(1)(b) provides that any of them may be revoked or varied by the Minister. It does not provide for a power of revocation, variation or suspension of the licence itself. The relevant provisions in respect of a licence are those in sections 17 to 22 of the Act. This interpretation is reinforced by the terms of section 33(4), which provide that some form of document may be issued as evidence of the giving of permission, consent, authority or direction, whereas the grant of a licence is dealt with elsewhere in the Act and the Regulations and is already assumed in the relevant provisions to have a documentary form. Section 33(4) would be redundant in relation to a licence, which indicates that section 33 is not concerned with licences at all, save for making it clear that the powers set out in section 33(1) may be excluded by the terms of a licence.

(3) Procedural unfairness

60.
Since the Minister had no power to suspend the appellants’ de facto licences as he purported to do, it is not necessary to consider whether he acted unfairly in his exercise of such a power.

(4) Relief

61.
Each of Adesh and Prakash is entitled to an order quashing the decision of the Minister to suspend his de facto licence and declaring it to have been unlawful. Are they entitled to an award of damages as well for loss of profit in running their service stations and, if so, in respect of what period of time?

62.
Mr Roe for the Minister accepts that a licence or (in these cases) a de facto licence constitutes a form of property for the purposes of section 4(a) of the Constitution: cf Paponette v Attorney General of Trinidad and Tobago [2010] UKPC 32. In the circumstances of these cases, the Minister’s unlawful purported suspension of the appellants’ de facto licences has had the effect of wholly preventing them from having the benefit of the licences from 28 November 2012 (in the case of Prakash) and 1 December 2012 (in the case of Adesh) and the manner in which the suspension was put into effect made it impossible for them to continue with their businesses or to have access to their property in the form of the service stations. In the circumstances of this case, the Board inclines to the view that the effects of the suspension were so great as to amount to a deprivation of the appellants’ property as from those dates, in respect of which they are entitled to damages under the Constitution; but it is not necessary to reach a concluded view about that since in each case the suspension constituted at least an unlawful infringement of the right to enjoyment of property with such serious consequences as to lead to an award of damages: see Paponette at paras 23-25.

63.
Mr Knox submits that the appellants are entitled to damages for loss of profits up to the present and into the future, on the basis that under the Act and the Regulations they had an expectation that their licences would be rolled over and continued from year to year. The Board does not agree. The appellants’ de facto licences arise by virtue of legitimate expectations based on them tendering and the Minister accepting licence fees for particular periods. The last period for which this occurred was the calendar year 2013 in the case of Adesh and (according to the submission of Mr Knox) for the period to 1 May 2014 in the case of Prakash. Neither Adesh nor Prakash offered to pay the licence fee

for any subsequent period, and hence could have no legitimate expectation to be provided with a licence beyond the end of those respective periods. The Board does not accept Mr Knox's contention that, because by 2013 they were in dispute with the Minister, there was no requirement for them to tender payment for later licence periods. If they wished to preserve their rights as de facto licensees based on their legitimate expectations, they had at least to do that. A person seeking to assert a legitimate expectation is required to satisfy any requirement for action on their side: see R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569-1570. It was open to the appellants to seek to continue their de facto licences by paying the licence fee after the Minister had taken action to suspend them, as is shown by the fact that Adesh did just that by making payment on 31 December 2012 for his licence for 2013.

64.

In the Board's judgment, therefore, the appellants are entitled to damages representing their loss of profit during the remaining period of the de facto licences which were current as at the date of the start of the suspension in each case and for the period of the de facto licences for which the Minister accepted payment, that is to say until the end of 2013 in the case of Adesh and until a date to be determined (either 1 May 2013 or 1 May 2014) in the case of Prakash. The position as regards Prakash depends upon the period to which the licence fee paid on 5 December 2012 related, which is a matter which requires further investigation. On this basis, the two cases should be remitted to the local courts to determine the amount of damages payable and to determine, so far as may be necessary in Prakash's case, the period in respect of which such damages should be paid.

Conclusion

65.

The Board allows the appeal in each case. The purported suspension of the relevant de facto licences was unlawful. The appellants are entitled to damages for breach of their rights under section 4(a) of the Constitution. The cases are remitted to the local courts for the quantum of such damages to be determined.