Privy Council Appeal No. 46 of 1990

D.J. Butcher *Appellant*

v.

(1) Petrocorp Exploration Ltd.
(2) Petrocorp Exploration (Taranaki) Ltd.
(3) Payzone Exploration Ltd.
(4) Southern Petroleum No Liability
(5) Nomeco New Zealand Exploration Co.
(6) Bligh Oil & Minerals (NZ) Ltd. and
(7) Carpentaria Exploration Co. (NZ) Ltd. *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH MARCH 1991

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD GRIFFITHS
LORD GOFF OF CHIEVELEY
LORD LOWRY

*[Delivered by **Lord Bridge of Harwich**]*

The background to the litigation

In New Zealand all petroleum existing in its natural condition below the surface of the land is the property of the Crown. It is a national resource of the utmost importance. Prospecting and mining for petroleum is strictly controlled and regulated by a statutory code under the Petroleum Act 1937, as amended from time to time, and the Petroleum Regulations 1978. The regulating authority is the Minister of Energy. The Crown itself, as the legislation contemplates that it should, has played a significant role in developing and exploiting national petroleum resources both directly and by encouraging oil companies to participate in the process. The Crown's direct participation in prospecting and mining activities is also under the control of the Minister of Energy, as agent on behalf of the Crown. Thus the Minister is cast by the legislation in a dual role. On the one hand, as the licensing and regulating authority he performs an independent statutory function
[10] involving in many circumstances the exercise of a

discretion which must be governed only by considerations of national policy and the national interest in the broadest sense. On the other hand, acting as agent of the Crown as an operator in the day to day business of prospecting and mining for petroleum he is engaged, like any other operator, in purely commercial transactions either alone or in association with others. The distinction between these two functions of the Minister is of critical importance in this appeal.

No one may prospect or mine for petroleum without a licence. Licences granted under the Act are of two kinds, prospecting licences and mining licences. Each confers the exclusive right of prospecting or mining, as the case may be, in the area covered by the licence. If the holder of a prospecting licence makes a discovery of petroleum he becomes entitled as of right to receive a mining licence covering a sufficient area to enable him to exploit the reservoir or field he has discovered in exchange for the surrender of the prospecting licence over that area. Subject to this the grant of licences is purely discretionary.

On 21st July 1977 the Minister granted a prospecting licence, PPL 38034, to the Crown for 5 years covering a large area on the west coast of New Zealand's North Island in the province of Taranaki. In 1978 a group of companies called Petrocorp was formed with the Crown as sole shareholder and PPL 38034 was assigned to it. On 21st July 1982 PPL 38034 was renewed for a further term of 5 years over an area of 2310 square kilometres. In March 1985 a 51% interest in the licence was reassigned by Petrocorp to the Crown and Petrocorp was appointed as the Crown's agent. Up to the end of 1985 some NZ$75 million of Government money had been expended in exploration. Some modest petroleum deposits had been discovered and mining licences covering areas appropriate to the exploitation of those deposits had been granted to Petrocorp in exchange for the surrender of PPL 38034 in relation to those areas. During 1985 a well, known as "Waihapa 1", drilled to a depth of 4800 metres true vertical sub-sea ("TVSS"), had discovered a modest deposit of gas condensate in a stratigraphic formation known as Kaimiro. Further tests were required to be undertaken, however, to ascertain whether the discovery warranted commercial exploitation and no mining licence had been granted in respect of it.

In December 1985 and January 1986 new arrangements were entered into whereby the Crown and Petrocorp assigned part of their interests in PPL 38034 to a number of oil companies who were to join in a joint venture to carry out further prospecting operations under the licence until its expiry on 20th July 1987 and thereafter to carry out mining operations under any future mining licences granted in respect of

discoveries in the area of PPL 38034. The proportions of the parties' respective interests in the licence resulting from these arrangements was as follows:-

The Crown	38.36%
Petrocorp	28.34%
Taranaki (a Petrocorp subsidiary)	1.7%
Payzone	17.5%
Southern	5.1%
Nomeco	5.0%
Bligh	2.0%
Carpentaria	2.0%

The rights and obligations of these parties were defined in a joint venture operating agreement which was signed on 14th April 1986 but took effect from 15th January 1986 ("the JVOA"). Under the JVOA the joint venturers were to spend NZ$45 million in drilling exploration wells in accordance with a defined programme of work obligations in the area of PPL 38034. As a result of operations under the JVOA deposits of petroleum were discovered at places named Tariki and Ahuroa. Before the expiry of PPL 38034 there were discussions between Petrocorp, on behalf of the joint venturers, and the Ministry with regard to the appropriate areas for which mining licences should be issued in consequence of the discoveries at Tariki, Ahuroa and Waihapa. After initial differences of opinion, Petrocorp accepted the Minister's view as to the areas which would be adequate to enable mining operations to be carried out in respect of the fields discovered and mining licences were applied for before 20th July 1987 and granted to the joint venturers on 17th November 1987 to take effect from 21st July 1987 over the following areas:-

PML 38038 Tariki 14.9 square kilometres
PML 38139 Ahuroa 15.1 square kilometres
PML 38140 Waihapa 22.86 square kilometres

The area of the Ahuroa licence adjoins that of the Tariki licence on its south side. The area of the Waihapa licence lies almost due south of the other two but at a distance from them of several kilometres.

During 1987 the Crown decided to sell its shareholding in the Petrocorp group and its interests in the existing mining licences in the Taranaki area, including the three which had been granted to the joint venturers. In June 1987 15% of the Crown's shareholding in Petrocorp was sold to Brierley Industries Ltd. In August a further 15% was sold to the public. Tenders for the remaining 70% were invited in November 1987 and the sale of these shares to Fletcher Challenge Corporation was completed on 3rd March 1988. The Crown's interests in the existing mining licences were advertised for sale in September 1987 but not then immediately sold. Following the expiry of PPL 38034 it was also decided to divide the

remaining area formerly covered by that licence, which, apart from areas subject to mining licences, still extended over more than 2000 square kilometres, into several blocks and to invite bids for the grant of new prospecting licences over those blocks in the form of prospecting work programmes. The unlicensed area lying between the Ahuroa and the Waihapa mining licences was part of what was referred to as "Block 7". The closing dates for bids for new prospecting licences was 29th April 1988.

Meanwhile on 26th February 1988 there occurred the event from which the dispute in this litigation arises. The joint venturers, while carrying out tests in the original Waihapa 1 well, discovered oil in a stratigraphic feature known as the Tikorangi limestone formation. This was an entirely new discovery quite unrelated to the discovery of gas condensate in the Kaimiro formation in respect of which the Waihapa licence had been granted. That discovery had been at a level below 4600 metres TVSS. The new discovery was at a level of approximately 2700 metres TVSS. Appraisal of the significance of the new discovery in the light of all available geological data revealed that the oil field discovered extended far beyond the boundaries of the Waihapa licence in a northerly direction, the major part of it lying under the surface of the land between the Waihapa and Ahuroa licences and probably extending into the Ahuroa licence area.

It will be convenient to refer to the new discovery as the Waihapa oil field. Its value is estimated to be in the order of NZ$1 billion. It is not now in dispute that the joint venturers, as holders of the Waihapa and the Ahuroa licences, are entitled to mine the Waihapa oil field within the boundaries of their existing mining licences. The dispute relates to the right to mine in the area lying between the Waihapa and Ahuroa licences which ceased to be subject to any licence when PPL 38034 expired on 20th July 1987. What happened was that Petrocorp, on behalf of the joint venturers, applied on 9th March 1988 for an extension of the Waihapa mining licence to cover an area of some 100 square kilometres which would have linked up the area of the Waihapa licence in the south with that of the Ahuroa and Tariki licences in the north and more than covered the whole area of the Waihapa oil field. Petrocorp also made a bid for the grant of a new prospecting licence over Block 7 on behalf of all the joint venturers except the Crown. In this they were in competition with four other bidders for prospecting licences over Block 7. Thus the Minister was faced with competing applications for licences over the area now known to contain the major part of the Waihapa oil field in the form of five bids for Block 7 including that of the joint venturers other than the Crown in addition to the application for an extension of the Waihapa licence made on behalf of the joint venturers including the

Crown. On 4th May 1988 the Minister of Energy, after considering the advice of his officials and consulting his Cabinet colleagues, made a number of decisions which may be summarised as follows:-

1. He refused Petrocorp's application for an extension of the Waihapa licence;

2. He decided not to accept any of the bids received for a new prospecting licence over Block 7;

3. He granted to himself on behalf of the Crown a mining licence, PML 38141, the Ngaere licence, over an area of 46.7 square kilometres lying between the Ahuroa and Waihapa licences and covering a large part of the Waihapa oil field;

4. He declined all bids received for the purchase of the Crown's interest in the Tariki, Ahuroa and Waihapa mining licences and invited Petrocorp and the other joint venturers to enter into negotiations for the purchase of these interests and of the Crown's full interest in the new Ngaere licence.

To complete the story, Petrocorp's agency to act on behalf of the Crown was terminated on 12th May 1988.

The litigation

On 12th August 1988 the joint venturers other than the Crown as plaintiffs instituted these proceedings against the Minister by way of an application for judicial review. There was originally an issue relating to the scope of the joint venturers' right to carry out mining operations within the area of the Waihapa licence. But this is now no longer in dispute. So far as the matters remaining in issue are concerned the plaintiffs challenged the validity of the Minister's decisions to refuse the application for an extension of the Waihapa licence, to grant the Ngaere licence to himself on behalf of the Crown and to offer to negotiate for its sale to the plaintiffs. The pleadings impugn those decisions as an abuse of the Minister's statutory discretion on public law grounds and voluminous particulars are given under the following headings:-

(i) Improper purpose.

(ii) Irrelevant considerations.

(iii) Failing to have regard to or to give due weight to relevant considerations.

(iv) The joint venture's legitimate expectation that an extension would be granted.

(v) *Audi alteram partem.*

(vi) Unfairness or unreasonableness.

Although there are some references in these particulars to the joint venture, the contractual terms of the JVOA are in no way invoked as imposing any contractual or other private law obligations on the Minister.

Affidavits were filed by both sides including an affidavit sworn by the Minister. In interlocutory proceedings an application to cross-examine the Minister was initially granted by the judge but on appeal his decision was reversed by the Court of Appeal [1991] 1 NZLR 1. In the course of the interlocutory hearing before the Court of Appeal the Solicitor-General conceded that the Minister had acted in making the impugned decisions on the view that he was under no relevant contractual obligations by virtue of the JVOA. This was hardly surprising since no such obligations had been alleged.

Their Lordships have been shown extracts from the written submissions made on behalf of the plaintiffs in the High Court. There is some reference to a "conflict of interest" between the Minister as joint venturer and as licensing authority and it was certainly part of the plaintiffs' case that the Minister had misused confidential information furnished to him as a joint venturer. But it would appear that the case when it came for trial before Greig J. was contested on familiar public law grounds for judicial review which sought to invalidate the decisions solely on the basis of flaws in the decision making process. In a lengthy judgment in which every complaint advanced by the plaintiffs is examined with meticulous care, there is nothing to indicate that it had ever been suggested that the Minister was contractually obliged to grant the extension of the Waihapa licence for which the joint venturers had applied or contractually disentitled from granting the Ngaere licence to himself on behalf of the Crown. Indeed the judge had no occasion to refer to the terms of the JVOA at all. He rejected all the plaintiffs' complaints and dismissed the claim.

The Court of Appeal (Cooke P., Richardson, Bisson, Hardie Boys, and Heron JJ.) by a majority of four to one, Richardson J. dissenting, allowed the plaintiffs' appeal and declared that the Minister's grant of the Ngaere licence to himself on behalf of the Crown was unlawful and that the licence was invalid. The proceedings in the Court of Appeal took an entirely different course from that which they had followed at the trial. The essential proposition on which the majority founded their judgment was that the JVOA placed the Minister under a contractual obligation which precluded him from granting the Ngaere licence to himself on behalf of the Crown. There had and has still been no amendment to the pleadings and it seems doubtful whether this proposition arose from arguments presented by leading counsel for the plaintiffs, who had not appeared at the trial, or whether it was introduced on the initiative of the court. Since no contractual

relief was ever claimed, the court stopped short of spelling out the precise nature, scope and effect of the contractual obligation which it found to exist. The primary ground on which Cooke P., delivering the leading judgment, held that the plaintiffs were entitled to relief was "that the Minister was not free to grant himself a sole licence with a view to sale to the joint venture and contrary to his obligations as a joint venturer". As a secondary ground he held that "the procedure of withholding information of the existence of the plan to grant a licence to the Minister only was unfair, in that it was contrary to natural justice and the legitimate expectations of reasonable business people in the position of the joint venturers".

The Minister has appealed to Her Majesty in Council by leave of the Court of Appeal and before the Board the proceedings have undergone a further metamorphosis. Sir Patrick Neill Q.C. placed in the forefront of his argument for the respondents contentions based on the terms of the JVOA leading to the conclusion that when the Minister granted the Ngaere licence to himself on behalf of the Crown he was obliged to hold it as a constructive trustee for all the joint venturers. Sir Patrick recognised that this went further than the Court of Appeal's decision and he invited the Board to substitute for the declaration made by the Court of Appeal a declaration that the Ngaere licence was held by the Minister in trust for all the joint venturers in proportion to their interests under the JVOA. The Solicitor-General, on behalf of the Minister, raised no objection to the scope of the issue being enlarged in this way. Both sides very sensibly take the view that all issues, whether of private or public law, should be finally resolved in these proceedings. In the result the private law claims made for the respondents have loomed largest in the argument and the claim to a remedy in public law, though still maintained in the alternative, has played a subordinate and much attenuated role. Before addressing the private law claims made on behalf of the respondents it is necessary to examine in some detail the provisions of the Act and the JVOA.

The Petroleum Act 1937

The long title of the Act is "An Act to make better provision for the encouragement and regulation of mining for petroleum, and to provide for matters incidental thereto". Section 3 provides that "all petroleum existing in its natural condition on or below the surface of any land, whether the land has been alienated from the Crown or not, is hereby declared to be the property of the Crown". Section 4 prohibits prospecting or mining for petroleum except pursuant to a licence granted under the Act. The grant of a prospecting licence under section 5 is discretionary and may be granted "on such terms and conditions as the

Minister may in his discretion specify". Section 5(2) provides:-

> "Without limiting the generality of subsection (1) of this section, the Minister may on granting the licence specify as a condition of the licence the terms on which the Minister or any other person authorised to act on behalf of the Crown shall be entitled to participate in prospecting under the licence or in the mining of petroleum under any mining licence granted in accordance with the provisions of section 11 of this Act."

The original term of a prospecting licence is not to exceed 5 years but may be renewed once only for a period not exceeding the original term over an area not exceeding one half of the area covered by the original licence: section 6. During the currency of a prospecting licence the licensee has the exclusive right to prospect for petroleum in the area which it covers: section 7. Section 11 provides as follows:-

> "11. Licensee entitled to grant of mining licence -
>
> (1) Subject to the provisions of this Act, if the holder of a prospecting licence satisfies the Minister that -
>
> (a) He has discovered, within the limits of the land comprised in the licence, a deposit of petroleum; and
>
> (b) If a mining licence is granted to him, he will comply with the conditions of the mining licence, -
>
> he shall have the right, on applying under section 12 of this Act before the expiry of the prospecting licence, to surrender that licence as to the whole of the land comprised in the licence, or any part of that land conforming with such graticular system as may be prescribed, and to receive in exchange a mining licence.
>
> (2) A mining licence granted in accordance with subsection (1) of this section shall be granted over the area of land surrendered or over such smaller area as the Minister determines will be reasonably adequate to enable mining operations to be carried out in respect of the reservoir or field intended to be mined in accordance with recognised good oilfield practice.
>
> (3) If the applicant disagrees with any decision of the Minister under ... subsection (2) of this section he may, within 28 days after the date of receipt of the decision, refer the matter to arbitration in accordance with section 47J of this Act.

(4) If the Minister grants a mining licence over a smaller area than the area applied for, that part of the area applied for which was not included in the mining licence shall, if the applicant so requires, continue to be included in his prospecting licence until its expiry or other termination."

Section 12 confers a general and wholly discretionary power on the Minister to grant a mining licence "on such terms and conditions as the Minister may in his discretion specify". But when the holder of a prospecting licence becomes entitled as of right to a mining licence in accordance with section 11, additional terms or conditions modifying or conflicting with those specified under section 5(2) when the prospecting licence was granted as conditions to be included in any mining licence granted in accordance with section 11 may only be included with the licensee's consent: section 12(4). All these provisions serve to emphasise that the only situation in which any party becomes entitled to a licence as of right is when the holder of a prospecting licence discovers a deposit of petroleum while his prospecting licence is still current and duly applies for a mining licence over an area sufficient to enable him to exploit that discovery.

A mining licence is to be for an initial term not exceeding 4 years and thereafter for a "specified term" not exceeding 40 years, but may be extended in certain circumstances if the licensee satisfies the Minister "that the petroleum discovery to which the licence applies cannot be economically depleted during the remainder of the specified term": section 13. A mining licence confers the exclusive right on the licensee to mine for petroleum on the land comprised in the licence: section 14. During the initial term of a mining licence the licensee must obtain the approval of the Minister of a programme for the construction of permanent works and structures for the development of any petroleum discovery within the limits of the land comprised in the licence and it is only on the approval of such a works programme and on the commencement of the specified term that the construction of permanent works may begin: section 14A. Section 20 provides that the Minister "may from time to time, on the application of the licensee, and upon or subject to such conditions as the Minister thinks fit, amend any licence by adding any adjoining land to the land comprised in the licence".

Section 36 is of central importance and must be set out in full. It provides as follows:-

"36. Minister may acquire licences and carry on mining operations -

(1) Subject to the provisions of this section, the Minister may, on behalf of the Crown -

(a) Grant any licence to himself or purchase or otherwise acquire any licence:

(b) Purchase or otherwise acquire any interest in any licence:

(c) Sell or otherwise deal with any licence or any interest in any licence:

(d) Carry on mining operations:

(e) Do any of those things jointly with any other person or persons.

(2) The Minister may in his discretion and on such terms and conditions as he thinks fit authorise the Secretary or any other person or persons on behalf of the Crown to acquire a licence or any interest in a licence. In any such case references to the Minister in this section shall be read as references to the Secretary or the other person or persons, and the Secretary or other person or persons may, subject to the terms and conditions of the authorisation, exercise all the powers and discretions granted to the Minister by this section.

(3) The Minister shall not prospect or mine for petroleum on any land unless a licence is held on behalf of the Crown in respect of that land.

(4) Subject to the provisions of this section, any licence acquired by the Minister or by any other person or persons on behalf of the Crown shall confer the same rights, benefits, and privileges as would be conferred on a private person holding the licence. No transfer or mortgage to the Crown of any licence shall operate as a merger of the interest created by the licence.

(5) A licence held solely by the Minister or by any other person or persons on behalf of the Crown shall not terminate by effluxion of time but shall continue in force notwithstanding the expiry of the term for which it was granted until the Minister, by notice in the *Gazette*, declares it to be surrendered.

(6) Nothing in this section shall be construed to impose any obligation on the Crown or on any person or persons holding a licence solely on behalf of the Crown or to render binding on the Crown any provisions of this Act that are not expressed to bind the Crown."

It is to be noted that, whereas sections 5, 7, 11, 12, 14 and 20 all open with the phrase "Subject to the

provisions of this Act", section 36 opens with the phrase "Subject to the provisions of this section" and provides in effect a self-contained code. The only other provisions of the Act that are expressed to bind the Crown are section 33, which requires a licensee exercising powers of entry on land to give notice to the occupiers, and section 39, which provides for the payment of compensation to landowners injuriously affected by the exercise of powers under the Act.

It is by virtue of section 36 that the Minister is called on to perform the dual role to which reference was made at the outset of this judgment. As licensing and regulating authority he has an important statutory function to perform which is conferred upon him qua Minister. It is clearly in this role that all discretionary decisions relating to the grant of licences under sections 5, 12 and 20, as well as many regulatory functions under both the Act and the Petroleum Regulations 1978, are to be performed. On the other hand, when acting under section 36 as grantee, purchaser or seller of a licence or of any interest in a licence or in carrying on mining operations under a licence, whether alone or jointly with any other person, the Minister is acting in quite a different capacity as agent on behalf of the Crown and in this role, save to the extent that the Crown is free, by virtue of section 36, from statutory restrictions applicable to other licensees, his function is analogous to that of any other operator in the petroleum exploration and mining industry. It will be convenient to refer to these two distinct functions of the Minister as his statutory and his commercial functions. Once the distinction is made, it is clear, in their Lordships' judgment, on the true construction of section 36, that in deciding whether or not to grant and in granting a licence to himself on behalf of the Crown the Minister is exercising his statutory function, though in receiving it as grantee on behalf of the Crown he is performing his commercial function.

It is appropriate to pause at this point to note that, if the Crown had not been one of the parties engaged in the joint venture, the joint venturers could not possibly have sustained any claim to the grant to themselves as of right of a mining licence to enable them to mine the Waihapa oil field outside the boundaries of the Ahuroa and Waihapa mining licences which they held. Nor could they have raised any objection in virtue of any private law rights to the Minister's grant of the Ngaere licence to himself on behalf of the Crown. Petroleum prospecting is no doubt a largely speculative enterprise. If the Waihapa oil field had been discovered by the joint venturers during the currency of PPL 38034, they would have been entitled as of right to a mining licence to exploit the whole of it. It was their misfortune that it was only discovered after PPL 38034 had expired. But it never

has been nor could have been suggested, so far as the provisions of the statute are concerned, that the circumstances of its discovery imposed any fetter on the Minister's liberty to grant a mining licence covering so much of the field as lay outside the limits of the Waihapa and Ahuroa licences to whomsoever he wished.

The joint venture operating agreement

The JVOA is drafted in terms which clearly recognise the distinction between the Minister's statutory functions and his commercial functions as agent for the Crown. Thus as a party to the agreement the Minister is described as "acting on behalf of Her Majesty The Queen in right of New Zealand (hereinafter with his successors and assigns called 'the Crown') of the first part". In the definition section on the other hand "the Minister" is defined as meaning "the Minister of Energy for New Zealand or any other Minister for the time being exercising the powers conferred on the Minister of Energy by the Act acting in that capacity and not as a joint venturer to this agreement". Wherever the terms of the agreement, in dealing with the rights and obligations of the parties, have occasion to distinguish between the Crown as a joint venturer and other joint venturers, reference is made to the Crown, not to the Minister. Thus, to give only one example, section 2.03(a) under the heading "The Crown's Agent and Delegation" provides:-

> "The Crown may from time to time appoint and keep and may on 30 days notice to other joint venturers replace an agent for doing any act, matter or thing required or allowed to be done by this agreement by the Crown."

By contrast, wherever the agreement makes provision for the procedure to be followed in connection with the obtaining of necessary statutory consents, reference is made to the Minister as distinct from the joint venturers. Again to give only one example, in contemplation of the situation following a discovery of petroleum under the prospecting licence and the making of an application for a mining licence pursuant to section 11, section 6.02(b) of the JVOA provides that "the operator shall submit an application to the Minister for a mining licence on behalf of the joint venturers" in respect of the area "which the operating committee consider necessary to enable the discovery to be developed. The joint venturers shall use their best endeavours to ensure that such mining licence is obtained". This clearly contemplates that the joint venturers and the Minister may disagree as to the extent of the area which, in accordance with section 11(2), is "reasonably adequate to enable mining operations to be carried out in respect of the reservoir or field intended to be mined" and this disagreement may in turn lead to an arbitration under section 11(3) between the Minister on one side and the joint venturers on the other.

Other important definitions in the JVOA are as follows:-

> "'The Licence' means Petroleum Prospecting Licence 38034 ..."
>
> "'Licence Area' means the area the subject of the Licence and of any Mining Licence issued to the Joint Venturers."
>
> "'Mining Licence' means a mining licence and any renewals thereof issued by the Minister to any one or more of the Joint Venturers under the Act in respect of the whole or any part of the Licence Area."

Article 2 of the JVOA is headed "The Joint Venture" and section 2.01 headed "The Establishment" reads as follows:-

> "2.01(a) The Joint Venturers hereby establish a joint venture in accordance with the provisions of this Agreement for the purposes of:
>
> (i) exploring, prospecting and mining for Petroleum in the Licence Area; and
>
> (ii) developing any commercial discovery, producing Petroleum therefrom, processing the Petroleum into a form suitable for transmission by tanker or pipeline and storing the Petroleum until it is lifted or otherwise disposed of;
>
> and such other purposes as may be agreed upon by the Joint Venturers unanimously.
>
> 2.01(b) All activities and operations of the Joint Venture shall be carried on in accordance with the laws of New Zealand but subject thereto all activities and decisions of each Joint Venturer in connection with the Joint Venture, including the Licence, any Mining Licence or the Licence Area, shall be directed to secure the maximum commercial advantage of the Joint Venture and shall conform with good oil and gas field practice."

The essence of the reasoning of the Court of Appeal leading to the conclusion that the JVOA prevented the Minister from granting the Ngaere licence to himself on behalf of the Crown is expressed in the following passage from the judgment of Cooke P. (at page 35):-

> "The Ngaere licence must fall within the definition of 'Mining Licence'. It is certainly within the 'Licence Area' and was certainly issued to one of the joint venturers, namely the Minister; and expiry

> of the prospecting licence should not on any realistic interpretation be held to diminish the area. By section 2.01(a)(i) of the joint venture operating agreement the first of the purposes of the joint venture are stated to be exploring, prospecting and mining for petroleum in the licence area. Section 2.01(b) is of major importance: [the President then quotes the subsection]
>
> Thus each joint venturer, including the Minister, has agreed that all his or its activities and decisions in connection with the joint venture, including on the foregoing interpretation any Ngaere licence, shall be directed to secure the maximum commercial advantage of the joint venture. As his Ngaere licensing decision was intended to secure the maximum commercial advantage of one joint venturer only, at the expense of the others, the Minister was in my view in breach of his obligations. The Minister's decision was not the less 'in connection with the Joint Venture' because he invoked statutory powers.
>
> All the Minister's activities and decisions in connection with the joint venture were necessarily carried out and made under statutory powers. The other joint venturers were entitled to expect that, subject to compliance with the laws of New Zealand. the Minister would be bound in matters connected with the joint venture not to promote the Crown's commercial advantage to their commercial disadvantage, just as they would be reciprocally bound to the Crown and one another to act for the maximum commercial advantage of the joint venture as a whole. To say that the Minister's statutory powers, such as his powers to grant or extend licences, were not affected by that obligation would be largely to destroy it."

Their Lordships, with respect, are quite unable to agree with this reasoning. It appears to them to be erroneous in two respects. First, it wholly ignores the distinction drawn in the JVOA between the position of the Crown as a joint venturer and the position of the Minister, as defined, "acting in that capacity and not as a joint venturer." Secondly, it misconstrues the definition of "Licence Area." So long as PPL 38034 continued in force it embraced the whole of the original 2310 square kilometres less the small areas covered by mining licences granted before 1986. But after PPL 38034 expired in July 1987 the only areas falling within the definition of "Licence Area" were the areas of the three mining licences which were granted to the joint venturers.

Cooke P. supported his construction by reference to section 2.02(b) which provides that "this agreement shall remain in force and the joint venture shall continue so

long as the Licence and any Mining Licence issued pursuant thereto in respect of any discovery made by the joint venture remain in force". So far from supporting the construction adopted, this seems to their Lordships to point against it, since it emphasises that the ambit of the joint venture is limited to the exploitation of PPL 38034 and of any mining licence "issued pursuant thereto". But in any event if the "Licence Area", as defined, is construed as including the area of more than 2000 square kilometres, which was originally within PPL 38034 but became available in July 1987 for the grant of fresh prospecting licences, for the period of 40 years or more during which the mining licences granted to the joint venturers might remain in force, this leads to extravagant consequences which clearly could not have been intended. Cooke P.'s construction would mean that for 40 years the Minister, while at liberty to grant licences to prospect and mine for petroleum in this area exceeding 2000 square kilometres to anyone else under sections 5 and 12 of the Act would nevertheless be inhibited by the JVOA from exercising his power under section 36 to grant a licence to himself on behalf of the Crown. It is clear to their Lordships that the JVOA did not, on its true construction, impose any such contractual fetter on the Minister's exercise of his statutory powers. But, even if it had purported to do so, the contractual fetter would have been ineffective, because it would have been quite incompatible with the proper exercise of the Minister's statutory powers in the national interest.

Sir Patrick Neill recognised the difficulties with which these considerations confronted him, and, while not abandoning any of the wider submissions which had found favour in the Court of Appeal, relied primarily on a very much narrower submission. Their Lordships hope that, in attempting to summarise it shortly, they will not fail to do justice to it. If constrained to accept (contrary to the wider submissions) that the "Licence Area" as defined in the JVOA did not include land which ceased to be the subject of any licence on the expiry of PPL 38034 and that the provisions of the JVOA did not in any way fetter the Minister's discretion with respect to the grant of any licences over that land, the narrow submission runs as follows. Under section 2.01(a), in addition to the purpose of "exploring, prospecting and mining for petroleum in the Licence Area", the purposes of the joint venture included "such other purposes as may be agreed upon by the joint venturers unanimously". Petrocorp was the authorised agent of the Crown until the agency was terminated on 12th May 1988. Accordingly, when Petrocorp on behalf of the joint venturers including the Crown applied to the Minister on 9th March 1988 for an extension of the Waihapa mining licence over approximately 100 square kilometres, this manifested the unanimous agreement of the joint venturers to the enlargement of the purposes of the joint venture to

include exploring, prospecting and mining for petroleum in the area of the extension applied for. It then follows, so runs the submission, that the Minister's decision, not as grantor but as grantee on behalf of the Crown, to accept the Ngaere licence became a decision "in connection with the joint venture" which, in accordance with section 2.01(b), was required "to be directed to secure the maximum commercial advantage of the joint venture" and thus required the Minister to hold the Ngaere licence in trust for all the joint venturers.

In their Lordships' judgment a number of the steps in this ingenious argument are of doubtful validity, but they are content to rest their rejection of it on the simple ground that the assumed enlargement of the Crown's contractual obligations could not lawfully take effect so as to fetter the Minister's discretion to exercise any of his licensing powers under the Act in the manner that he thought would best serve the national interest in granting any new prospecting or mining licences over the unlicenced area formerly included in PPL 38034. As already stated, the contract could not validly impose any direct restraint on the various options open to the Minister in deciding what new licences to grant. It follows, in their Lordships' judgment, that any extension of the contract which had the purported effect of precluding the exercise by the Minister of the option of granting a licence to himself on behalf of the Crown for the sole benefit of the Crown would impose an indirect fetter on his statutory powers which would be equally invalid as incompatible with the purpose and policy of the statute.

In the result their Lordships conclude that the Minister was right to take the view, which seems initially to have been shared by all the other parties, that the contractual obligations of the Crown under the JVOA were of no relevance to the decisions he made in refusing the joint venturers' application for the extension of the Waihapa licence and in granting the Ngaere licence to himself on behalf of the Crown. Their Lordships have felt it necessary to address the contractual issue at some length, but they can hardly hope to improve on the dissenting judgment of Richardson J. which sums the matter up effectively and concisely in the following passage (at page 48):-

> "The short answer is that the decisions made by the Minister under ss 20 and 36 were his statutory assessments as to where the national interest lay. The decision by the Minister to grant himself a mining licence was not one made 'in connection with the joint venture' at all. It was made in the exercise of a statutory power expressly reposed in the Minister. So, too, the decision under s 20 not to extend the Waihapa licence was a discretionary decision taken in the national interest under that statutory power. And the expressions 'the Licence,

any Mining Licence or the Licence Area' in section 2.01(b) were all then confined as to area to the lateral boundaries of the Waihapa licence. The new licence which the Minister granted to himself was the product of his decision under s 36: it was never part of the joint venture."

Grounds for judicial review

In the absence of any relevant contractual obligations affecting the Minister's freedom to exercise his power to grant any new licence over the area of Block 7 as he thought fit in the national interest, the only alleged flaw in the decision making process on which the majority of the Court of Appeal relied as a ground for quashing the Minister's decision was that the joint venturers had a legitimate expectation, so it was said, that when the Minister contemplated the possibility of granting the Ngaere licence to himself on behalf of the Crown they would be specifically consulted and given the opportunity of making representations against his taking that course. Their Lordships need only say that they see no basis for such an expectation. When Petrocorp applied for the extension of the Waihapa licence on 9th March 1988 they submitted all the material they thought necessary in support of their application. Moreover, this was followed on 30th March by a personal letter addressed to the Minister by the Chief Executive of Petrocorp in which he wrote:-

> "The application for an extension was made under Section 20 of the Petroleum Act 1937. You, as the Minister of Energy, have a discretion whether or not to grant the extension. We understand that there may be some reluctance on the part of officials to recommend that the extension be granted as they feel it will detract from the Taranaki Block Offer currently in progress in that the area sought includes part of two of the seven blocks on offer. Accordingly we thought it important to write to you to outline the basis on which we believe that an extension ought to be granted.
>
> In essence, we believe that equitable, practicable and economic considerations heavily favour the granting of the extension."

The letter then sets out at length the arguments in favour of granting the extension sought. The writer was at that time clearly aware that the grant of any licence over the Block 7 area was entirely at the discretion of the Minister. There is no reason to think that the representations he made in support of the extension licence application would have been any different if he had been specifically informed that one of the options that the Minister was considering was the grant of a licence to himself on behalf of the Crown under section 36.

Of the numerous other complaints advanced by the plaintiffs at the trial, all of which were dealt with very fully by Greig J., there remain only two which their Lordships find it necessary to address.

The Minister in his affidavit refers to all the relevant documentary material which he considered before making the impugned decisions and then deposes:-

"5. In making the various decisions including the three in issue in this proceeding, the ultimate question in my mind was how best to deal in the interest of the nation, with what was clearly a valuable Crown-owned resource. The principal matters to which I had regard in making these decisions are contained in the papers referred to in paragraph 4 above and can be summarised as follows:

5.1 The significance of the discovery in both value and extent (such as this was known at the time);

5.2 The fact that the area for which the award of the Ngaere PML was recommended was not subject to any existing rights;

5.3 The history of prospecting in the region including the involvement of the Crown and the Joint Venture in that activity and expenditure by those parties;

5.4 The objectives and various provisions of the legislation;

5.5 The fact that the significance of the new discovery was confirmed by the evaluation of data held on open file;

5.6 The basis for the award of the Waihapa PML to the Joint Venture being a small gas discovery in a different formation from that in which the new oil discovery was located;

5.7 The implications for the prospecting licence tender round in the area;

5.8 The implications for the bids received for the Crown's equity in on-shore Taranaki mining licences in the area;

5.9 The need for a full economic evaluation of the discoveries;

5.10 The appropriateness of negotiating exclusively with the Joint Venture.

6. I was aware of the argument that, because the Waihapa mining licence was granted in respect of a different discovery to the one raising these new issues, the Joint Venture's application for an extension to that licence on the basis of the new discovery was inappropriate. However I placed little weight on this consideration as I could see that what the Joint Venture was seeking was a mining licence over the whole of the new discovery. I treated the application accordingly."

It is submitted on this material that the Minister had regard to an irrelevant consideration in that he considered that the joint venturers, as holders of the Waihapa mining licence, were not entitled as of right to mine the new oil field even within the boundaries of the Waihapa licence. There had been some discussion as to whether, as a matter of procedure, a further licence was required to be obtained for this purpose and after the litigation commenced a question was raised with respect to the joint venturers' right to mine the new oil field within the Waihapa licence area. As already indicated, that question is now no longer in dispute. But their Lordships do not read paragraphs 5.6 and 6 of the Minister's affidavit as indicating that he had formed any view one way or the other as to the joint venturers' rights within the area of the Waihapa licence. On the contrary, he is emphasising that what he had to consider was the grant of a licence outside the Waihapa licence boundaries. There is nothing in this point.

Finally there is complaint of unfairness. This has appeared in many guises at different stages in this litigation. But at the conclusion of the argument before their Lordships there appear to be only two aspects of the alleged unfairness which require to be considered. The first can be dealt with very shortly. It is said that the Minister, or more accurately his officials, acted unfairly in making use of confidential information relating to the newly discovered oil field, particularly with respect to its depth, extent and potential value, supplied to the Minister as a joint venturer under the JVOA. The short answer is that, whatever detailed information was necessary to supplement much that was already public knowledge, in order that the Minister should be in a position to appraise the potential of the new field as fully and accurately as was possible at that stage, was supplied to him by the joint venturers, not only as a fellow joint venturer, but also in discharge of their statutory obligation to furnish all relevant information in support of the joint venturers' application for the extension of the Waihapa mining licence.

The other outstanding complaint of unfairness arises from a telephone conference held on 15th April 1988

between Mr. Fowke and Miss Cole, two senior officials of the Ministry, on the one side and three representatives of Petrocorp on the other. The Petrocorp representatives were seeking reassurance as to the prospects of success of the Petrocorp application for an extension of the Waihapa licence. Mr. Fowke, who was on friendly terms with these representatives, was in no position to disclose what advice had been given to the Minister, but was anxious to give them what comfort he could. Realising that he must be extremely careful what he said, Mr. Fowke made a note in advance of what he intended to say and invited Miss Cole to join the conference as a witness of what he did say. The note records:-

"1. That we did not expect to have a decision on the extended licence application prior to 29/4/88;

2. That on that basis they should therefore consider submitting an application for the prospecting licence bids which close 29/4/88.

3. A strictly personal viewpoint of mine is that I envisage that the present joint venture partners will develop the oil field together."

What Mr. Fowke had in mind, he explains, was that the Minister would, after granting a licence to himself, negotiate with the joint venturers for them to exploit the field. The Petrocorp representatives made affidavits to the effect that Mr. Fowke had assured them that he would recommend the grant of their extension application and that this lulled them into a false sense of security. In the light of Mr. Fowke's contemporary note, it is clear that whatever was said was expressed as a personal view and, even if the Petrocorp representatives misunderstood what was said, they could not have supposed that Mr. Fowke was in any position to pre-empt the Minister's decision. Their complaint that they were lulled into a false sense of security is hardly consistent with their acceptance of Mr. Fowke's advice that they should enter a bid for a new prospecting licence over Block 7 rather than relying exclusively on their extension application. This is all of a piece with what was said in the Chief Executive's letter of 30th March and all goes to show that Petrocorp were perfectly well aware that the Minister was at liberty to exercise his statutory discretion as he thought fit. Much has been made in argument of the telephone conversation on 15th April 1988 but their Lordships do not see how it could possibly afford any ground on which to impugn the legality or propriety of the Minister's decisions.

Conclusion

Once it is appreciated that the contractual obligations of the Crown under the JVOA were

irrelevant to the Minister's exercise of his statutory powers, it becomes clear that this application for judicial review was misconceived. Here again their Lordships cannot do better than conclude by adopting another short passage from the dissenting judgment of Richardson J. where he said (at page 46):-

> "I would hold that the identification and determination of the national interest in this case was for the Minister alone and is not reviewable by the Courts. That in my view is the true intent and meaning of the statute in that regard. The Minister had three proposals before him for consideration: the application by the joint venture under s.20 for extension of its licence into the unlicenced areas, the bids by the five tenderers for prospecting licences and the proposals by the Ministry that he act under s.36 and secure the resource for the Crown. The area was unlicensed. No one had any right to mine there. The statute provided the Minister with a range of options for the exploitation of the resource in the national interest and for the return to the Crown as owner of the resource in the form of annual fees, royalties, participatory profits and profits of selling or dealing with licences. Section 36 does not specify the criteria to be weighed by the Minister in exercise of various powers conferred on him by that provision. But the whole thrust of the legislation is to subject the resource and its development and exploitation to the control of the Minister."

Lord Scarman said in *Nottinghamshire County Council v. Secretary of State for the Environment* [1986] A.C. 240, 250-251:-

> "Judicial review is a great weapon in the hands of the judges: but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficent power."

This is just as true in New Zealand as it is in the United Kingdom.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the order of the Court of Appeal set aside and the order of Greig J. restored. The respondents must pay the appellant's costs before the Court of Appeal and the Board.