Conclusions

The court has in a sense made a non-decision. The case subject to appeal conclusively determines the proposition that the claims on foot in the proceeding were not authorised. It is (highly) persuasive authority that the claims could not be made out in any event.[10]

However, the decision does suggest that the appropriate level of claim is on the basis of "individual" or "small group" rights (as opposed to the communal level at which the failed applications were pitched). As is well known, Wongatha was a consolidation of a number of previous overlapping claims over parts of the area. It may be that the direction the judge is pointing is back to a series of smaller claims.

Of course, his Honour has also raised some very fundamental questions. His decision leaves open the issue of whether *any* claim can be formulated for this region. Under section 13 and section 67, the *Native Title Act* requires all claims to be heard and determined at one time. Practically, that means that it is impossible to determine native title on the basis of individual rights that may change over time and which might be held by a number of persons.

Perhaps the problem is one of framing the claims to reflect both the evidence and the requirements of the *Native Title Act*. Or perhaps (as hinted at by his Honour in his summary of the decision), the only solution is political.

NEW ZEALAND

CROWN MINERALS – PETROLEUM EXPLORATION – PERMIT SCHEME[*]

Bounty Oil & Gas NL v Attorney-General (unreported, High Court, Wellington, 27 June 2006, CIV 2005-485-2054, AP 2006-485-15, Mackenzie J)

Appeal against revocation of exploration permit – Validity of notices challenged – Assertion that permit conditions met – Court asked to quash revocation notices

Background

Bounty was one of the holders of a petroleum exploration permit in the Great South Basin. The permit obliged its holders to carry out a specific work programme within stipulated time frames. Bounty was unable to meet the specified time deadlines. The Ministry issued revocation notices under section 39 of the *Crown Minerals Act 1991*.

Nature of the High Court Hearing

The case was brought under Rule 718 of the High Court Rules. Termed "Appeal to be a rehearing"[1] the Rule allows the court to come to its own conclusions, based on the material put before the decision maker, and any further evidence which has been admitted. Mackenzie J

---

10 It appears that his Honour's *ratio* is that the claims are not authorised. It follows that if he is correct in that conclusion, the balance of his decision is *obiter*.

* Bryan Gundersen, Partner, Kensington Swan and Josef Bartos, Intern, Kensington Swan.

1 *McGechan on Procedure* paras HR718.01-718.04.

considered it was the place of the court to examine the merits of the revocation decisions in the light of all the material put before the Ministry of Energy officials and the additional evidence put before the court.

Status of Appellant

The court had to deal with a preliminary issue regarding the status of the appellant. Bounty was the sole appellant although it was not a sole permit holder of the revoked exploration permit. The court considered the right of appeal to be exercisable only by the permit holders collectively. Although there was no apparent formal consent to the appeal by the other permit holders, the Attorney-General raised no objection and the court dealt with the matter "on the basis that the appeal is one by all permit holders"[2]

Substantive Issues

The substantive issues in the case were:

- whether the Group Manager of Crown Minerals, who issued the notice of revocation, was authorised to do so; and
- whether a third party's default in making payment was a legitimate excuse for Bounty's failure to meet the work programme and therefore the conditions of the exploration permit.

Validity of Notice

Bounty argued that the Group Manager did not have delegated authority to issue the notice. The court considered whether the Chief Executive (whose powers are delegated by the Minister) could subdelegate these powers, and whether the wording of the delegation had been effective to achieve this purpose. The court concluded, after close examination of the relevant sections of the *Crown Minerals* and *State Sector*[3] Acts that the Group Manager of Crown Minerals had been duly authorised to issue the notices of revocation.

Reasonable Cause for Default

The court also concluded that the obligation to acquire the data rested on the permit holders and "they could not relieve themselves of that obligation by transferring that responsibility to Electro Silica".[4] The court did not generally exclude the possibility that a failure of a contracting party could constitute a reasonable cause for non-compliance by the permit holder with its obligations. However, it found that the failure in this case was not sufficient. Although Bounty submitted that it had taken all reasonable steps to gain access to the data, the court concluded that according to the evidence Bounty had not made any significant effort to acquire the data from the Fugro[5] and it "had the ability to contract on terms which protected its rights to acquire the data in the event of a failure by Electro Silica".[6] The court concluded that the failure of Electro Silica was not a cause beyond Bounty's control and that Bounty did not take reasonable efforts to remedy the non-compliance with the conditions of the permit. The revocation of the permit was, therefore, fully justified.

---

2 Para 4, lines 10-11.

3 *Crown Minerals Act 1991,* s 6, and *State Sector Act 1988,* s 41.

4 Para 52, line 15.

5 Bounty had entered into a farm-in agreement with Electro Silica in respect of the collection of the seismic data and Electro silica had sub-contracted the work to Fugro.

6 Para 54, line 34.