IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-1720

IN THE MATTER OF	The Judicature Amendment Act 1972
BETWEEN	GXL ROYALTIES LIMITED Applicant
AND	THE MINISTER OF ENERGY FOR NEW ZEALAND Respondent
AND	SWIFT ENERGY NEW ZEALAND LIMITED, GREYMOUTH GAS KAIMIRO LIMITED, GREYMOUTH GAS PARAHAKI LIMITED, GREYMOUTH GAS TURANGI LIMITED, GREYMOUTH PETROLEUM TURANGI LIMITED & PETROCHEM LIMITED Added Respondents

Hearing: 3 September 2008

Counsel: M R Heron & E McGill for Applicant
U R Jagose & P G Scott for Respondent
J Shackleton & R P Brier for Swift Energy New Zealand Limited
M D O'Brien & P C Sutherland for the Greymouth Companies and PetroChem Limited

Judgment: 30 April 2009

JUDGMENT OF WILD J

Introduction

[1] In form this is an application for judicial review. The decision the applicant, GXL Royalties Limited, seeks to review is that of the respondent Minister on 16 July

2008, to consent to the transfer of Petroleum Exploration Permit (PEP) 38742 by Swift Energy New Zealand Limited to four companies in the Greymouth Petroleum Group. Section 41 Crown Minerals Act 1991 requires the consent of the Minister to the transfer of any PEP or interest in such a permit.

[2] In reality, this proceeding is yet another power-play through the Court between Todd Energy and Greymouth Petroleum. The two are "fierce competitors" in the New Zealand oil and gas industry. That was Mr O'Brien's description in his submissions. I will refer to GXL as "Todd", because Todd has owned GXL since 30 May 2008, and that ownership best explains what this case is all about.

[3] PEP 38742 covers an area onshore in North Taranaki. It surrounds and extends to the south of Waitara. On its northeastern boundary is the area included in Petroleum Mining Permit (PMP) 38161 held by Greymouth. To the southeast PEP 38742 bounds with PMP 38150 held by Todd. Petroleum is being mined in both those permit areas: by Greymouth from its Turangi well and by Todd from its Mangahewa wells.

[4] Both Greymouth and Todd bid when Swift put PEP 38742 up for sale. Greymouth was successful, purchasing Swift's interest on 12 May 2008. I gather there is some background to this because, in the reply affidavit he swore on 19 September 2008 for Todd, its general counsel Mr C B Hall deposes at p3:

> … There is quite a story that could be told about the manner in which Greymouth came to be the successful bidder for Swift's interest in the permit.

Mr Hall does not recount that story, acknowledging immediately that it is irrelevant.

[5] As I have mentioned, Todd subsequently (on 30 May 2008) acquired GXL, which held a 5% overriding royalty interest in petroleum produced from a specified part of the permit area of PEP 38742.

[6] The evidence indicates to me that Todd is using this royalty interest to try to prevent, or at least to obstruct and delay, Greymouth's use of PEP 38742. That is what is driving this proceeding, and it is not a promising basis for it.

[7] The transfer by Swift to Greymouth of PEP 38742 required GXL's consent as royalty holder. GXL was entitled to satisfy itself that Greymouth had the resources – technical as well as financial – to use PEP 38742 in a timely and effective way.

[8] The Minister had a coincidental interest, although a financially greater one since the ad valorem and accounting profits royalties payable to the Crown are closer to 15-20% net of prospecting and exploration costs. Moreover, the whole aim of the Crown minerals regime is to foster the exploration and mining of New Zealand's petroleum resources.

[9] Before Todd acquired it, GXL had declined consent to the transfer by Swift to Greymouth, and had requested further information about Greymouth's financial position and its work programme for PEP 38742. After Todd acquired GXL it confirmed GXL's refusal to consent, and sought considerably more information.

[10] Todd's case against the Minister is grounded on an "assurance and undertaking" it alleges (in para 26 of its statement of claim) the Minister gave Todd on 3 June 2008, that he would not consent to the Swift/Greymouth transfer until Todd, as royalty holder, had consented.

[11] The Minister subsequently consented, on 16 July 2008, to a fresh application by Swift. That application was lodged after Swift and Greymouth met Ministry officials and complained that Todd was unreasonably withholding its consent.

[12] Todd filed its application for review on 5 August 2008. Its statement of claim alleges that both Swift and Greymouth gave Todd assurances that PEP 38742 could not be transferred until Todd had consented to the transfer. Notwithstanding that, Todd cited only the Minister as respondent to its application.

[13] Almost inevitably, by application filed on 28 August 2008, Swift applied to be joined as a party to the proceeding, on the grounds that its interests were affected and its participation was necessary. Five companies in the Greymouth Group made similar applications on 1 September 2008. Those five companies are Greymouth Gas Kamiro Limited, Greymouth Gas Parahaki Limited, Greymouth Gas Turangi

Limited, Greymouth Petroleum Turangi Limited and Petrochem Limited. Todd opposed those applications. On the other hand the Minister, by memorandum dated 29 August, indicated he would consent to them, but on the basis that Swift and the Greymouth companies be restricted to the existing issues in the proceeding. In particular, the Minister indicated that he would oppose the attempt of Swift, the Greymouth companies and Petrochem to raise the issue whether Todd had unreasonably withheld consent under its Royalty Deed with Swift.

[14] The joinder applications could not be dealt with prior to the hearing. At the start of the hearing on 3 September, Mr Heron indicated that he wanted the joinder applications heard and decided before I heard argument on the substantive questions. I told Mr Heron that there was no prospect of my doing that, and also hearing the substantive proceeding, on 3 September, which was the only day set aside for the hearing. The matter was resolved on the basis that I granted the joinder applications, and heard from the joined parties, but reserved leave to Todd to file, by 17 September, further evidence and submissions replying to those of the joined parties. Todd exercised that leave. On 19 September it filed:

- A third affidavit sworn on 19 September by Mr Hall, replying to the affidavits of Messrs R M P Dunphy (sworn on 27 August for Greymouth and Petrochem) and Mr R S Rabindran (sworn on 28 August for Swift); and

- Submissions in reply to those of Swift, the Greymouth companies and Petrochem.

[15] The ‘reply’ submissions filed by Todd went well beyond matters properly in reply. The submissions presented by Todd at the hearing on 3 September were an admirably succinct eight pages, which counsel elaborated upon orally. Those in ‘reply’ ran to over 13 pages, and substantially re-argued most (but I accept not all) Todd’s case.

[16] This inevitably drew objection from counsel for Greymouth. In a memorandum he filed on 26 September, Mr O’Brien complained that Greymouth

and Swift were disadvantaged by the new evidence and “relatively lengthy submissions” which Todd had filed on 19 September. He sought leave to make “a reasonably brief submission on the new evidence … and to comment on the new submissions”, and attached his response (in point by point format – a little over four pages). This, in turn, elicited a memorandum from counsel for Todd on 7 October objecting to my looking at Mr O’Brien’s further submissions, and seeking an urgent teleconference and “a right to be heard orally in support of its submissions in reply”. In a further, final, memorandum on 6 November, counsel for Todd abandoned those requests. They mentioned that they understood that no further hearing time was available. They reiterated their request that I have regard to their submissions and evidence in reply filed on 19 September, but not to Greymouth’s further submissions filed on 26 September.

[17] My decision on all this is to accept and take into consideration all the material filed for Todd on 19 September and that filed for Greymouth on 26 September. I am satisfied that I have now heard or read everything that can properly be said about this matter by any party affected by it.

[18] Todd seeks review of the Minister’s decision to consent on three grounds. As ultimately framed by Todd in its reply submissions of 19 September, these are:

a) Abuse of power. Alternatively either:

   i) The assurance/undertaking provided by the Crown gave rise to a legitimate expectation of a particular outcome (namely that the application for transfer would not be processed without GXL’s consent); or

   ii) At the very least gave rise to a duty to consult GXL before the Crown acted contrary to the assurance/undertaking previously given to GXL.

b) Failure to take into account special circumstances/relevant considerations; and

c) Breach of duty to consult.

[19] Before considering these grounds, I need to place the critical 3 June 2008 alleged "assurance and undertaking" by the Minister in its context, which includes events both before and following 3 June. First, some background.

Factual background

[20] PEP 38742 was granted by the Minister in 2002 to GXL (not then Todd-owned) and a second company. The permit was for five years expiring 19 July 2007. By 2003 GXL held the whole permit interest.

[21] In 2004 GXL transferred its interest in PEP 38742 to Ballance Agri-Nutrients Ltd which granted GXL a 5% overriding royalty interest in petroleum produced from a specified part of the permit area. This was provided for in a Deed of Assignment and Overriding Royalty (the Royalty Deed) dated 27 July 2004.

[22] The Royalty Deed also provided that the grantor (Ballance) could transfer its interest under the permit if:

> (i) [Balance] obtains for prior consent of [GXL], which consent shall not be unreasonably withheld, where it is established that the…transferee has sufficient financial capability to meet the obligations under the permit and this deed; and
>
> (ii) the…transferee signed a Deed of Covenant by which it is bound by all the provisions of this deed…

[23] There followed a series of transactions until PEP 38742 was held 20% by PetroChem and 80% by Swift.

[24] In October 2007 Greymouth purchased Petrochem, at the same time purchasing, from GXL, a release of Petrochem's obligations under the Royalty Deed.

[25] On 2 May 2008 Greymouth purchased Swift's 80% interest in PEP 38742, thus becoming the 100% owner of the permit interest.

[26] On 7 May Swift applied to the Minister for his consent, pursuant to s 41, to transfer its permit interest to Greymouth.

[27] Also on 7 May, Swift sought GXL's consent to transfer its permit interest to Greymouth. This, of course, alerted GXL to the proposed transfer to Greymouth. GXL refused to give this on the grounds:

a) Greymouth's financial capability was not established; and

b) GXL had not been provided with evidence of the work programme for the permit.

[28] The second of these grounds for refusal is not pleaded, so it is only a) that is relevant. That is perhaps because, in an affidavit he swore on 27 August, Mr Dunphy of Greymouth deposed:

> 20. GXL also asked for details of Greymouth's intended work programme. For reasons I will explain, the Greymouth Companies did not have any intended work programme. The Permit had been granted in July 2002 for a period of five years, expiring in July 2007. Prior to the expiry date, application had been made for a Permit extension and the Permit continued pending determination of such application (under section 36(5A) of the Crown Minerals Act 1991). However, the work programme for the Permit had expired with the end of the first permit period in July 2007. A permit work programme is the source of specific permit work obligations. Consequently there were at the time (and still are) no specific work programme "obligations under the Permit".

Chronology

[29] I set this out in tabular form:

Date	**Event**
9.12 a.m. Tuesday 27 May 2008	Greymouth's solicitors, Bell Gully (Mr O'Brien), e-mails GXL (Mr Foley). Attaches a copy of Swift's permit transfer application of 7 May.

Time / Date	Event
3.56 pm Friday, 30 May	Crown Minerals/MED (Mr Morris) e-mails Swift (Mr Rabindran): > Hi Rabin, > In the above application you identified that the Deed of Covenant (attached at schedule 6 of the Agreement for Sale and Purchase) required ministerial consent under section 41 of the Crown Minerals Act 1991. However, we have yet to receive a copy of the executed Deed. > Please note that if you want the Minister to consider the Deed then you will need to provide the executed version, until then we will be unable to progress the application. > Kind regards, > Andrew Morris
(time unknown) Friday, 30 May	Todd's solicitors, Russell McVeagh (Mr Heron) telephones Crown Law Office and speaks to Ms Arthur. Advises is considering serving proceedings on Crown Minerals re PEP 38742 and asks who should he contact in Crown Law?
9.38 a.m. Tuesday, 3 June	Todd e-mails letter to Swift, Greymouth and Minister: • Todd has not consented to transfer Swift to Greymouth because not provided with sufficient information to assess Greymouth's financial capability to perform its obligations under the permit – cl 7.2(a)(i) of Royalty Deed. • Todd rejects that the information provided is sufficient. • Swift's application to the Minister for consent under s 41 makes no reference to Todd's consent being required. Accordingly, "there is a risk that the Minister is unaware of the requirement for [Todd's] consent and could consent when the transfer cannot [at this stage] lawfully proceed". • States: > We require immediate undertakings from Swift and Greymouth that no further steps will be taken to progress the sale, transfer or assignment of the Permit. > We copy this to the Ministry and ask it to advise immediately that not steps will be taken to process the application for transfer of the Permit. > Absent such undertakings and advice, we will issue proceedings to preserve our position.
3.40 pm Tuesday, 3 June	Russell McVeagh (Mr Heron) e-mails Crown Minerals (Mr Anastasiadis): > Dear Michael, > As discussed, attached is the Royalty Deed. You will see from Clause 7.2 that GXL's consent is required in this

	situation. That consent has not been provided. I would be most grateful for your confirmation of our discussion just now, that no further steps will be taken in the consent process (and no consent will be granted) by the Ministry without evidence of the consent of GXL (as required). The parties can then follow the process provided in the Royalty Deed. You advised that MED (and in particular Mr Andrew Morris, who is dealing the application for consent) was aware of the requirement for this consent and had contacted Swift and others regarding it. I would be most grateful if you could provide your confirmation before your meeting at 4 pm. Kind regards, Michael Heron
3.49 pm Tuesday, 3 June	Mr Anastasiadis e-mails Mr Heron: Dear Michael I confirm our telephone conversation of this afternoon that the Crown is aware of the requirement for GXL Royalties Ltd (formerly GeoSphere Exploration Ltd) to consent to the proposed transfer of Swift's interest in PEP 38742 to Greymouth Petroleum Acquisition Co Ltd. Until the consent of GXL Royalties Ltd has been procured, the Crown has advised Greymouth Petroleum Acquisition Co Ltd that the application cannot be processed. Regards Michael Anastasiadis
9.44 pm Tuesday, 3 June	Mr Rabindran e-mails Mr Heron: Dear Mike As I mentioned during our telephone conversation today, Swift believe that the Deed of Covenant between GXL and the Greymouth companies needs to be submitted to the MED for Ministerial consent and we have been working on that basis with both the MED and the Greymouth companies. With regard to the second paragraph of your email, the information you have requested is information that you will have to ask Greymouth for. We look forward to receiving the executed Deed of Covenant so that we can forward it to the MED in order to progress our application for consent.

	Kind regards Rabin
9.08 a.m. Wednesday, 4 June	Mr Heron e-mails Mr Rabindran: Dear Rabin, Thank you for this message. You will see from Chris Hall's letter of yesterday, that the information required has not been forthcoming from Greymouth (despite GXL's endeavours). As set out in that letter, the obligation is on Swift to obtain the prior consent of GXL, where it is established that the purchaser (Greymouth companies) has sufficient financial capability to meet the obligations under the Permit and the Deed. Given the Royalty Deed is between Swift and GXL, it ultimately falls to Swift to procure the provision of the required information, in order to have the opportunity to obtain the consent. For convenience, until 30 May, GXL was dealing with Greymouth directly. In light of this and as GXL has not succeeded with its requests of Greymouth, it seems the most productive approach is for Swift to procure Greymouth to provide the information requested, so that the matter can progress. Swift should feel free to deal with GXL directly once the information has been obtained. Kind regards, Mike
Wednesday, 4 June	Bell Gully writes to Todd: • Greymouth has supplied sufficient information to comply with clause 7.2(a)(i) Royalty Deed. Officials at Crown Minerals have advised they will accept Greymouth as transferee of Swift's interest in PEP 38742. • States: Contrary to Mr Hall's 3 June letter, it is clear from the penultimate paragraph of the letter from Mr Rabindran (for Swift) to the MED dated 7 May 2008 that the MED has been advised that Ministerial consent will be sought for the Deed of Covenant between GXL and Greymouth. The MED has advised it would not progress the Swift application (which had otherwise been accepted as in order for progressing) until the MED has received the executed Deed of Covenant. GXL's delay in executing the Deed of Covenant is continuing to delay the Minister's section 41 approval of the Greymouth-Swift transaction, and for the reasons and consequences which have been advised to GXL, that situation can not be allowed to persist.

	As GXL's expressed requirements in relation to clause 7.2(a) have been met, GXL is requested for the last time to sign and return the deed of covenant in the form agreed between Mr Foley and Mr O'Brien. Please ensure the Deed signed by GXL is provided to Bell Gully by not later than 5pm on 5 June 2008.
Wednesday, 4 June	Todd replies to Bell Gully and disputes that Greymouth has provided sufficient information to GXL about Greymouth's financial capability. Rejects that delay by GXL is delaying the Minister's s 41 approval of the Greymouth/Swift transaction. Asserts the delay arises from "Greymouth's persistent refusal to provide information required for GXL to form a view pursuant to s 7.2(a) of the Royalty Deed". States that Bell Gully's ultimatum will not be acceded to.
Thursday, 5 June	Bell Gully writes to "the directors, GXL". Advises that the four Greymouth Companies acquiring PEP 38742 are the holders of PMP 38161 (Turangi). States that GXL has known this from the outset. Repeats that GXL was advised on 22 May that: "The Greymouth companies' combined revenues in 2007, as disclosed in the audited annual royalty return filed for PMP 38161, exceeded $40 million." Points out that GXL is aware PEP 38742 expired in 2007 and thus no work programme has been approved. Points out that GXL (Dr Beggs) was aware of Swift's proposed work programme currently on file with Crown Minerals for consideration, but states that a further copy of this will be sent shortly.

[30] Further correspondence ensued between Bell Gully and Todd, as to the sufficiency of the information Greymouth had supplied to Todd.

[31] On 9 June Crown Minerals refused a request by Greymouth that it write to all parties confirming that Greymouth had a "perfectly satisfactory" record of performance and the requisite qualifications to operate PEP 38742. On 17 June a meeting was held at Crown Minerals with Swift's solicitor, Mr Rabindran, and Greymouth's solicitor, Mr O'Brien. Mr Anastasiadis of Crown Minerals deposes that at the meeting Messrs Rabindran and O'Brien expressed the view that Todd was unreasonably withholding its consent, and that the impasse could not be resolved satisfactorily. Mr O'Brien contended that Greymouth could bind itself to the Royalty Deed by way of a deed poll because clause 7.2(a) required only that "the

purchaser … signs a deed of covenant by which it is bound by all the provisions of this deed". Although Mr Anastasiadis indicated his agreement, he required that Swift and Greymouth provide him with written opinions to that effect, so that he could obtain advice from the Crown Law Office.

[32] On 19 June Swift submitted to the Minister a revised application for transfer of PEP 38742 to Greymouth. That application was accompanied by a deed of covenant executed as a deed poll, under which Greymouth covenanted in favour of GXL and Swift, agreeing to be bound by all the provisions of the Royalty Deed. Todd was not advised of the revised application.

[33] Swift also sent the requested legal opinion which expressed the view that the deed poll was sufficient for the purposes of s 41; there was no requirement for Todd's consent because Greymouth had covenanted to be bound by the terms of the Royalty Deed. This opinion, which was written by Swift's counsel Mr Rabindran, stated:

> The withholding of consent is however a contractual matter arising under the existing Royalty Deed and is a matter for the parties. It is not something which falls within the ambit of section 41. There is no requirement for ministerial consent to consent by GXL
>
> GXL is not the Permit holder, it has no interest in the Permit, it is not a party to the agreement for which the Minister's consent is sought under section 41 and it has no standing in respect of that application.
>
> With provision to the Minister of the executed Deed of Covenant, Swift and Greymouth companies, and their respective counsel, are of the view that there is no reason why the section 41 consent application should not be processed and granted in accordance with the requirements of section 41(3). The Minister is respectfully requested to provide this consent as soon as possible.

[34] On 25 June Mr O'Brien confirmed to the Minister his support for the opinion Mr Rabindran had expressed. He added:

> With regard to the Minister's consent, we note that GXL has no proprietary or other interest in the permit itself. The permit holders are Swift and Petrochem. GXL's rights are to receive a royalty based on the value of any produced petroleum less costs. This is not an interest in the permit or in any petroleum. It is simply, and no more than, a contractual right to payment (which arises only if and when petroleum is produced, provided certain permit holder costs have been first recovered).

[35] A memorandum was then prepared by Crown Minerals staff, and signed by Mr Anastasiadis. This was provided on 16 July to Mr Chris Kilby. Mr Kilby is the Group Manager of Crown Minerals and holds delegated power to grant Ministerial consent. The memorandum outlined the history and background of the permit before describing the current circumstances in this way:

> 10. On 7 May 2008, the permit holders submitted an application for ministerial consent. It sought consent to the Sale Agreement, Deed of Assignment and also to the agreed form of the deed of covenant ('Covenant') attached as a Schedule to the Sale Agreement (an executed version of which was to be provided by the permit holders as soon as it was completed). The vendor and purchasers solicitors expected that the Covenant would be signed by all parties concerned.
>
> 11. The purpose of the Covenant was to satisfy certain requirements agreed to under the Royalty Agreement. In particular, under clause 7.2 of the Royalty Agreement, Swift may sell or otherwise transfer its interest in the Permit to an unrelated party subject to GXL's royalty rights if:
>
> (a) the purchaser 'signs a deed of covenant by which it is bound by all of the provisions of the Royalty Agreement; and
>
> (b) the grantor obtains GXL's consent, which 'shall not be unreasonably withheld, where it is established that the purchaser … has sufficient financial capability to meet the obligations under the Permit and this Deed'.
>
> 12. Swift sought GXL's consent to the transfer in early May 2008, requesting that it sign the Covenant, but GXL did not provide it. On 3 June 2008, GXL (through Todd Exploration Ltd, 'Todd') advised that by agreement dated 30 May 2008 all shares in GXL had been purchased by Todd and refused to give the requested consent claiming that it lacked information on whether the proposed new permit holders had sufficient financial abilities to perform their obligations under the Royalty Agreement. Financial information was provided but this was not considered satisfactory by GXL and it requested further information.
>
> 13. On 19 June 2008, Swift and Petrochem (which believe that GXL is unreasonably withholding consent) submitted an amended application for ministerial consent. The amended application sought consent to the Sale Agreement, Deed of Assignment and to a new deed of covenant ('Deed of Covenant') dated 16 June 2008. In the Deed of Covenant the Greymouth companies covenanted in favour of GXL and Swift to be bound by all the provisions of the Royalty Agreement to the full extent Swift is bound and have warranted that they have sufficient financial capabilities to meet their obligations. Since this document is a deed poll, GXL does not need to sign it (because it receives the benefit of the covenant and warranty).

14. The amended application was accompanied by a legal opinion from Swift's and Greymouth's solicitors stating that:

> The withholding of consent is … a contractual matter arising under the existing Royalty Agreement and is a matter for the parties … [I]t is not something which falls within the ambit of section 41 … [t]here is no requirement for ministerial consent to consent by GXL.
>
> GXL is not the Permit holder, it has no interest in the Permit, it is not a party to the agreement for which the Minister's consent is sought under section 41 and it has no standing in respect of that application.

15. Crown Minerals instructed the Crown Law Office to review these opinions as well as provide independent legal advice to the Minister. In an opinion dated 11 July 2008, Crown Law agreed with the conclusions reached by Swift's and Greymouth's solicitors and confirmed that the issue of GXL's consent (or failure to provide consent) is a contractual matter for the parties and is not relevant to the Minister's decision as to whether the Minister consents to the agreements.

…

Assessment of Application

20. … the proposed new permit holders are considered to have the necessary technical and financial capability to give effect to the Permit.

21. The overriding royalty interest held by GXL has been previously considered by the Minister and received consent on 19 November 2004. You are now being asked to consent to the proposed new permit holder's agreement to be bound by it and this is considered to be appropriate.

22. Based on the information submitted by the applicant, and to the best of our knowledge and belief, the transfer and dealing are not considered to raise any negative concerns and are not expected to affect the operations of the Permit adversely.

Recommendation

23. It is recommended that you consent to the transfer and dealing described above and contained in the Sale Agreement, the Deed of Assignment and the Deed of Covenant.

…

[36] Ministerial consent to the transfer was granted on 16 July. Todd became aware of that on 29 July.

[37] This proceeding was commenced on 5 August 2008. With its statement of claim, Todd filed an application for interim relief, in the form of various declarations and an order quashing the Minister's consent. In a judgment he delivered on 12 August, following a hearing the previous day, Miller J made an order that:

> The Crown ought not to take any further action that is or would be consequential on the granting of consent to the transfer of the Permit, including but not limited to, granting consent to any application to extend the duration of the Permit pursuant to section 37 of the Crown Minerals Act 1991 ("Act").

[38] Although Crown Minerals was subsequently notified that the sale of PEP 38742 had been completed on 25 August, it has not notified that publicly due to Miller J's order.

Grounds for review

[39] I address these in the order in which I have set them out in [18] above, save that I deal with legitimate expectation and duty to consult together. As I mentioned, that is the way in which Mr Heron ultimately advanced the grounds in his reply submissions of 19 September.

Abuse of power

[40] Todd alleges, not bad faith on the Minister's part, but that he acted improperly. GXL's reliance here is on *Beaton v Institute of Chartered Accountants of NZ* HC AK CIV 2005-404-2642 17 November 2005 Allan J, which in turn refers to *New Zealand Wool Board v Commissioner of Inland Revenue* (1999) 19 NZTC 15,082 at 15,108-15,110. Both cases involve a decision actuated by some additional or collateral goal. There is no suggestion of that here.

[41] All the grounds enumerated in points 2.3-2.5 inclusive of Todd's 3 September submissions address process. Thus, the issue Todd raises is one of process, not power.

[42] As abuse of power is not made out – indeed, strictly is not asserted – I dismiss this first ground for review.

Legitimate expectation/Duty to consult

[43] Todd pleaded that Mr Anastasiadis's 3 June 2008 e-mail gave rise to:

> … a legitimate expectation that the purported consent would not be granted.

[44] That pleading cannot succeed, as New Zealand law still does not entertain a legitimate expectation of a substantive outcome. I consider the current state of New Zealand law is as Randerson J stated it in *The New Zealand Association for Migration and Investments Incorporated v Attorney-General* [2006] NZAR 45 at [159]:

> [159] In no case, however, could I envisage a Court directing that a substantive benefit (such as a licence or permit) be granted. That would be to usurp the function of the Executive. Indeed, Mr Harrison did not put his case on that basis. He characterised the present case as one involving an expectation as to how … applications would be processed rather than an expectation of a benefit in terms of substantive outcome.

[45] I do not overlook what might be said to be a trend to adopt the English position as stated in *R v North East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622 at paragraph 57, confirmed in *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115. Both are decisions of the English Court of Appeal. Examples of that trend include Gendall J's decision in *Staunton Investments Ltd v Chief Executive Ministry of Fisheries* [2004] NZAR 68 and Chisholm and Harrison JJ's decision in *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZRMA 251.

[46] In its submissions Todd argued that Crown Minerals' e-mail gave rise:

> … at the very least to a duty to consult (Todd) before the Minister acted contrary to the assurances/undertakings previously given to Todd.

[47] For Todd to allege Mr Anastasiadis's 3 June e-mail was an "assurance and undertaking" cannot add to the e-mail something which is not in it. In his letter to Swift and Greymouth earlier on 3 June, Mr Hall for Todd had stipulated:

> We require immediate ***undertakings*** from Swift and Greymouth that no further steps will be taken to progress the sale, transfer or assignment of the Permit.
>
> We copy this to the Ministry and ask it to ***advise*** immediately that no steps will be taken to process the application for transfer of the Permit.
>
> Absent such ***undertakings and advice***, we will issue proceedings to preserve our position.

The emphasis is mine, to demonstrate the deliberate distinction Mr Hall drew in the requests he made to Swift and Greymouth, and to the Ministry, respectively. The letter was duly copied to the Minister.

[48] The critical e-mail exchange of 3.40pm/3.49pm on 3 June is set out in the chronology in [29] above.

[49] In his reply e-mail, Mr Anastasiadis confirmed his earlier telephone advice to Mr Heron that the Minister:

a) Was aware of the requirement for GXL's consent to the proposed transfer by Swift of its interest in PEP 38742 to Greymouth; and

b) Had advised Greymouth that (Swift's) application for consent cannot be processed until GXL consent has been obtained.

[50] On a fair reading, Todd was entitled to interpret and rely on this as the Crown advising Todd that Swift's application would not be processed until Todd had consented to the transfer.

[51] I hold that that advice (or it could be termed a representation) gave Todd a legitimate expectation that the Minister would advise Todd if he proposed consenting to an application for transfer by Swift, to which GXL had not consented. In other words, the Minister would advise Todd if he proposed departing from the position he advised Todd he had adopted.

[52] The evidence and submissions, particularly those for the Minister, address a distinction between the requirement of clause 2 of the Deed of Covenant (which Mr

Anastasiadis deposes he had in mind) and clause 7.2 of the Deed of Royalty which Mr Heron was obviously focusing on, since he referred to it and attached a copy of it to his e-mail.

[53] Any distinction between the two documents is immaterial to my interpretation of Mr Anastasiadis's critical e-mail. As Todd points out, the Deed of Covenant (which is Schedule 6 to the Agreement for Sale and Purchase dated 2 May 2008 between Swift, and the Greymouth companies and Petrochem) provided for Todd's consent, as required by the Deed of Royalty which was referred to in Preamble A. Swift's application of 7 May referred to the Deed of Covenant because it required the Minister's consent.

[54] Although detrimental reliance on advice will be relevant, it is not a necessary precondition to invoking breach of a legitimate expectation based on that advice. In the nature of things, such reliance is normally present: *Talleys Fisheries v Cullen* HC WN CP287/00 31 January 2002 R Young J; *The New Zealand Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 at [144]. The evidence here, particularly the affidavit of Mr Futter sworn on 2 September 2008 for Todd, establishes reliance here.

[55] Todd contends that its legitimate expectation was to be consulted by the Minister if he intended consenting to an application by Swift. Todd relies on this passage from *Vea v Minister of Immigration* [2002] NZAR 171 (HC) which neatly captures the situation here, including the possibility of conflict with the Minister's statutory duty, which the Minister raises:

> The law is now clear that if the State makes representations or assurances that it will act in a certain way, it must follow the indicated policy and apply it unless it gives those affected the opportunity to make representations against the policy being changed. Such representations give rise to a legitimate expectation of certain treatment or that a certain procedure will be followed. As was said by the Privy Council in *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346, 351:
>
> > … when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty … The principle [is] that a public authority is bound by its undertakings as

> to the procedure it will follow, provided they do not conflict with its duty …

[56] The administrative law requirements of consultation have been well canvassed, perhaps most recently by Baragwanath J in *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 (HC). What McGechan J said at first instance in *Air New Zealand Ltd and Ors v Wellington International Airport Ltd and Ors* HC WN CP 403/91 6 January 1992 is also often reverted to:

> Implicit in the concept is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses. It is also implicit that the party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh. Beyond that, there are no universal requirements as to form.

[57] Here, the duty to consult/right to be consulted sounds in a requirement for procedural fairness and openness, entitling Todd as an affected party to prior notice from the Minister if he intended consenting to the transfer. If any authority is needed for that requirement, it is spelt out in *De Smith's Judicial Review* 6th ed, 2007, para 7-043 and, to take just one example from case law, the Court of Appeal in *Waitemata Health v Attorney-General* [2001] NZFLR 1122, per Elias CJ:

> [96] … The standards of procedural fairness described as natural justice … require anyone whose rights or interests are affected to be given notice of … hearings and an opportunity to be heard, unless those rights or interests are speculative or insignificant. Prior notice is essential to an effective right to be heard and in its absence there is a denial of the right.

[58] The Minister submits that any requirement to consult cuts across the scheme of the Crown Minerals Act. Section 41(3) requires that the Minister "shall" consent to an application which meets the statutory criteria, unless there are special circumstances. I deal with special circumstances under the next ground for review.

[59] For present purposes, I do not accept that imposing on the Minister a duty to advise Todd, if he is proposing to depart from the course previously advised, and to consent to an application by Swift, cuts across the statutory scheme. It merely requires the Minister to exercise his statutory duties in a manner which, given the circumstances (particularly the 3 June e-mail exchange) is procedurally fair.

[60] This ground for review succeeds.

Failure to take into account special circumstances/relevant considerations

[61] Todd submits that Mr Anastasiadis's 3 June advice amounted to a special circumstance, or to a relevant consideration, which the Minister ought to have considered, and which should have operated against the Minister granting consent.

[62] "Special circumstances" is drawn from s 41(3) of the Crown Minerals Act which provides:

> (3) The Minister shall consent to [transfer of a permit] on such conditions as he … thinks fit, unless in his … opinion special circumstances exist. Before making a decision in respect of any such agreement, the Minister may require the production of such information relating to the agreement as the Minister considers necessary or desirable.

[63] Todd submits that there were special circumstances because the Minister:

- Knew Todd's consent to the transfer was required under the Royalty Deed;
- Knew Todd had not consented;
- Had advised he would not process Swift's application until Todd had consented; and
- Knew Todd would rely on this advice.

[64] Todd submits further that the correspondence of its interest as royalty holder, and the Minister's interest under the Crown Minerals regime, in Greymouth's financial capability to meet the permit requirements reinforces the existence of special circumstances.

[65] Ms Jagose's submissions for the Minister rejected Todd's submission that such private law contractual matters can constitute "special circumstances" under s 41(3). She submitted that the aim of the Crown Minerals Act is the efficient and

effective use of New Zealand's petroleum resources, which s 10 places in Crown ownership. Ms Jagose contended that the purpose of s 41(3) is easily understood; if a permit could be transferred without the Minister's oversight, a person unable (either financially or technically) to meet the permit conditions and/or to use the permit as intended could enter the industry. She noted that Miller J made this point in *Greymouth v Attorney-General* HC WN CIV 2004-485-1115 3 October 2005 when he said at [39] that s 41(2)(d):

> … serves a clear legislative purpose, which can be deduced from [s 41] itself, of ensuring that the Crown knows the identity of all those with a degree of control over permits.

[66] I agree with Ms Jagose's focus on s 22, which requires the Minister to carry out his functions and powers relating to applications for permits in a manner consistent with the minerals programme for petroleum promulgated under ss 17 and 18.

[67] Clause 5.9.4 of the *Minerals Programme For Petroleum* issued effective 1 January 2005 provides the following non-exhaustive list of matters the Minister will take into account when considering application for the transfer of a permit:

> - Whether the proposed new permit holder or holder of an operating interest in the permit has the financial and technical capability to comply with the conditions of, and give proper effect to, the permit;
>
> - Other exploration or mining activities both in New Zealand and internationally that the proposed new permit holder or holder of an operating interest in the permit has been involved with to the extent that these activities impact on the proposed permit holder's ability to comply with the conditions of the permit.
>
> - Whether any proposed new permit holder or holder of an operating interest in the permit (or related companies) has complied with work programme conditions, the lodgement of data, the payment of fees associated with previously held petroleum permits or licences;
>
> - International obligations the Government may have which are relevant to the application for consent; and
>
> - Verification of registration and incorporation as a New Zealand or international company and any legislative requirements that need to be met to invest and operate in New Zealand.

[68] Given that consent is mandatory under s 41(3) unless the Minister considers "special circumstances" exist, that list of matters must amount to "special circumstances" if they are to be taken into account by the Minister. All those matters are 'Crown minerals management matters' – matters pertinent to the efficient and effective use of New Zealand's petroleum resources.

[69] The question is whether "special circumstances" should be limited to such matters. The words "special circumstances" are ordinary words in regular use. In case some definition of them is required, Todd referred to the definition of "special consideration" provided by the Court of Appeal in *Peninsula Watchdog Group (inc) v Minister of Energy* [1996] 2 NZLR 529 at 536 per Richardson P delivering the Court's decision:

> A special consideration is one outside the common run of things, one which … is exceptional, abnormal, or unusual, but something less than extraordinary or unique.

[70] Moving away from the statutory context, the Crown contends Todd, by this proceeding, is attempting to gain leverage in its dispute with Swift under the Royalty Deed. That demonstrated the force of limiting "special circumstances" to Crown minerals management matters. Still further, Todd was not a party to Swift's s 41 application, making it even less likely that Todd's contractual concerns could amount to "special circumstances".

[71] Todd countered all of this by asserting that the Minister had, by his actions of 3 June 2008, accepted that the Royalty Deed (and Todd's rights under it) were "special circumstances". If, as the Minister submits, he is required to consent to all applications bar special circumstances, then his advice of 3 June 2008 can only be interpreted as accepting that "special circumstances" did exist. In short, the Minister's actions on 3 June are inconsistent with the submissions he now makes. I do not accept that Mr Anastasiadis's 3 June 2008 e-mail can be equated with the Minister accepting that "special circumstances" existed. Even if it had, I consider that view would have been erroneous.

[72] As Ms Jagose submits, protecting a private contractual right was not a proper concern for the Minister, and cannot therefore have constituted a "special

circumstance", in terms of s 41(3), even when combined with the other points in Todd's list - [63] above. If the position were otherwise, then a party could use a proceeding such as this to obtain leverage in a private contractual dispute, which is what the Minister says Todd is about here.

[73] The fact that the private contractual right asserted corresponds with the Minister's proper concerns under the *Minerals Programme For Petroleum* (I refer particularly to clause 5.4.32 of the Programme) does not alter that position. It is nothing more than an irrelevant coincidence.

[74] For the same reasons, I hold that Todd's contractual rights under the Deed of Royalty are not relevant considerations for the Minister under s 41(3). Mr Anastasiadis's 3 June e-mail did not make them relevant. It gave only the expectation of advice which I have spelt out in upholding the previous ground for review.

[75] This ground for review fails.

Relief

[76] In the event that I upheld any of Todd's grounds for review, the Minister, Swift and Greymouth joined in submitting that the grant of relief would be futile, or (as Swift put it) "of no practical effect". Given that the Minister is restricted to Crown minerals management matters, and has decided that these favour consenting to the transfer to Greymouth, the Minister will surely make the same decision again if his existing decision is quashed and the matter remitted to him. The Court of Appeal's decision in *New Zealand Mäori Council v Attorney-General* [1996] 3 NZLR 140 is authority that the Court should exercise its discretion to refuse relief in such a situation.

[77] Todd advanced several arguments to the contrary. First, it contended that if the consent is quashed and Swift needs to apply again for consent, then Todd will have the opportunity to file injunction proceedings preventing Swift from making a third application until Todd has consented to the transfer. That is correct. But in my

view Todd would have no real prospect of obtaining an injunction. The reasons are that the sale of the permit interest by Swift to Greymouth settled on 25 August 2008, and cannot now be undone. Or at least, I cannot conceive of a Court attempting to undo that sale. Secondly, I reiterate my view – expressed to Todd's counsel in the course of argument – that damages are an adequate remedy for Todd, and it thus has no prospect of obtaining an injunction. I elaborate on both these matters in the following paragraphs.

[78] Secondly, Todd contended that it is not inevitable that the Minister would make the same decision again. It made these points:

- Todd may provide the Crown with the advice given to Todd by Mr Lucas of PriceWaterhouseCoopers in his letter dated 12 September 2008. Todd claimed that, in preparing that advice, Mr Lucas saw a lot more information about Greymouth's financial capability than the Minister saw before he consented to the transfer;

- Todd may be able to enjoin Swift from making a further application until it has Todd's consent; and

- Mr Kilby may not be the decision maker next time round, and the new decision maker may take a different view.

[79] I have already dealt with the second of those points. I am not persuaded by either the first or the third. As to the first, another view of Mr Lucas' report is that it is an elaborate justification of a request for information that went well beyond what Todd needed to be satisfied about Greymouth's financial capability. As to the third point, I do not know whether other Ministry officers hold the relevant delegated powers. If they do, it seems inevitable that they would refer back to Mr Kilby's decision and focus upon any reason(s) why they should take a different view.

[80] I view this as a situation where quashing the Minister's decision and remitting it to him would be pointless, because I cannot see any basis on which he would reach a different decision second time round. The Court of Appeal

commented in *Tap (New Zealand) Pty Ltd v Attorney-General* CA48/06, 13 December 2006 at [53]:

> [53] … It would hardly seem right for us to set aside a permit which was required [by the Minerals Programme for Petroleum] to be granted. Likewise there would not be much point in referring the matter back to the Minister since the MPP would still require the competition between the two applications to be resolved in favour of Origin.

[81] The Minister also opposes relief on the basis that the real dispute here is a contractual one between Todd on the one hand, and Swift and Greymouth on the other. Swift and Greymouth support the Minister in that submission.

[82] On 13 August 2008 Todd (the plaintiff is GXL Royalties Ltd) commenced a proceeding against Swift and Greymouth. In that proceeding Todd essentially seeks an unwinding of Swift's sale and transfer of the permit to Greymouth, plus an inquiry into damages. I note from the Court file that Todd has appealed from a judgment Dobson J gave on 30 January 2009, ordering Todd to provide proper particulars of various aspects of its pleadings. Notwithstanding that appeal, Associate Judge Gendall on 5 February gave directions which keep that proceeding moving along toward a hearing. It is currently in the discovery/inspection phase. I adhere to my view that Todd is unlikely to obtain any relief in that proceeding beyond an award of damages, if it has sustained any. The reason is that the Swift/Greymouth sale settled on 25 August, and property has passed. As of 27 August last year, when Mr Dunphy swore his affidavit for the Greymouth Companies and Petrochem, Petrochem was drilling Kowhai A-1 well in PEP 38742. Mr Dunphy deposes that that drilling, planned since December 2007, involves expenditure in the millions of dollars. In those circumstances, I cannot conceive of a Court embarking on the exercise of trying to unwind the sale.

[83] Quite apart from that, I consider Todd faces a fatal hurdle in that it did not seek injunctive relief against Swift and Todd when both declined to give Todd the undertakings it sought from them in its letter of 3 June 2008, the critical part of which I have set out in [47] above. Todd attempts to meet this by asserting that it did not become aware until 29 July 2008 that the Minister had granted consent, and thought it was then too late to seek an injunction. Only on 22 August when Mr

Anastasiadis's affidavit was served on it, did Todd become aware that the sale transaction had not yet settled. Those points come nowhere near explaining or justifying Todd's failure to seek injunctive relief immediately following the refusal of Swift and Greymouth to give Todd the undertakings it sought on 3 June.

[84] As Greymouth submits, Swift and Todd were free to progress and complete their transaction, with the Minister's consent as a condition subsequent (s 41(2) provides that they had to obtain it within three months). Thus, Greymouth submits that nothing actually turns on the Ministry's advice to Todd of 3 June.

[85] In similar vein, the Crown makes the point that an order quashing the Minister's consent pursuant to s 41(3) will not assist Todd in unwinding the sale/transfer by Swift to Todd. Todd needed to seek injunctive relief before that sale settled on 25 August.

[86] In summary, Todd is hoist with the petard of its own disqualifying delay, and cannot shift blame for its predicament onto any other party.

[87] I note that Greymouth submits that Todd will not be able to establish any breach of contract by Swift (rather, the breach is by Todd in unreasonably withholding consent) or – assuming a breach – will not be able to establish that it has suffered any damages. That is because Greymouth is a proper transferee which is good for the solemn undertaking it has given to pay the royalties due to Todd under the Royalty Deed. These are matters for determination in Todd's separate proceeding. Beyond making two points relevant to the grant of relief here, it is inappropriate that I comment on them. The first point is that I do not accept Todd's submission that there will be insurmountable difficulties in quantifying Todd's loss. I suspect the real difficulty will be for Todd in establishing any loss. Secondly, I am not persuaded by Todd's submission that it may encounter difficulties in enforcing any judgment against Swift. Although Swift appears largely to have withdrawn from operations in New Zealand, the purchase price of USD15 million under the sale agreement for PEP 38742 is payable upon three letters of credit, each for USD5 million, for presentation 6, 18 and 30 months after completion on 25 August last.

[88] Todd rejects that the Crown minerals regulatory framework is put at risk if commercial disputes such as those between Todd, and Swift and Greymouth, influence regulatory decision making. Todd contends that the issue in this proceeding is whether Todd can rely on the Minister's "assurances/undertakings". It maintains that, rather than a commercial dispute impinging on regulatory decision making, flawed regulatory decision making has impacted on a commercial dispute. Whichever way round the matter is put, it seems to me that the Minister's decision should stand, because it properly had no regard to Todd's commercial rights. If that decision was quashed, and the Minister directed to make it again, then Todd's commercial rights could have no bearing on it.

[89] Since it is an issue in Todd's separate proceeding, I should not express a concluded view as to the adequacy of the financial information about the Greymouth companies that was provided to Todd in the letter dated 9 June from Greymouth's auditors, Ernst & Young. I tend to the view that, coupled with Todd's background knowledge about Greymouth, that information ought to have satisfied Todd. It is not without significance that it satisfied the Minister. Todd is entitled to make the point that what satisfied the Minister may not have satisfied Todd. However, the effect of granting the relief sought by Todd would be to constrain the Minister to Todd's view of the adequacy of the financial information provided to Todd. That cannot be right either.

[90] For all those reasons, I decline to grant Todd any of the relief it seeks in these proceedings.

Result

[91] Todd has succeeded in establishing that it had a legitimate expectation of being advised by the Minister if he intended departing from the advice he gave Todd on 3 June 2008.

[92] Todd fails on its other grounds for review.

[93] I exercise my discretion to decline to grant Todd any of the relief it seeks.

[94] I discharge the interim order made by Miller J on 12 August 2008.

Costs

[95] Todd has essentially failed in this proceeding. Further, I consider that the proceeding was largely a "spoiling" tactic by Todd.

[96] In those circumstances, I order that Todd is to pay the costs of each of the Minister, Swift and Greymouth, on a 2B basis, but with allowance to each of those three parties for second counsel. I have allowed Swift and Greymouth their costs because they were proper respondents to this proceeding. The relief sought by Todd affected their rights and they ought to have been joined. As Cooke P commented when delivering the Court of Appeal's judgment in *Minister of Education v De Luxe Motor Services (1972) Ltd* [1990] 1 NZLR 27 (CA) at 34:

> Their interests are directly affected by the judicial review application. Natural justice requires that persons whose granted rights are in jeopardy be given an opportunity of being heard.

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