IN THE FALKLAND ISLANDS COURT OF APPEAL

CIVIL APPEAL NO. 2. OF 2016

London

Date: 10 April 2018

Before:

SIR JOHN SAUNDERS, TIMOTHY STRAKER QC, ADRIAN HUGHES QC

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BETWEEN:

GEOPHYSICAL SERVICE INCORPORATED
(a company incorporated in Canada)

APPELLANT

and

HER MAJESTY IN RIGHT OF HER GOVERNMENT OF THE FALKLAND ISLANDS

RESPONDENT

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Matti Lemmens and **Leah Mangano** (**Borden Ladner Gervais LLP**) for the **Appellant**
Jim Cormack and **Susan Fallan** (**Pinsent Masons LLP**) for the **Respondent**

Hearing date: 8 March 2018

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Approved Judgment

We direct that no official shorthand note need be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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JUDGMENT OF THE COURT OF APPEAL:

A. THE APPEAL AND THE JUDGMENT OF THE CHIEF JUSTICE

1. This is an appeal from a judgment of the Chief Justice of the Falkland Islands dismissing the claim started by writ of summons on 31 March 2014 brought by the Appellant, Geophysical Service Incorporated (the "Appellant"). The Appellant is a Canadian corporation which is in the business of seismic surveying and acquiring and processing geophysical data in the context of prospecting for hydrocarbons. The Respondent (the "Respondent") governs the Falkland Islands through successive Governors.

2. The trial took place in Stanley between 11 and 14 October 2016. A comprehensive judgment (the "Judgment") dealing with the list of issues at paragraph 22 of the Judgment was given by the Chief Justice on 9 December 2016.

3. A Notice of Appeal was entered on 9 December 2016 and the appeal came to be heard on 8 March 2018. The issues subject to appeal (the "Issues on Appeal") are set out in the Memorandum of Appeal dated 7 February 2017 and the Respondent's Notice of Grounds for Affirming the Decision dated 17 March 2017.

B. THE STATUTORY REGIME

4. The backdrop to the case is the statutory regime for the exploration and exploitation of minerals in the Falkland Islands controlled waters.

5. Offshore exploration in these waters ("Offshore Exploration") is regulated by the Offshore Minerals Ordinance 1994 (No. 16 of 1994) (the "Offshore Minerals Ordinance") which repealed the Continental Shelf Ordinance 1991, *"to replace it so as to make further and better provision for the exploration and exploitation of minerals in the Continental Shelf and other controlled waters of the Falkland Islands and for matters connected with or relating to the foregoing matters"*. The Offshore Minerals Ordinance prohibits Offshore Exploration unless it is conducted in accordance with the terms and conditions of a licence granted under the

Ordinance. Offshore Exploration without a licence is a criminal offence. The Offshore Minerals Ordinance authorises the Governor of the Falkland Islands to grant exploration licences, upon such terms and conditions as the Governor sees fit, provided the Secretary of State consents to the grant and the terms and conditions imposed.

6. The Offshore Petroleum (Licensing) Regulations, 2000 (the "Licensing Regulations") were made in accordance with the Offshore Minerals Ordinance and provide for applications for exploration licences. The Licensing Regulations provide that any person may apply for an exploration licence in accordance with the Licensing Regulations, and with every application for an exploration licence, the applicant shall pay a prescribed fee of £1,000.

7. The Petroleum Survey Licences (Model Clauses) Regulations 1992 SR & O 25/1992 (the "Model Clauses Regulations") provide that the clauses set out in the Schedule thereto (the "Model Clauses" or "Model Clause") are deemed to be incorporated in every licence granted under the Offshore Minerals Ordinance unless specifically excluded, modified or varied by any provision of the licence.

8. The Issues on Appeal raise the proper construction of an exploration licence, for the purpose of conducting surveys to acquire data, applied for by the Appellant and granted by the Respondent under the Offshore Minerals Ordinance and in particular the meaning and validity of Model Clause 17(2)(e) incorporated therein.

C. THE FACTUAL BACKGROUND

9. The facts are not in dispute. A summary is sufficient. They are set out in more detail at paragraphs 34 to 43 of the Judgment.

10. The Appellant's business includes seismic surveys of the sea bed. The surveys acquire data referable to geological structure. A principal intention is to discover the presence of oil under the sea bed capable of extraction. The raw or field data obtained during a survey (SEG-D data) is processed so as to produce a picture of the geological layers beneath the sea bed (SEG-Y data). The Appellant does not

carry out the extraction of oil but supplies data to oil exploration companies who use it to see whether oil can profitably be extracted from the sea bed.

11. Sometime before 8 September 2004, the Appellant decided, if permissible, to carry out a survey of part of the sea bed in the ocean surrounding the Falkland Islands. The Appellant intended to supply the data it obtained to one or more willing purchasers.

12. It is common ground that in order to conduct a lawful survey the Appellant required a permit from the Respondent, issued in accordance with the terms of the Offshore Minerals Ordinance. Application had to be made in writing and the fee payable under the Licensing Regulations was £1000.

13. Application for a permit was made by the Appellant to the Respondent on 8 September 2004. The appropriate fee was tendered. The application form made reference to the Model Clauses which would be included in the permit. Although the permit is more properly called a licence, except where directly quoting, we have used the word "Permit" to avoid any possible confusion with a licence under the Copyright Act 1956 which is relevant to one of the principal grounds of appeal.

14. On 11 November 2004, the Respondent sent to the Appellant a copy of the proposed Permit. It had not been signed by the Governor so was not yet in force. The proposed Permit specified the Model Clauses which were to be included in the Permit 'and shall have effect as if set out at length in the licence.' Included in the Model Clauses which were to be incorporated in the Permit was Model Clause 17(2)(e), the text of which is set out below; it is the proper construction of that clause which is central to this case. In summary, 17(2)(e) provided that at the expiration of a period of five years (or such greater period as was specified in the Permit) from the date on which any particular item of specified data (as defined in Clause 17) had been received by the Governor from the Licensee that item of data may be published or disclosed by the Governor to any person.

15. On 17 November 2004, the Appellant emailed the Respondent asking where the Model Clauses could be found. The Appellant was directed to the Respondent's website.

16. On 19 November 2004, Mr Paul Einarsson, the Chief Operating Officer of the Appellant, emailed the Respondent raising a number of queries which made it clear that he had considered and that he understood the effect of the Model Clauses. He queried the short term (5 years) before data obtained by the Appellant and provided to the Respondent could be published by the Respondent and set out arguments against the incorporation in the Permit of Model Clause 17(2)(e) in its then current form.

17. On 23 November 2004, the Respondent replied that the legislation was clear, that the Respondent was not able to alter the 5 year period and that Clause 17(2)(e) would remain in the Permit.

18. Whilst Mr Einarsson described this as "poor policy" in his response of 23 November, he accepted in evidence (as found at paragraph 41 of the Judgment) that he understood the Respondent's policy and that he also understood that the Respondent had rejected his proposals of 19 November to amend the terms of the Permit. He signed the Permit on behalf of the Appellant on 24 November and returned it to the Respondent. The Permit had not been issued by then as it had not been signed by the Governor. On 10 December 2004, the Respondent sent a copy of the Permit signed by the Governor to the Appellant.

19. The Permit as initially issued covered the period 20 December 2004 to 20 December 2005. At a later stage the Appellant sought and was granted an extension of the Permit for the further period from 20 December 2005 to 20 December 2006. A fee of £5000 was paid for the extension.

20. On 28 October 2010, the Respondent wrote to the Appellant giving notice that, as more than 5 years had elapsed since data had been acquired by the Appellant under the Permit, it intended to make the data publicly available.

21. The Appellant responded by email dated 2 November 2010 asking that the 5 year period should be extended due to the fact that it had not been able to recover the costs that it had expended on obtaining the data. By its reply dated 5 November 2010, the Respondent agreed to an extended release date of December 2012 to allow the Appellant more time to recover its costs and earn a financial return.

22. By its email dated 1 March 2011, pursuant to a further request for an extension by the Appellant, the Respondent agreed to a further extension of the 5 year period to December 2013 but made clear that there would be no further negotiation beyond that date.

23. On 17 October 2013, the Respondent informed the Appellant that it intended to release the data from 1 January 2014.

24. The data had not been released by the time that the writ was issued seeking injunctive relief preventing the Respondent from releasing the data. The Respondent has not released the data pending the outcome of these proceedings.

D. THE PERMIT - PUBLIC LAW INSTRUMENT OR CONTRACT

25. Before the Chief Justice there was much debate as to whether the Permit, and in particular Model Clause 17, was to be construed as a public law instrument or in accordance with contractual principles of construction (Judgment paragraphs 160-179).

26. The Chief Justice considered (Judgment paragraph 177) that the better view was that the granting of the Permit, which incorporated the Model Clauses, was an exercise of a public law function so as to produce a public law instrument which was to be construed in accordance with the principles of statutory interpretation. This was a finding of the Chief Justice which is not sought to be challenged. It appears to us that such is manifestly the position. The sea bed, controlled by the Crown, is regulated by legislation with a scheme of licensing in the public interest. It is clear that licensing is a public law function. We therefore agree with the approach of the Chief Justice. Cranston J expressed the position clearly in the case

of *R (on the application of Data Broadcasting International Limited) v The Office of Communications* [2010] EWHC 1243, at paragraph 88:

> "In my view these licences are not contracts. A contractual analysis distorts their juridical character. The licences are public law instruments. They constitute statutory authorisation permitting the licensees to undertake activities which would otherwise be unlawful and, in this case, place them under particular obligations, breach of which exposes them to the risk of the imposition of statutory financial penalties or ultimately to revocation of the licenses. In granting them, the licensing authority acts pursuant to its statutory duties and functions, and there is no intention to enter into any private law legal relations with the licensees. There is no express agreement between the parties in the contract sense. In the main the conditions in the licences are derived directly from statutory provisions."

27. We further agree with the Chief Justice's view that in any event little turns on this debate because the Permit is clearly intended to create legally enforceable and binding rights and obligations and its provisions are clear and unambiguous, in particular those in Model Clause 17(2)(e).

E. CONSTRUCTION OF THE PERMIT

28. Fundamental to our consideration of the Issues on Appeal is the proper construction of the Permit. The construction that we adopt below is consistent with treating the Permit as a public law instrument.

29. Paragraph A of the Permit provides that, "*Clauses 1 to 3, 5 to 14 and 16 to 26 of the [Model Clauses] shall be incorporated in [the] Licence and shall have effect as if set out at length in [the] Licence"*. The Model Clauses are accordingly incorporated in the Permit and have effect as if they were set out at length therein. Clause 2(1) of the Model Clauses provides that the Permit is governed by the law of the Falkland Islands, and Clause 2(2) provides that the Supreme Court of the Falkland Islands has sole and exclusive jurisdiction *"in relation to any dispute, difference or question arising between the Governor and the Licensee under or by this Licence or their respective rights and liabilities in respect thereof."*

30. Paragraph B of the Permit provides, amongst other matters, that *"In consideration of the payments provided for by the Model Clauses and the performance and*

observation by the Licensee of all the terms and conditions of the Model Clauses or hereinafter contained…." the Governor grants to the Appellant as Licensee the licence and liberty to search for petroleum in the sea-bed and sub-soil subject to the provisions of the Permit and over the area defined in Schedule 1. The initial Permit was for a year from 20 December 2004 to 20 December 2005 but, as noted above, it was subsequently renewed for a further year from 20 December 2005.

31. Paragraph D of the Permit provides that the additional conditions set out in Schedule 5 shall have effect in addition to the obligations contained in the Model Clauses.

32. Condition 5 of Schedule 5 provides that *"The Licensee shall provide the Director of Mineral Resources copies of all data acquired by the Licensee under this Licence as required by Petroleum Operations Notice No.1"* ("PON 1"). This data comprises seismic, gravity and magnetic data.

33. Condition 6 of Schedule 5 provides:

> "*Notwithstanding the terms of Model Clause 17(2), the Governor shall be entitled to exhibit and display for the purpose of promoting minerals exploration in the South Atlantic all or part of the data acquired by the Licensee under this Licence, but the Governor shall not allow such data to be copied or taken away by any person without the consent of the Licensee, which consent may be withheld if the Licensee intends selling or licensing such data within the five year confidentiality period before the data is published by the Governor.*"

34. Clause 16 of the Model Clauses provides:

> "*16.(1) The Falkland Islands Government may, subject to paragraph (2) of this clause, at its own cost, produce for sale and distribution, and, if for sale, so that any revenue derived from sales is entirely for the benefit of the Falkland Islands Government, an interpretation report in relation to any data communicated by the Licensee under any preceding provision of this Licence.*
>
> *(2) If any interpretation report to which paragraph (1) of this clause relates is produced, it shall not without the prior consent of the Licensee contain illustrated examples of more than fifteen per cent of the total line lengths of the surveys undertaken by the Licensee, but this restriction shall cease to have effect at such time as clause 17(2) ceases*

to have effect so as to restrict the disclosure of any of the specified data referred to in clause 17(1).

(3) Nothing in clause 17 shall have effect so as to preclude or inhibit the exercise by the Falkland Islands Government of its rights under paragraphs (1) and (2) of this clause."

35. We note that Model Clause 16 is consistent with our interpretation of Model Clause 17 below.

36. Clause 17 of the Model Clauses provides:

"*17.1(1) For the purpose of this clause "the specified data" means all records, returns, plans, maps, samples, accounts and information which the Licensee is obliged under any provision of this Licence to furnish or supply to the Governor or to the Secretary of State.*

(2) The specified data shall not, except with the written consent of the Licensee, which shall not unreasonably be withheld, be disclosed to any person not in the service of or engaged by the Crown:

Provided that -

(a) the Governor shall be entitled at any time to make use of the specified data for the purpose of preparing and publishing such returns and reports as may be required by law;

(b) the Secretary of State shall be entitled at any time to make any use of the specified data -

(i) for any purpose for which the Governor may use it under (a) above; or

(ii) for any non-commercial purpose related to the international relations of the United Kingdom or the Falkland Islands as he sees fit;

(c) the Governor may at any time, under such conditions he may consider necessary to protect the commercial confidentiality of the information, disclose any of the specified data to any elected member of the Legislative Council of the Falkland Islands;

(d) the Governor or the Secretary of State may at any time, under such conditions as the Governor or the Secretary of State, as the case may be, may consider to be necessary to protect the commercial confidentiality of the information, disclose any of the specified data to -

(i) the British Geological Survey; and

(ii) the British Antarctic Survey;

(e) at the expiration of a period of five years (or such greater period as is specified in the Licence) from the date on which any particular item of specified data is received by the Governor that item of specified data may be published or disclosed by the Governor to any person;"

37. Model Clause 17(1) defined the "specified data" as all records, returns, plans, maps, samples, accounts and information which the licensee is obliged to furnish or supply to the Secretary of State. Hereinafter such data is referred to as the "Data".

38. The basic position under Model Clause 17(2) is that the Data is not to be disclosed to any person (other than Crown Servants) except with the written consent of the Licensee, which shall not unreasonably be withheld. That basic position is qualified by the six exceptions in the lettered provisos.

39. Proviso 17(2)(e) is the exception of central relevance to this case. The provision is clear and unambiguous. It is an express permission to the Governor to publish or disclose the Data to any person at the expiration of 5 years or such greater period as is specified in the Permit from the date of receipt of the Data by the Governor. The provision refers to a period of time whose commencement and duration is clear. These are straightforward words that carry the plain meaning that the Governor has the ability after 5 years or such greater period as is specified to publish or disclose the Data. There is no qualification to this express permission requiring any royalty payment to be made to the Licensee at the expiry of the stipulated period.

40. In our view it is of central importance to this case that:

a. The Appellant, but for the Permit, could not search for petroleum in the sea bed or gather seismic data in respect of the sea bed.

b. If it did so it would be committing a criminal offence.

c. The Permit created binding rights and obligations on both the Appellant and the Respondent.

d. The Appellant acquired the rights and obligations set out in the Permit as a result of its voluntary action in applying for and accepting the Permit.

e. The lawful existence of the Appellant's property in the Data only arose because of the voluntary act of the Appellant in applying for and accepting the grant of the Permit.

F. THE ISSUES ON APPEAL

41. By its Memorandum of Appeal, the Appellant relied upon the following (summarised) Grounds of Appeal:

a. Ground 1 - that the Chief Justice had been wrong in law to hold that the Appellant's pleadings had not included allegations relating to Section 31(3) of the Copyright Act 1956 in respect of Model Clause 17(2)(e) and that he should have construed the clause to consider whether it was inoperative.

b. Ground 2 – that the Chief Justice had been wrong in law in holding that a public law licensing scheme need not comply with the Berne Convention, need not make explicit that such a licensing scheme was contained therein and need not provide compensation in return for such a licence. In particular this Ground alleges that:

i. The Chief Justice ought to have held that a copyright licence did not arise as a result of Model Clause 17(2)(e), alternatively

ii. The Chief Justice ought to have held that such copyright licence required an accompanying licence fee payable to the copyright owner.

iii. The Chief Justice erred in finding that the Appellant would be estopped from bringing its claims.

c. Grounds 3, 4 and 5 concern the findings of the Chief Justice relating to the decision of the Respondent to disclose the data and the nature of the Respondent's discretion. In summary it is alleged that:

i. The Chief Justice should have held that the exercise of discretion included a consideration of the property rights of the Appellant;

ii. The Chief Justice was wrong to have held that the discretion was limited to consideration of the purpose of the Offshore Minerals Ordinance;

iii. There was insufficient evidence for the Chief Justice to have held that the purpose of the Offshore Minerals Ordinance was the promotion of offshore oil and gas exploration and exploitation.

42. By its Notice of Grounds Affirming the Decision, the Respondent submits that the Chief Justice should have held (if he did not on a proper interpretation of the Judgment so hold) that a future claim by judicial review of a decision of the Governor to publish under Clause 17(2)(e) is barred by the findings in the Judgment.

G. GROUNDS 1 AND 2 - CHALLENGE UNDER THE COPYRIGHT ACT 1956

43. Ground 1 involves an allegation that the Chief Justice had been wrong to hold that the Appellant's pleadings had not included allegations relating to Section 31(3) of the Copyright Act 1956 as a basis for the contention that it was inoperative. Irrespective of his view as to whether this part of the case had been pleaded, we consider that the Chief Justice gave full consideration to the merits of the substantive contention of the Appellant (Judgment paragraphs 101-110 and 242-246) and we address the merits of this issue below.

44. Ground 2 is the principal Ground relied upon by the Appellant in this appeal and is based on the issue of copyright. A number of contentions are raised by the Appellant under this Ground which we address below. In essence, the Appellant contends that the Permit, in particular Model Clause 17(2)(e) thereof, is invalid in that it

contravenes the Copyright Act 1956. The contentions based on copyright were dealt with in detail by the Chief Justice in Sections E, H2 and H3 of the Judgment.

45. At the trial there was an initial argument as to whether the Data could attract copyright. Having reviewed the law (at Judgment paragraphs 111-136) the Chief Justice concluded (at paragraph 133) that it could attract copyright. That finding has not been appealed. Accordingly, we proceed on the basis that the Data secured by the Appellant attracts copyright.

46. The data comes about through sophisticated equipment sending pulses of energy into the sea bed. The time taken for the energy to travel to various geological layers and reflect back to the vessel's sensors are processed using sophisticated formulae to produce images of the depth at which the various geological, reflecting areas occur. The raw data is known as SEG-D data, whilst the processed output is known as the SEG-Y data. The Chief Justice held that both categories of data could attract copyright. Indeed the pleadings, save to describe how the data came into existence, did not propound any material differences between the categories of data. In particular both were treated as falling within the phrase "specified data" in Model Clause 17(1) of the Permit.

47. A point that had been unheralded in any prior document or submission came to be advanced before us by the Appellant. It was to the effect that the "specified data" did not include the processed SEG-Y data so that it could not be embraced by any terms of the Permit whether under the Model Clauses or otherwise. We do not consider this contention to be valid for three reasons. First, because of the broad definition under Condition 5 of Schedule 5 requiring all data acquired by the Licensee to be provided to the Respondent and the width of the definition of "specified data" under Model Clause 17(1). Second because it was made clear by the Respondent prior to the issue of the Permit that Model Clause 17(2)(e) included processed data. Thirdly, we do not consider that this point is available to be taken at this stage given the way matters have proceeded as described above and the fact that it was not raised at trial.

48. The principal argument developed at the hearing before us was that Model Clause 17(2)(e) when properly construed was repugnant and should be struck down. The argument depends on the proposition that the Data is protected by copyright and has a number of components. The two main contentions are, firstly, that there is incompatibility between the applicable copyright legislation and Model Clause 17(2)(e) so that the latter has to give way and, secondly, that Model Clause 17(2)(e) operates to appropriate property without compensation and must be construed to avoid that result given that appropriation without compensation is ordinarily repugnant to the common law and that, in any event, property rights are protected by the law of the Falklands.

Alleged incompatibility with Copyright legislation

49. By section 1(1) of the Copyright Act 1956, copyright in relation to a work, i.e. the Data, means the exclusive right to do and authorise other persons to do certain acts in relation to that work. By section 1(2), subject to the provisions of the Act copyright is infringed by any person who, not being the owner of the copyright, and without the licence of the owner thereof does or authorises another person to do any of the said acts (i.e. the acts mentioned in subsection (1)) in relation to the work.

50. The Chief Justice addressed the legal requirements of a licence by an owner of copyright at paragraphs 80 to 98 and 211 to 215 of the Judgment, with which we agree. There is no requirement that a licence has to be in writing or be the consequence of a contract. A licence need not be express but can also be implied or inferred. An owner of a copyright can for reasons or for no reason simply license, in a formal or informal way, the use of his (copyrighted) work. Further, there is no restriction on a copyright owner prospectively licensing his work; this must, as a matter of practicality, happen on a multitude of occasions. Authors, commissioned to write books, and their publishers or journalists and their newspapers come to mind.

51. The Appellant argues that the Model Clauses remove the protection given by the Copyright Act 1956. This is an argument which begs the question; it proceeds on the footing that protection sufficient for the Appellant's purposes has been given by the Copyright Act 1956. The protection given by the Act is protection against

infringement but as section 1(2) of the Act, noted above, makes plain, infringement depends on steps being taken without the licence of the owner. If such a licence has been given, there is no loss of protection under the Copyright Act 1956.

52. We refer to our construction of the terms of the Permit, above, in respect of which we take the view that Model Clause 17(2)(e) is a clear and unambiguous permission to the Governor to publish or disclose the Data to any person at the expiration of 5 years or such greater period as is specified in the Permit from the date of receipt of the Data by the Governor. At paragraphs 216, 232 and 233 of the Judgment the Chief Justice held that upon the proper construction of Model Clauses 16 and 17(2) the manifest and expressed legislative intention of each of these provisions was to provide a licence to use the copyrighted works, ie. the Data. He held that the licence was express in that it was an inherent part of what is statutorily permitted. If not express, then he held that it was to be inferred from that which was expressly stated in the Model Clauses. We agree with this analysis and the Chief Justice's conclusion in this paragraph of the Judgment and consider that this provides the answer to the Appellant's allegation that the Model Clauses are inconsistent with the Copyright Act 1956.

53. The Appellant raises the following particular arguments in support of this Ground.

54. The Appellant drew attention to section 36(4) of the Act to support an argument (see paragraph 58 of its skeleton argument) that a licence was contractual in nature. Part of section 36(4) is said to have been ignored by the Chief Justice. We doubt it was but, more importantly, section 36(4) does not carry the significance attached to it by the Appellant. Section 36(4) provides that a licence granted by the owner of the copyright is binding on every successor in title save for a purchaser in good faith for valuable consideration and without notice of the licence. This is nothing to do with the form of a licence or whether or not it has to be contractual. It simply deals with the effect of a licence on purchasers of the copyright.

55. The Appellant stated (at paragraph 62 of its skeleton argument) that the Chief Justice had determined (at paragraphs 95-100 of the Judgment) that there could be a collateral copyright licence and (at paragraph 68 of its skeleton argument) that the

Chief Justice "has attempted a contractual workaround to a public law instrument". In oral submissions the Appellant focussed this criticism on paragraph 247 of the Judgment. We reject this criticism as confused or misleading. It is clear from paragraph 247 and section H4 as a whole that the Chief Justice was considering the contractual approach only in the alternative and that was because both parties had originally pleaded and argued the correctness of the contractual approach.

56. We have carefully read paragraphs 95-100 of the Judgment and do not consider that he determined the matter in the way suggested by the Appellant. The Chief Justice held, in terms we endorse, that a copyright licence can arise by statute with there being no reason why such a licence could not arise in the context of an exploration licence granted pursuant to a statutory regime for the licensing of oil exploration. The Chief Justice went on to state that such was the case whether the exploration licence was to be characterised as a public law instrument or as a contract.

57. Finally, the Appellant argued that clause 17(2)(e) was an illegitimate attempt to modify the Copyright Act 1956 and so fell foul of the Colonial Laws Validity Act 1865, which Act, by section 2, provides that a colonial law repugnant to the provisions of an Act extending to the colony shall be read subject to such Act and to the extent of such repugnancy be void. In this context the Appellant refers to section 31(3) of the 1956 Act which is a provision intended, putting the matter generally and briefly, to protect foreign authors.

58. We do not consider section 31(3) of the 1956 Act aids the argument as to repugnancy. Nor do we consider that there is any repugnancy or anything approaching repugnancy. The Copyright Act 1956 contemplates, albeit not in specific terms, what in fact came to happen namely the creation of copyright data with a licence as to its use. Consequently, the licensing regime does not operate repugnantly to the Copyright Act 1956 and, in particular Model Clause 17(2)(e) is not repugnant to that legislation.

Alleged appropriation of property without compensation

59. The preceding analysis also, in our view, disposes of the submission that the permit operated as appropriation (of copyright) without compensation. Just as there is no

bar to a publishing house commissioning an author to create a literary work with the publishing house being licensed subsequently to use the copyright material that arises, there is no bar on the Crown, as owner or controller of the sea bed permitting its exploration with data that arises being licensed for use by the Crown. In neither circumstance is there any appropriation when the copyright material comes to be used. In the first case the agreement between the parties provides what can happen, in the second case the permit, without which the exploration would be criminal, provides what can happen.

60. The Chief Justice addressed this point at paragraphs 227 to 232 of the Judgment in rejecting the proposition that the Appellant was entitled to a royalty payment in return for the Respondent's release of the Data pursuant to Model Clause 17(2)(e). The essential point in our view is that there is no appropriation of Data from the Appellant pursuant to the Permit. The Appellant voluntarily applied to the Respondent for the Permit containing these terms and the Data only exists because the Appellant was authorised to obtain it by the Permit which contained respective rights and obligations which were perfectly clear from its terms.

61. Accordingly we reject the contentions made under Ground 2, save for addressing the issue of estoppel below.

62. Although we have considered and rejected this Ground of Appeal on its merits, we should add that we concur with the view of the Chief Justice (at paragraphs 231 and 244 of the Judgment) that the appropriate remedy of the Appellant, had it objected to the terms upon which the Respondent had been prepared to grant, or in fact granted, the Permit would have been by way of judicial review pursuant to Order 53. This was not done and it was confirmed that no such application was being made at trial or on appeal.

H. ESTOPPEL

63. Ground 2 also includes a challenge to the finding by the Chief Justice in relation to an argument of the Respondent (recorded at paragraph 301 of the Judgment) that the Appellant would in any event have been estopped by convention from asserting its present claim because the basis on which the parties conducted themselves was

that the Appellant had at all material times accepted without objection that the Data received by the Respondent under the Permit could be published or disclosed by the Respondent after the expiry of the 5 year period.

64. The Chief Justice found (at paragraph 307 of the Judgment) that the Appellant would have been estopped from relying on the interpretation proposed by the Appellant in the action. However he held that it was not necessary for the Respondent to rely upon such an estoppel given the Chief Justice's interpretation of the Model Clauses. His reasoning is at paragraphs 295 to 310 of the Judgment.

65. We do not agree with the conclusion or the reasoning of the Chief Justice on this issue or the submissions made by the Respondent. Although the issue is not essential to our judgment, just as it was not essential to the Judgment of the Chief Justice, we consider that the matter proceeds as follows.

66. In matters of public law, the private law doctrine of estoppel will ordinarily have no place. If authority is needed this is provided by the decision of the House of Lords in *R (Reprotech (Pebsham)) Ltd v East Sussex County Council* [2002] UKHL 8, [2003] 1WLR 348, in which it was held that a local authority could not be estopped from performing its functions and that the doctrine of estoppel was inappropriate. Lord Hoffmann (at paragraphs 33 and 34) stated that:

> "33. In any case, I think that it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord Scarman pointed out in *Newbury District Council v Secretary of State for the Environment* [1981] 578, 616, estoppels bind individuals on the ground that it would unconscionable for them to deny what they have represented or agreed. But these concepts of private law should not be extended into "the public law of planning control, which binds everyone." (See also Dyson J in *R v Leicester City Council. ex p. Powergen UK Ltd* [2000] JPL 629, 637.)
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> 34. There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power: see *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote…"

67. If an individual cannot in public law rely on an estoppel against a public authority then by parity of reasoning the public authority should not be able to rely on an estoppel against an individual. At the heart of the *Reprotech* judgment lies the proposition that the legal relationship is governed by the relevant public law instrument or decision, which instrument represents the expression of the public interest. Lord Hoffmann raised the analogy between estoppel and the public law concept of legitimate expectation but the latter would not apply to the conduct of the Appellant and in any event is irrelevant here. We should note that the *Reprotech* case was not cited to the Chief Justice who therefore did not have the benefit of Lord Hoffmann's speech.

68. We therefore uphold the appeal on the issue of estoppel by convention, but estoppel is not in any event relevant given our decision on the proper construction of the Permit and our rejection of the other contentions under Ground 2.

I. GROUNDS 3 TO 5: THE RESPONDENT'S DISCRETION

69. Grounds 3, 4 and 5 address the findings of the Chief Justice relating to nature of the decision of the Respondent to disclose the data and the extent of any discretion on the part of the Respondent. In summary it is alleged that:

    a. The Chief Justice should have held that the exercise of discretion included a consideration of the property rights of the Appellant;

    b. The Chief Justice was wrong to have held that the discretion was limited to consideration of the purpose of the Offshore Minerals Ordinance;

    c. There was insufficient evidence for the Chief Justice to have held that the purpose of the Offshore Minerals Ordinance was the promotion of offshore oil and gas exploration and exploitation.

70. The Chief Justice addressed this issue at paragraphs 267 to 293 of the Judgment. He made clear that the Appellant had no pleaded case alleging any error on the part of the Respondent in the exercise of its discretion and confirmed (at paragraph 270 of the Judgment) that the Appellant did not seek to make a judicial review claim by

any means in relation to the Respondent's decision to publish the Data pursuant to Model Clause 17(2)(e) or at all. This was confirmed to us during the hearing of the Appeal by Counsel for the Appellant.

71. However the Chief Justice did address the question whether there were any limits as to the disclosure or publication of the Data as a matter of construction of Model Clause 17(2)(e). He addressed the issue as to how the discretion of the Governor stood to be exercised under clause 17(2)(e) at paragraphs 279 to 291 of the Judgment.

72. On the face of it the provision is simply one which enables but does not require the Governor to publish or disclose. We agree with the Chief Justice (at paragraph 280 of the Judgment) that the legislative intent was to give the Governor an unqualified discretion so that the limits on its exercise were those addressed in the case of *British Oxygen v Ministry of Technology* [1971] AC 610 as cited by the Chief Justice at paragraph 279 of his judgment, namely bad faith or that the decision was so unreasonably exercised that there cannot have been any real or genuine exercise of discretion which is a very high hurdle.

73. We do not consider that as a matter of law the effect publication and disclosure might have on the private property rights of the Appellant would constitute a material consideration for the Governor on such a decision, nor that the Governor would have to consider the alleged list of considerations at paragraph 105 of the Appellant's skeleton argument (paragraph 285 of the Judgment). There is nothing in the legislation to suggest such is the case or to indicate that any means of inquiry as to such matters is given to the Governor.

74. We therefore reject Grounds 3 to 5 of the Appeal.

75. We make no finding on the Respondent's contention that the Chief Justice should have held (if he did not on a proper interpretation of the Judgment so hold) that a future claim by judicial review of a decision of the Governor to publish under Clause 17(2)(e) is barred by the findings in the Judgment.

J. CONCLUSION ON THE APPEAL

76. Pursuant to the Grounds set out in the Memorandum of Appeal and summarised at paragraph 41 above, paragraph 12 of the Appellant's skeleton argument conveniently summarises the arguments advanced before us by the Appellant in the Appeal. We use this list to summarise our conclusion on these arguments:

a. First, that the Model Clauses should be read down to the extent repugnant to section 31(3) of the Copyright Act 1956. We do not agree on the basis that the Model Clauses are not so repugnant.

b. Second, that if not read down the Model Clauses could not have been imposed as they were void in their application. We do not consider that they were void but rather part of an enacted legislative scheme voluntarily adopted by the Appellant as the basis upon which it was permitted to obtain the Data.

c. Third, that if a copyright licence was provided for, it was a statutory copyright licence that attracts compensation so as not to deprive a person of his property without compensation. We do not agree on the basis that the property was only acquired by reason of the voluntary application for the Permit which contained rights and obligations binding both Appellant and Respondent.

d. Fourth, that the discretion exercised by the Governor in publishing should take into account the effect publication and disclosure has on the private property rights of the Appellant. We do not agree; there is nothing in the legislation to suggest such should be the case or to indicate that any means of inquiry as to such matters is given to the Governor.

e. Fifth, that the Appellant cannot be estopped from challenging the interpretation of clause 17(2)(e). We agree with the Appellant's objection to this finding of the Chief Justice but it has no relevance to our overall decision on the Appeal given our decision on the other Grounds.

77. In conclusion, the Appeal stands to be dismissed.

78. We indicated that we would receive submissions in writing as to consequential matters, including costs. We direct that any such application should be made in writing and/or by email to the Registrar of the Court of Appeal within 14 days of the handing down of this judgment. Responses to such applications should be made in writing and/or by email to the Registrar within 7 days thereafter.