IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2018-485-205
[2019] NZHC 1222

UNDER		the Judicial Review Procedure Act 2016
BETWEEN		GREYMOUTH PETROLEUM MINING GROUP LIMITED First Applicant
		GREYMOUTH GAS KAIMIRO LIMITED Second Applicant
		GREYMOUTH GAS PARAHAKI LIMITED Third Applicant
		GREYMOUTH GAS TURANGI LIMITED Fourth Applicant
		GREYMOUTH PETROLEUM TURANGI LIMITED Fifth Applicant
AND		MINISTER OF ENERGY AND RESOURCES First Respondent
		CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Second Respondent

Hearing: 25-28 March 2019

Counsel: J A Farmer QC, F J Cuncannon, F M Greig and P I C Comrie-Thomson for applicants
V E Casey QC, J K Gorman and S J Jensen for respondents

Judgment: 31 May 2019

RESERVED JUDGMENT OF DOBSON J

Contents

Introduction **[1]**
The statutory regime **[11]**
The factual background **[20]**
First ground of challenge: the power to impose a condition requiring partial surrender **[46]**
Greymouth's argument [48]
The regulator's response on the power to impose a surrender condition [62]
Analysis [69]
Could the permit continue without condition 6(a)? [85]
Second ground of challenge: incorrect interpretation of condition 6(a) **[95]**
The natural and ordinary meaning of condition 6(a) [96]
Aids to interpretation of condition 6(a) [102]
The context at the time [110]
The Tui permit as a precedent [120]
Subsequent conduct [126]
The respondents' "loophole" [135]
Third ground of challenge: errors of law and fact in alleged surrender demand **[159]**
Challenge to the regulator's factual analysis [169]
Fourth ground of challenge: interpretation of condition 6(b) **[182]**
Fifth ground of challenge: additional error in application of condition 6(b) **[190]**
Results and costs **[197]**

Introduction

[1] This application for judicial review is brought by a group of companies that cumulatively have been granted the interest as holder of a petroleum mining permit (PMP) for an area of some 68 square kilometres in north Taranaki, known as the Kowhai Permit (the permit). They are conveniently referred to as Greymouth.

[2] Mining permits are issued on conditions, including a work programme, as to how the resource is to be extracted. The work programme for this permit has been revisited more than once.[1] Greymouth's essential concern is that delegated decision-makers on behalf of the Minister of Energy and Resources and the chief executive of the Ministry of Business, Innovation and Employment (the respondents/the regulator/the decision-makers[2]) cannot lawfully impose a condition of the work programme that would require surrender of part of the permit area, or enforce consequences of perceived breaches of such a condition.

---

1 Revised work programmes were incorporated into the permit on 2 April 2013 and 3 June 2016.

2 The statutory provisions create powers of decision for more than one officeholder, together with the entitlement to appoint delegates to make such decisions. The particular individuals responsible for various challenged decisions are immaterial to the arguments raised.

[3] Alternatively, Greymouth contends that the regulator has attempted to enforce an incorrect interpretation of the condition requiring partial surrender. That condition (condition 6(a) in its current terms) provides:

> 6 Within 90 months of the commencement date of the permit, the permit holder shall (to the satisfaction of the chief executive):
>
> (a) surrender all areas of the permit where drilling has not demonstrated (to the satisfaction of the chief executive) commercially producible hydrocarbons (at that time);

[4] Greymouth's various requests for amendments to the work programme have resulted in extensions to the period of time for fulfilment of the condition from an initial period of 48 months, to 66 months, and most recently to the current 90 months. Those revisions have included inconsequential renumbering of the conditions, and it is sufficient to refer to the condition by its current number. 6(a).

[5] Since June 2016, condition 6(a) has appeared as the first part of two on-going obligations on the permit holder, the second of which (condition 6(b)) has required, within the same time limit, the permit holder to:

> (b) submit for the approval of the chief executive an ongoing work programme for the remainder of the permit term.

[6] The regulator takes the view that Greymouth is in breach of both condition 6(a) and 6(b). In addition to taking different views as to the correct interpretation of condition 6(a), the parties disagree over whether condition 6(b) requires the permit holder only to submit an on-going work programme for approval within 90 months of commencement of the permit, or also to have obtained the chief executive's approval of the work programme.

[7] The parties are also at odds as to whether conditions 6(a) and 6(b) are independent of each other or whether, as the regulator contends, they create sequential obligations requiring the permit holder to obtain agreement on the areas to be surrendered from the original area of the permit, before presenting an on-going work programme. The regulator argues that the work programme needs to be assessed against the extent of the permit area still to be mined.

[8] Dialogue between the parties up to March 2018 led to a communication from the regulator which Greymouth took to constitute a demand that it apply for surrender of all areas outside a part of the permit area, as defined on a map accompanying the regulator's letter. Greymouth contends that the March 2018 letter from the regulator amounts to the exercise of a statutory power (or that it involves the exercise of a statutory power of decision) and the lawfulness of that action is also contested.

[9] The judicial review proceeding was commenced in April 2018. It advances these concerns in challenges to the statutory authority of the regulator to impose condition 6(a), and four alternative challenges contending that the regulator:

- has misinterpreted condition 6(a);
- has made errors of facts and law in respect of the so-called surrender demand;
- erred in its interpretation of condition 6(b); and
- erred in the application of condition 6(b).

[10] The parties were at odds as to the legal effect of the position that had been reached at the time the proceedings were commenced. Although the respondents did not concede the necessity for doing so, they agreed to an undertaking that they would not serve a notice under the Crown Minerals Act 1991 (the CMA) to revoke or transfer the permit, and would not take steps under the CMA to require surrender of part of the permit area until 20 working days following delivery of this judgment.

The statutory regime

[11] The 2013 amendments to the CMA introduced an explicit purpose section in s 1A, in the following terms:

> **1A Purpose**
>
> (1) The purpose of this Act is to promote prospecting for, exploration for, and mining of Crown owned minerals for the benefit of New Zealand.

(2) To this end, this Act provides for—

(a) the efficient allocation of rights to prospect for, explore for, and mine Crown owned minerals; and

(b) the effective management and regulation of the exercise of those rights; and

(c) the carrying out, in accordance with good industry practice, of activities in respect of those rights; and

(d) a fair financial return to the Crown for its minerals.

[12] Ms Casey QC accepted on behalf of the regulator that s 1A rendered explicit what had been the implicit purpose of the CMA prior to the 2013 amendments. The focus on exploitation of Crown-owned minerals means that decisions under the CMA are not to be influenced by other policy factors, such as environmental concerns at the consequences of production of hydrocarbons: those factors are to be reflected in decisions taken in other contexts. A general theme of the grounds of Greymouth's challenge is that the attempted enforcement of condition 6(a) against the wishes of Greymouth as the permit holder is antithetical to the efficient allocation of rights to mine Crown-owned minerals and the effective management of those rights.

[13] Under the CMA, the Crown controls all aspects of prospecting, exploring for, and mining, Crown-owned minerals by requiring those wishing to do so to obtain the appropriate permits from the relevant Crown agency.[3] Permits for prospecting may be issued on a non-exclusive basis to authorise entry onto land to conduct relatively non-intrusive testing and sampling. The holder of a prospecting permit has the right, on satisfying the Minister that the results of the prospecting justify doing so, to surrender the prospecting permit and exchange it for an exploration permit for the area and the mineral identified in the course of the prospecting activity. Exploration permits are granted exclusively to one permit holder.[4] Where the holder of an exploration permit can satisfy the Minister that, as a result of the activities authorised by the permit, a deposit or occurrence of a mineral to which the permit relates has been discovered, the permit holder then has the right, before the exploration permit expires, to apply to

---

3 CMA, s 8 – very limited exceptions exist for owners of land on which minerals exist in the natural state.

4 Section 32(1) and (2).

surrender that permit insofar as it relates to land in which the deposit or occurrence exists, and be granted in exchange a mining permit for that land and that mineral.[5]

[14] The statutory regime distinguishes, in provision for mining, between PMPs and mineral mining permits for all other types of Crown mineral.

[15] The CMA also provides for the publication of minerals programmes to establish policies, procedures and provisions to be applied in respect of the management of Crown minerals.[6] The Minister is obliged to provide a minerals programme, the content of which is to be made publicly available with an opportunity for submissions to be made on its content. Once settled, a minerals programme is issued by the Governor-General by way of Order in Council on the recommendation of the Minister. Each minerals programme is to be reviewed within 10 years of its issue.

[16] Minerals programmes for petroleum (MPP) were issued to take effect from 1 January 2005 (MPP 2005) and more recently with effect from 24 May 2013 (MPP 2013).

[17] The regulator cited provisions in the MPP as authority for certain aspects of the procedure adopted in dealing with Greymouth. For Greymouth, Mr Farmer QC expressed reservations as to the adequacy of the MPP as a source of authority where its provisions were, to any degree, inconsistent with the CMA which, as primary legislation, had to prevail over delegated legislation.

[18] At the time the PMP was issued to Greymouth in 2009, the Minister (acting by a delegated decision-maker) was empowered to grant any person a permit in respect of any specified minerals and land on such conditions "as the Minister thinks fit".[7] That section was redrafted in the 2013 amendment to the CMA to read as follows:

> **25 Grant of permit**
>
> (1) The Minister may grant a prospecting permit, an exploration permit, or a mining permit under this Act in respect of minerals in land—

5 CMA, s 32(3).
6 Sections 13 to 22.
7 Section 25.

(a) to any person or persons; and

(b) in either of the following ways:

(i) as the result of an application initiated by a person under section 23A:

(ii) as the result of a public tender process under section 24; and

(c) subject to any conditions that the Minister may impose, as the Minister thinks fit, including authorising the prospecting or exploration for, or mining of, a mineral only—

(i) in particular circumstances; or

(ii) by means of a particular method; or

(iii) if the mineral occurs in a particular state, place, phase, or stratum.

(2) However, the Minister is not obliged to grant a permit to any person or persons unless expressly required to do so under section 32.

(3) Each permit granted by the Minister must specify—

(a) the minerals and land to which the permit applies; and

(b) the conditions on which the permit is granted; and

…

[19] The parties cast the nature and effect of the relatively lengthy course of dealings between them about the PMP in very different lights. The factual findings on their competing versions may influence the merits of various arguments raised in the proceedings. It is accordingly appropriate to begin with a review of the history of those dealings.

The factual background

[20] Predecessors of Greymouth's interest were granted an exploration permit in 2002 over what has become the full 68 square kilometres of the PMP. An exploration permit is usually a pre-requisite to a mining permit,[8] grounds for the latter type of

[8] In limited circumstances, an application for a mining permit may also be made by cash bonus bidding, for example where a mining permit is surrendered or revoked: MPP 2005 at [5.2.17] and [5.6.4].

permit requiring evidence of a discovery of a petroleum field within the exploration permit area, the mining of which will provide the Crown with a fair financial return.[9]

[21] In July 2007, those responsible for the exploration permit applied for an extension of that permit to extend it into a second five year term. The provisions of the CMA make it a condition of any such application for extension of duration of an exploration permit that the area of such permit be reduced by at least half.[10]

[22] Before that application was determined, Greymouth became involved in September 2007 when it acquired a partial interest in the ownership of the exploration permit. At that time, Greymouth pursued a different initiative of applying for an appraisal extension over the entire area of the exploration permit, a credible discovery having been made in the south-eastern corner of the exploration permit in the Mangahewa formation.[11]

[23] By December 2008, Greymouth had become the sole holder of the existing exploration permit. Before either application in relation to it was determined, Greymouth took the different approach of applying for a PMP – first over half of the area covered by the exploration permit, and then over the whole 68 square kilometre area. The PMP was sought for a term of 40 years.

[24] The CMA and MPP 2005 required an applicant for a PMP to satisfy the Minister that the petroleum field had been delineated to such a degree as to support mining development. An applicant also had to surrender that part of the exploration permit insofar as it related to the land in which the deposit occurred in exchange for a PMP for that land.[12]

[25] In this case, the regulator rejected Greymouth's applications on the ground that all information provided to the regulator did not establish, to the requisite standard, the existence of commercially producible hydrocarbons over the whole 68 square kilometres. The regulator was concerned that the discovery of commercially

---

9 At [5.6.3] and [5.6.6].
10 CMA, s 37(1)(a).
11 Pursuant to CMA, s 37(2).
12 CMA, s 32(3) and (4); MPP 2005 at [5.6.7] and [5.6.16]–[5.6.18].

producible hydrocarbons in the south-eastern corner of the proposed permit area could not justify a claim to their presence across the whole of the requested permit area. As a result, the regulator rejected a number of proposed work programmes provided by Greymouth.

[26] In about May 2009, Greymouth suggested that the regulator's concern could be addressed by granting a PMP on terms that would require Greymouth to surrender those parts of the area in which Greymouth had not, within a defined period (four years was proposed), established the presence of commercially producible hydrocarbons.

[27] Without the terms for a PMP having been resolved, Greymouth advised the regulator at the end of June 2009 that, in the near future, it would be commencing commercial production from its Kowhai A-1R well in the south-east of the proposed permit area. Although it was not clear on the evidence, it appears that commercial production may well have started before the PMP was granted.

[28] Towards the end of 2009, officials within the regulator accepted that satisfactory arrangements could be made by imposing a condition on the PMP requiring surrender of areas that had not, within a defined period, been demonstrated to contain commercially producible hydrocarbons. The regulator's recommendation to the decision-maker on 24 November 2009 was that commercially producible hydrocarbons had been proven in the vicinity of the Kowhai A-1R well, but not across the remainder of the area requested for the mining permit. The requirement for proof of the presence of commercially producible hydrocarbons over the rest of the area was to be addressed by the terms of the work programme, which would oblige Greymouth to provide on-going production data and drilling results that would enable a decision to be made on the retention of the remaining parts of the permit area. An appendix to the regulator's memorandum to the decision-maker recorded:

> However, the work programme agreed to will sufficiently mitigate any uncertainty of hydrocarbon accumulations within four years from the permit grant. If economic (at that time) hydrocarbons are not discovered, such areas outside of the Kowhai discovery will be surrendered.

[29] The PMP was granted on 2 December 2009 for a period of 15 years. The condition more recently numbered 6(a) was included in a schedule to the permit from the outset.

[30] A further condition of the PMP was that Greymouth would submit an outlier well drilling and testing programme to the regulator within 24 months, namely by 2 December 2011. Before that deadline arrived, Greymouth submitted a proposed work programme to drill two, and potentially three, further wells, which would all be relatively close to the production well at Kowhai A-1R.

[31] This extent of drilling activity was treated by the regulator as insufficient to demonstrate the presence of commercially producible hydrocarbons over the whole of the permit area. The regulator treated the proposal from Greymouth as being advanced on the basis that, if accepted as sufficient, Greymouth would at a later date surrender other parts of the permit area which could not be assessed on the basis of the proposed work programme.

[32] From relatively early in the life of the PMP, the regulator was aware of a reluctance on the part of Greymouth's board of directors to finalise the extent of any area of the PMP to be surrendered, and to take that step. This was due to the terms of banking covenants which the regulator understood had been based partly on the size of the PMP.

[33] The differences between Greymouth and the regulator on the extent of Greymouth's obligations under its work programme appeared to be resolved by April 2013. The certificate of change of conditions dated 2 April 2013 included an additional requirement that Greymouth test a prospect in the western part of the permit area, and extended (from four years to five and half years) the period in which the work necessary to establish the areas within the PMP containing commercially producible hydrocarbons was to be undertaken.

[34] The next deadline for complying with the conditions of the PMP was 2 June 2015. In advance of that date, in March 2015 Greymouth advised the regulator that it would not be drilling an exploration well in the western part of the permit area, which

was an option for it under the terms of the work programme. In late May 2015, Greymouth applied for a second extension of the time limit for complying with conditions, including 6(a), from five and half to seven and a half years. Circumstances beyond Greymouth's control had delayed its work on one of the further wells to be drilled in the south-eastern corner of the permit area. Discussions at that time resulted in a further extension to 2 June 2017 by which time (at least on the view the regulator took in granting the extension) Greymouth was to establish the commercially exploitable areas and surrender the remainder. At the same time, condition 6(b) was added to renew an obligation for Greymouth to provide an updated work programme in light of developments up to that time.

[35] With the June 2017 deadline approaching, on 14 March 2017 Greymouth applied for a further extension of 18 months so that the obligations in conditions 6(a) and (b) were to be complied with by nine years from the grant of the PMP. The terms of Greymouth's letter are instructive in reflecting its then understanding of the obligation created by condition 6(a):

> Condition 6(a) requires that the permit holders "*surrender all areas of the permit where drilling has not demonstrated ... commercially producible hydrocarbons*". The corollary of this obligation is that the permit holders have had a reasonable opportunity to drill sufficient wells (in a stepwise fashion in accordance with good oilfield practice) to demonstrate commercially producible hydrocarbons.

[36] The regulator took the view that it could not consider this latest request because it had not been lodged more than 90 days before compliance with the condition was due. That time limit became relevant by virtue of 2013 amendments to the CMA which imposed that time limit.[13] The new provision gave the regulator a limited exception to receive such applications nearer to the date for compliance than 90 days only where compelling reasons existed.[14] The regulator took the view that such reasons could not be made out.

[37] The regulator considered Greymouth to be in breach of condition 6(a) once the 2 June 2017 deadline passed without Greymouth surrendering all areas of the PMP where it had not demonstrated that commercially producible hydrocarbons were

---

13 CMA, s 36(4b).
14 Section 36(4C).

present. It is common ground that breaches of a permit by mining companies is a serious matter to be avoided.

[38] The regulator's explanation for the course of dealings that occurred after the June 2017 deadline is that the responsible personnel were keen to avoid the consequences of Greymouth breaching the PMP, whilst adhering to the essential rationale for the conditions on which it was originally granted. The explanation is provided in the affidavits of Mr David Jeaffreson, who is the head of petroleum exploration and production at New Zealand Petroleum & Minerals. A solution conceived by staff at the regulator was to apply a different interpretation to the requirement in condition 6(a) from that which they had applied until that time. This would create a "loophole" to avoid the consequences of not being able to grant a further extension for compliance with condition 6(a).

[39] Instead of the surrender obligation applying to all areas within the PMP where Greymouth had not demonstrated the presence of commercially producible hydrocarbons, the condition could be treated as requiring the surrender only of those areas where drilling had occurred and had failed to demonstrate the presence of commercially producible hydrocarbons. At that time, all the wells Greymouth had drilled revealed commercially producible hydrocarbons, with the consequence that Greymouth would not be required to surrender any areas within the permit area on this "narrow interpretation" of condition 6(a).

[40] Greymouth denies that this narrower interpretation of the obligation under condition 6(a) was only conceived in the circumstances and at the time contended for by Mr Jeaffreson. Instead, Greymouth contends that this narrower interpretation was the common understanding shared by the parties from the outset. The interpretation more recently contended for by the regulator as being a reversion to its so-called "original" interpretation of the condition is said to be a contrived attempt to change the rules when the issue of Greymouth's alleged non-compliance with the conditions of the PMP became problematic.[15]

---

[15] I deal with the competing contentions on this "loophole" explanation at [135]–[158] below.

[41] From about mid 2017, Greymouth opposed a solution that involved any positive obligation to establish the presence of commercially producible hydrocarbons in all areas within the PMP. In July 2017, it raised the issue of vires, contending that the regulator did not have the statutory power to impose any condition that required the holder of a PMP to surrender parts of a permit area.

[42] Attempts to resolve the dispute continued. As part of a technical presentation delivered on 22 February 2018, Greymouth personnel indicated the absolute minimum area in respect of which they considered they had established the presence of commercially producible hydrocarbons. The map used for this discussion was not intended as conveying any acknowledgement that Greymouth could not establish the presence of commercially producible hydrocarbons in other parts of the permit area outside those that they identified.

[43] On 7 March 2018, Mr Jeaffreson wrote to Greymouth recording the position the regulator considered had been reached at that time. That letter stated that areas not demonstrated to contain commercially producible hydrocarbons needed to be surrendered in accordance with condition 6(a). The letter annexed the map that Greymouth had presented on 22 February 2018, contending that there was no evidence of commercially producible hydrocarbons outside the area defined by a polygon that Mr Jeaffreson had endorsed on it.

[44] Greymouth had voiced concerns that, if it complied with the demands and submitted an application for surrender of part of the area within the PMP, it could not be satisfied that the regulator would not transform it into an application for surrender of a larger area because of a power reserved to the Minister to do that in s 40(7A) of the CMA. Mr Jeaffreson's 7 March 2018 letter provided an assurance that, if Greymouth presented a partial surrender application for the area outside the polygon, he would support a recommendation to the decision-maker that there be no amendment to the area to be surrendered.

[45] The 7 March 2018 letter from the regulator did not lead to a resolution. In April 2018, the present proceedings were commenced and an alternative ground of

challenge was included, treating the letter as a purported exercise of a statutory power which was pleaded to be unlawful.

First ground of challenge: the power to impose a condition requiring partial surrender

[46] Condition 6(a) requires the surrender of areas within the PMP in certain circumstances. Greymouth argued that the Minister does not have the power to impose that obligation. The current version of this condition was imposed since the 2013 amendments to the CMA. Accordingly, on Greymouth's approach, it is the terms of the CMA since that time that apply to the scope of the decision-maker's power to impose conditions of the PMP. The power is given by s 25(1)(c) to the Minister to impose any conditions as he or she thinks fit. However, in *Unison Networks Ltd v Commerce Commission*, the Supreme Court stated:[16]

> [53] A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision-maker "so uses his discretion as to thwart or run counter to the policy and objects of the Act". A power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.

[47] Accordingly, the Minister's discretion to impose conditions on a mining permit is not unlimited and the power must be exercised for the purpose of the CMA.

Greymouth's argument

[48] Greymouth submitted that any reduction of the area to which a PMP applies has to occur in the circumstances authorised by the CMA. Three possible modes are provided for: relinquishment, revocation or surrender. Both relinquishment and revocation are not voluntary, but rather are imposed by the decision-maker. In the first instance, relinquishment is an obligation that the Minister may impose under the terms of ss 35B and 35C in relation to part of a permit area. Revocation would apply to the

---

16 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 (citations omitted).

whole of the PMP and may be imposed where there has been a contravention of the CMA or of terms of the permit.

[49] In contrast, Greymouth characterised "surrender" as a voluntary, permit holder-driven process where the holder elects to surrender the PMP or part of the land to which it applies.

[50] One of Greymouth's criticisms of condition 6(a) is that it misapplies the terms for the three circumstances in which an area may cease to be part of a PMP. Here, any reduction in the area would not result from Greymouth voluntarily electing to surrender an area or areas of the PMP, but would be an obligation mandatorily driven by the decision-maker.

[51] More importantly, Greymouth argued that the CMA did not provide any power for the decision-maker to require a permit holder to relinquish part of an area granted for a PMP. The CMA provides for six types of PMP, namely:

- prospecting permits for petroleum, and for other minerals;
- exploration permits for petroleum, and for other minerals;
- mining permits for petroleum, and for other minerals.

[52] In ss 35B and 35C, provision is made for the decision-maker to impose a relinquishment obligation as a condition of prospecting and exploration permits for minerals, or a petroleum exploration permit. Arguably, the limit on that power is deliberate with the consequence that there is no power under the CMA to impose, as a condition of issue of a PMP, a relinquishment obligation which could have been imposed as a condition of a petroleum exploration permit.

[53] Greymouth argued that this limitation, inherent in contrasting the provisions where a power to require relinquishment is present, is supported by the purpose of the CMA and the policy in its administration. The relevant statutory purpose is to promote mining of Crown-owned minerals by efficient allocation of rights, their effective

management and regulation and the encouragement of the carrying out of mining activities in accordance with good industry practice. Arguably, once a permit holder has committed the resources necessary to justify the grant of a PMP, the manner in which the mining is to occur ought to be left to the expertise of the permit holder, consistent with the general obligation to mine in accordance with good industry practice. It could create unreasonable impediments to the proper planning, and in particular to the raising of debt and equity capital for inevitably very substantial financial undertakings, if the permit holder is vulnerable to a subsequent reduction in the area it is permitted to mine.

[54] In this case, Greymouth had applied for the PMP for a term of 40 years. Although only 15 years was awarded, it is nonetheless a substantial undertaking that arguably requires the permit holder to be in control of the sequence in which the resource is mined.

[55] The regulator's argument on the power to impose the surrender condition relied in part on the proposition that condition 6(a) was critical to the original decision to grant the PMP. Therefore its lawfulness ought to be assessed by reference to the terms of the CMA as in force in 2009 (without the contrast with the terms of ss 35B and 35C, introduced only in 2013).

[56] Greymouth's rejoinder was that even if the terms of the CMA as in force in 2009 apply, then the same argument about inconsistency with the policy and purpose of the CMA would still apply. The apparently unconditional discretion granted by the terms of s 25 as it then stood was subject to the constraint that required all conditions to be consistent with the purpose of the CMA. Given the acknowledgement that s 1A introduced in 2013 reflected the pre-existing purpose of the statute, in 2009 the decision-maker would have been similarly constrained not to impose any condition that frustrated the achievement of the purpose for which mining permits are issued. The threat of requiring relinquishment of part of the area of a PMP would materially frustrate capital raising, and disrupt the preferable sequential planning for exploitation of the resource that arguably is best left to the permit holder.

[57] Section 36 of the CMA specifies the circumstances in which the decision-maker can amend the conditions of a permit.[17] The types of change provided for are limited to amending the conditions of a permit, extending the minerals or land to which the permit relates, decreasing the minerals to which the permit relates or extending the duration of a permit. Section 36 does not provide a power to reduce the area of the permit and Greymouth argued that was deliberate. It submitted that this exclusion meant there was no power to require a reduction in the area of a permit.

[58] Section 36 provides limited circumstances in which a change to a permit under that section may be made. If not with the prior written consent of the permit holder or on the permit holder's application, such changes can only be "as provided in the permit". Greymouth argued that the reference to other possible types of change that might have been referred to in the PMP when originally issued should not extend the types of change beyond those explicitly provided for in s 36. Accordingly, the decision-maker's power to reduce the area of the PMP, which is implicitly excluded from changes of the type authorised by s 36, cannot be validated by the PMP nonetheless providing for it.

[59] Greymouth filed an affidavit from Mr Christian Linskaill of Edinburgh, Scotland, a petroleum engineer with over 25 years of international oilfield experience, who is also qualified as a solicitor in Scotland. Mr Linskaill applied his extensive international experience to describe preferable methods for regulators to administer various forms of permits. He acknowledged the appropriateness of reducing the extent of prospecting and exploration licences, but stated there should be no reduction in areas granted for mining:

> The production licence acreage should not only include the area evaluated by the licence holder to contain all commercially producible hydrocarbons (the proved reserves (P1)), but must also dedicate adequate acreage for any additional probable reserves (P2), and also any possible reserves (P3) …

[60] Mr Linskaill opined that certainty of the acreage within a mining permit is required from the outset for financial reasons, given the reliance that investors will place on the scope of the venture in which they are investing. However, both the 2005

---

[17] The section is in materially the same terms pre- and post-2013 amendments.

and 2013 MPPs include provisions recognising that the Minister may require there to be options to reduce the size of a permit, or amend the duration of the permit, after the first stage of work programmes if it is established that the extent of the reservoir or amount of the reserves is less than originally forecast.[18]

[61] I accept Greymouth's submission that the inclusion of these provisions in a form of delegated legislation cannot expand on the scope of the Minister's decision-making power under the CMA, but they have clearly been a component of the landscape for the petroleum mining industry in New Zealand since at least 2005.

The regulator's response on the power to impose a surrender condition

[62] For the respondents, Ms Casey submitted that it was the terms of the CMA as they applied in 2009 that should dictate the scope of the decision-maker's powers to impose condition 6(a). The terms originally imposed have been maintained throughout, subject to successive deferrals of the date by which the condition must be satisfied, changes in the numbering of the condition and a change in the identity of the delegated decision-maker responsible for monitoring compliance with the permit.[19]

[63] Greymouth focused on the form in which the on-going content of the condition was addressed in June 2016. This was done formally by replacing the schedules previously attached to the PMP with new ones, as attached to the certificate confirming that action. Arguably, at that point the conditions of the PMP were amended and re-imposed, which required the exercise of the power under s 36(1) of the post-2013 version of the CMA.

[64] From the respondents' perspective, there has been no new decision taken since 2009 on the need for, or appropriateness of, condition 6(a). It was a condition perceived as critical to the decision to grant the permit, and the rationale for it has remained constant. Arguably, the statutory authority for imposing the condition was

---

18 MPP 2005 at [5.6.11] (quoted at [65] below), MPP 2013 at [8.4(3)].

19 The condition originally referred to the scope of drilling having to be demonstrated "to the satisfaction of the Secretary", and that was retained in the 2013 amendment. In the 2016 amendment, the clause was changed to require the satisfaction of the chief executive.

that existing when it was imposed, and no new power was required when the same condition was renumbered in 2016.

[65] On the basis that the CMA as in force in 2009 applies, the respondents argue that the decision-maker's discretion in s 25 of the CMA was to be applied in its terms, so that permits could be granted "on such conditions as the Minister thinks fit". Ms Casey accepted that the purposes of the CMA represented a relevant constraint on the exercise of the power to impose conditions. However, she submitted that the decision to impose the condition was consistent with those purposes. At the time, MPP 2005 applied. Its provisions on the allocation of PMPs included the following:

> 5.6.7 The first step in evaluating a mining permit application is to determine whether or not there is sufficient evidence of a petroleum field having been discovered, to support the grant of the permit. The applicant needs to satisfy the Minister that a petroleum field has been identified and delineated to such a degree that the proposed work programme and mining development can be supported.
>
> …
>
> 5.6.11 The Minister will consider a work programme which is set out in development stages. For example, this may be appropriate where a petroleum reservoir has been identified but its long-term performance characteristics cannot be established other than by commercial production. … The Minister may require that there be options to reduce the size of the permit area or to amend the duration of the permit after the first stage, if it is established that the extent of the reservoir or amount of reserves is less than originally prognosed.
>
> …
>
> 5.6.16 The appropriate area of a mining permit, in every case, will be the area that the Minister determines is reasonably adequate to enable the activities authorised by the mining permit to be carried out. … The Minister's assessment will be made having regard to the applicant's delineation of the petroleum field and the proposed work programme … In making a decision the Minister will recognise that while the general extent of a field can be ascertained using geological, geophysical and engineering data, it can be difficult to clearly define the limits of a petroleum field …

[66] It was argued for the respondents that the decision-maker's power to impose conditions must extend to requiring a surrender of part of the permitted area when it becomes apparent that there is no basis for treating the whole area as capable of commercial production of hydrocarbons. If that discretion did not exist, then concerns

about the extent to which a proposed permit area may not all be capable of producing hydrocarbons would preclude a lawful decision to grant the permit at all.[20]

[67] As to the relevance of s 36, Ms Casey submitted that it had no direct application because the provision in issue is not a change to the PMP, but rather an original condition, in the absence of which the PMP would likely not have been issued. Even if it did qualify as a "change" for the purpose of s 36, then it was permitted because the original provision for that to occur was in the terms of the PMP as issued.

[68] As to any inconsistency between the statutory language, and condition 6(a) contemplating an enforced "surrender", the extent to which land is to be removed from a permit area remained primarily in the hands of the permit holder. If the permit holder is confident of the presence of commercially producible hydrocarbons, then it will do sufficient work to establish their presence to the satisfaction of the decision-maker, within the period stipulated by the condition of the permit. There is an element of choice resting with the permit holder in that, if it elects not to undertake the necessary work, it will be required to volunteer the surrender of that area.

Analysis

[69] I am not persuaded that there has been any material change to the terms of condition 6(a) that requires the decision-maker to rely on the post-2013 terms of the CMA. The renumbering of the condition and change in the identity of the nominated decision-maker have no bearing on the scope of the power to grant the PMP subject to such a condition. The extensions to the date for fulfilment of condition 6(a) have been granted at the permit holder's request, by way of concession from the time originally stipulated for compliance. That does not require the exercise of any different statutory power to that which was relied on when the PMP was granted.

[70] Section 25 creates a wide discretion to impose conditions "as the Minister thinks fit", with the over-arching constraint that conditions may only be imposed where they are consistent with the purpose of the CMA. The Supreme Court has put

---

[20] MPP 2005 at [5.6.6].

this constraint in terms that the power is not to be exercised "for a purpose that is not within the contemplation of the enabling statute".[21]

[71] Mr Farmer repeatedly submitted that it is inconsistent with the purpose of the CMA in facilitating efficient exploitation of the Crown's minerals to constrain the scope of a permit after it has been issued in the way that condition 6(a) purports to do. A potential difference over the scope of admissible evidence on the extent to which conditions such as 6(a) are imposed was avoided by the respondents' acknowledgement that a condition in the same terms has not been imposed in other PMPs.

[72] There were also different perspectives on whether it was unusual for the regulator to issue PMPs for areas as large as the 68 square kilometres of the Kowhai permit. Greymouth's evidence included statements from Mr Michael Adams, a petroleum engineer who had been consulted by the regulator on Greymouth's application at the time it was originally granted. Mr Adams considered that the Kowhai permit is "typically sized for an onshore permit of that vintage granting rights to mine over multiple formations".

[73] Greymouth also procured an affidavit from Mr Michael Anastasiadis, who was the compliance manager of the Crown minerals section of the regulator at the relevant period. He is now working in a legal role outside government. Mr Anastasiadis's recollection is that the regulator was enthusiastic about the Kowhai discovery and Greymouth's application, in part because it introduced increased competition in the exploitation of potential hydrocarbon deposits.

[74] The decision-maker's rationale was, in effect, that an application for a PMP of 68 square kilometres would not have been granted where the discovery related to a relatively small portion of its total area, unless the regulator was able to revisit the justification for granting the PMP over the larger area, once the results of further drilling could be taken into account. These circumstances demonstrate that the flexibility for the decision-maker to grant a PMP over a larger area than is initially justified, subject to subsequent revision of the justification for doing so, is a flexibility

---

21 *Unison Networks Ltd v Commerce Commission*, above n 16, at [52].

that is desirable in appropriate circumstances to advance the purposes of the statute. I am not persuaded that imposing a requirement for subsequent reduction in the area of a PMP is contrary to, or inconsistent with, the purposes of the CMA.

[75] Greymouth's evidence from Messrs Adams and Anastasiadis, whilst it may question the merits of a condition in the terms of 6(a) being imposed, does not make out the proposition that it is inconsistent with the purposes of the CMA to acknowledge the decision-maker has such a power in general terms. Nor does the absence of such conditions applying to other permits help to make out the proposition that such a condition is necessarily inconsistent with the purposes of the CMA.[22]

[76] I am not persuaded that the scope of the decision-maker's power to impose the surrender condition should be decided differently if the power is to be assessed under the post-2013 terms of the CMA. Section 25 has been redrafted and expanded, but the terms of the power to impose conditions are materially the same. That is, each permit granted by the Minister must specify the conditions on which the permit is granted,[23] and the Minister may impose any conditions as he or she thinks fit.[24]

[77] The post-2013 form of the CMA does include the new ss 35B and 35C. This gives rise to Greymouth's argument that the explicit terms of the powers in these sections to impose relinquishment obligations in prospecting and exploration permits leads, by exclusion, to the absence of such a power in the case of mining permits. Greymouth's analysis of the statutory scheme suggested that the inclusion of explicit powers to require relinquishment of the three other types of permit, but not in respect of petroleum prospecting permits, or mining permits for either petroleum or other minerals, signalled a parliamentary intention to preclude relinquishment once a permit of any of those three types was issued.

[78] Greymouth's submissions referred to the observation of Lord Cooke sitting in the House of Lords concerning the Latin maxim *generalia specialibus non derogant*,

---

22 Although structured differently, the Tui permit (see [110] below) also required surrender of areas initially included in a PMP where exploration wells did not establish the presence of commercially producible hydrocarbons.

23 CMA, s 25(3)(b).

24 Section 25(1)(c).

which is applied to the effect that where a matter is covered by a general provision and also by more specific provisions, the legislature intends that the more specific provisions govern.[25] In Lord Cooke's words, this maxim:

> … is not a technical rule peculiar to English statutory interpretation. Rather it represents simple common sense and ordinary usage.

[79] I do not accept that the explicit provision of a power to impose a relinquishment obligation in the case of three other types of permit indicates the absence of a power to do so with a PMP. No parliamentary materials were brought to my attention suggesting that was intended. The respondents did, however, refer to the select committee report which recommended amending the terms of the new s 25 to empower the Minister to impose conditions as he or she sees fit, subject to the over-arching obligation to comply with the CMA, which suggests the absence of such a constraint.[26]

[80] The greater flexibility afforded to the decision-maker if such conditions can be imposed means that the power to impose them in appropriate cases is consistent with the purposes of the CMA. The present circumstances illustrate the utility of having such a power, where the alternative would have required a decision to decline a PMP for the area applied for, or limit the PMP to the area already demonstrated to contain commercially producible hydrocarbons. More would be required to counter that than the inference Greymouth invites to be drawn from the contrasting position with prospecting and exploration permits in ss 35B and 35C.

[81] A subsidiary aspect of Greymouth's argument was the inconsistency in the terminology used by the decision-maker. Condition 6(a) contemplates a requirement to surrender part of the permit area while, in the CMA, that concept is confined to initiatives taken by a permit holder of its own volition. Arguably, consistency with the statutory language would have required the decision-maker, when using mandatory terms, to impose such a condition as a relinquishment obligation.

---

25 *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK* [1998] AC 605 (HL) at 627.
26 Crown Minerals (Permitting and Crown Land) Bill 2012 (70-2) (select committee report) at 4.

[82] I accept that the statutory usage treats "surrender" as a step voluntarily initiated by permit holders, whereas the terms of condition 6(a) impose a mandatory obligation on the permit holder to qualify for continued retention of areas within the permit area. The extent of effort undertaken by the permit holder to retain as much of the permit area as it considers capable of commercial production of hydrocarbons is a matter for the permit holder. If the regulator is not satisfied by Greymouth of the presence of commercially producible hydrocarbons in areas within the PMP, the consequence is to relinquish such areas.

[83] However, I do not accept that the inconsistency of terminology as between the CMA and condition 6(a) can affect the lawfulness of the regulator's power to impose the condition in the terms it did. The nature of the obligation is clear and I note that the term "relinquishment" did not appear in the CMA prior to the 2013 amendment. A subsequent ground of review challenges the interpretation of condition 6(a) as adopted by the regulator, but any ambiguity contended for does not arise out of the inconsistency between the terminology used in the condition and the terminology used in the statute for equivalent activities.

[84] It follows that the regulator did have power to impose condition 6(a) in the terms it did, and the first ground of challenge cannot be made out.

Could the permit continue without condition 6(a)?

[85] On the first ground of challenge, Greymouth sought declarations to the effect that the Minister did not have the power to impose an obligation requiring the holder of a PMP to relinquish part of the permitted area and, in consequence, that condition 6(a) is not valid. This relief was sought on the basis that the PMP would, in all other respects, continue on its terms, so that Greymouth could mine the whole 68 square kilometre area for the remainder of the term of the PMP without any surrender obligations.

[86] In the event that I found condition 6(a) to be in excess of the decision-maker's power, the respondents advanced arguments that, in any event, the condition is not severable from the remainder of the terms on which the PMP had been issued. Consequently, if (contrary to the respondents' submissions) I held that the regulator

had no power to impose condition 6(a), then arguably the whole PMP would fail for the absence of the power to grant it subject to this condition.

[87] Given the conclusion I have reached that the decision-maker does have power to impose condition 6(a), it is unnecessary to decide between these competing positions. However, it is appropriate to briefly record the opposing arguments.

[88] Greymouth objected to the respondents raising the point that condition 6(a) could not be severed when the point had not been taken in pleading, and was first notified when the respondents' written submissions were served shortly before the hearing. The inability to sever an invalid condition was highly material to the issues in the judicial review and arguably ought not to be considered when Greymouth was not adequately warned. Greymouth argued that, had it been given proper warning, it would have adduced evidence to demonstrate that, had the decision-maker realised that it lacked jurisdiction to impose the surrender condition, it would nevertheless have granted the PMP on its remaining terms.

[89] The evidence that was adduced for Greymouth included recognition of the relative importance of the Kowhai discovery, and therefore the Crown's interest in having the discovery appropriately exploited. Greymouth's witnesses disputed the respondents' view that it was unusual to grant PMPs over an area as large as the permit area, and also that there was inadequate data to justify the inclusion of areas beyond the south-eastern corner where the discovery had been made. Greymouth took the view that there would be nothing inconsistent with the proper administration of the Crown minerals regime for the permit to continue in other respects without condition 6(a).

[90] The factual situation described in the respondents' affidavits was that on-going unease about granting a permit of the size applied for in the north Taranaki area was signalled on a number of occasions during the application process. It was conveyed sufficiently for Mr Dunphy, the chair of Greymouth Petroleum Mining Group Limited and responsible for Greymouth's application, to have volunteered a surrender condition be attached to the PMP to justify the initial grant over an area as large as that sought.

[91] I am satisfied on the evidence that the ability to revisit the area that would be justified for the PMP was of primary importance to the decision-maker in granting the PMP for the full area applied for. Condition 6(a) was conceived with an onus on the permit holder to establish the presence of commercially producible hydrocarbons in other parts of the permit area after complying with a "suitably aggressive work programme".

[92] In accepting the regulator's view about the relative significance of being able to revisit the extent of the area appropriately continued within the permit, I have borne in mind the views of Mr Adams about the utility of drilling to establish the presence of commercially producible hydrocarbons, and the prospects for commercial extraction in other parts of the permit area without undertaking drilling.[27] Those views could not relegate the significance of the on-going control over the extent of the permit area sufficiently to justify any grant of relief for Greymouth as sought, namely on terms that the PMP continued without any constraint as to area for the remainder of its term.

[93] I cannot decide what impact additional evidence for Greymouth on this point might have had, but on the matter as argued it would not have been appropriate to grant relief on terms that simply struck out condition 6(a) and otherwise left the PMP unchanged. If condition 6(a) was ultra vires the regulator, then some opportunity would need to be given, as a condition of any relief, for the regulator to address the on-going justification for continuing the PMP for areas where the presence of commercially producible hydrocarbons have not been made out to the regulator's satisfaction.

[94] In reply, Mr Farmer emphasised the uncertainties and potential commercial prejudice that might follow from any determination that, because of the inclusion of an ultra vires condition 6(a), the permit must be deemed not to have lawfully existed. Had it been necessary, a result could have been procured that avoided the adverse consequences of any such retrospective finding.

---

[27] See [169]–[171] below.

Second ground of challenge: incorrect interpretation of condition 6(a)

[95] Greymouth's first alternative to its challenge to the decision-maker's power to impose condition 6(a) was that the regulator had adopted an incorrect interpretation of its terms when purporting to enforce it. Greymouth contended that any obligation to surrender was confined to areas within the PMP where it had drilled, and such drilling had revealed the absence of commercially producible hydrocarbons. Greymouth's activities to date have not produced that result in relation to any parts of the permit area.

The natural and ordinary meaning of condition 6(a)

[96] The interpretation exercise appropriately starts with the natural and ordinary meaning of the condition. To reiterate, it specifies:

> 6 Within 90 months of the commencement date of the permit, the permit holder shall (to the satisfaction of the chief executive):
>
> (a) surrender all areas of the permit where drilling has not demonstrated (to the satisfaction of the chief executive) commercially producible hydrocarbons (at that time);

[97] Greymouth submitted that the condition requires surrender of areas where drilling has occurred that has proven an absence of commercially producible hydrocarbons. On this interpretation, all parts of the permit area where no drilling has occurred need not be surrendered, because drilling has not occurred which establishes the absence of commercially producible hydrocarbons.

[98] Greymouth's interpretation is as if the surrender obligation related to areas "where drilling *has occurred and* has not demonstrated … commercially producible hydrocarbons". Unless a work programme was imposed or agreed with Greymouth that required wells to be drilled at specified locations throughout the permit area, this interpretation affords Greymouth the opportunity to avoid surrendering any part of the permit area by electing not to drill. Further, this interpretation would require the drilling of a well before an area could be excluded from those recognised as containing commercially producible hydrocarbons when certain areas may well be identifiable as such without drilling. It is an interpretation that requires the permit holder to establish a negative, likely at very substantial cost.

[99] The respondents' interpretation of the natural and ordinary meaning of condition 6(a) is that, on the date for its performance, Greymouth must surrender all areas of the PMP except those where drilling has demonstrated, to the satisfaction of the chief executive, the presence of commercially producible hydrocarbons. The assessment of whether hydrocarbons are present in commercially producible form is to be made at the time for fulfilment of the condition and accordingly takes into account matters such as projected gas prices and the then state of technology. This interpretation imposes a positive onus on Greymouth to satisfy the decision-maker of the presence of commercially producible hydrocarbons, which is to be evidenced by the outcome of drilling. It also leaves to Greymouth the decision as to which areas within the PMP are the most likely to be profitable, where Greymouth would be in a better-informed and incentivised position to decide on the sequence for drilling.

[100] As originally imposed, condition 6(a) was to be satisfied by the end of four years into the 15 year term. Since then, the time for fulfilment of the condition has been extended to seven and a half years, being halfway through the term of the PMP. I am satisfied that, on the natural and ordinary meaning of the words used, condition 6(a) imposes a positive obligation to demonstrate the presence of commercially producible hydrocarbons. In order to retain areas of the PMP, Greymouth had to establish that to the satisfaction of the regulator by the results of drilling.

[101] One aspect of Mr Farmer's criticisms of a literal interpretation of condition 6(a) was the impracticability of a requirement that Greymouth had to "drill the whole field" in order to retain it within the PMP. Ms Casey accepted that the regulator would reasonably be required to have regard to all data supporting the presence of hydrocarbons, and not just the evidence established by drilling. That indicates that further drilling may not be required in relation to some areas, leading to the natural and ordinary meaning being qualified to the effect that Greymouth had to establish the requisite presence of hydrocarbons to the satisfaction of the regulator, including, *where necessary,* by the results of drilling.

Aids to interpretation of condition 6(a)

[102] The terms of permits, including the conditions on which they are issued, are the subject of dialogue between the applicant and those processing the application for the purpose of making a recommendation to the delegated decision-maker as to whether, and if so on what terms, any particular permit application should be granted. Ultimately, however, the delegated decision-maker is to impose conditions in exercise of the power in s 25 of the CMA.

[103] Once issued, the terms of the permit constitute a public document which is able to be searched, although there is scope for debate as to how wide a potential audience is likely to be. Submissions for Greymouth included the suggestion that searching the terms and conditions of a permit in the on-line system maintained by the respondents is not straightforward. Nonetheless, the task of interpretation of condition 6(a) is to be undertaken on the basis that a statutory right has been issued to extract Crown minerals within a system that affords access by the public to those terms and conditions.

[104] As to resort to extrinsic materials, the respondents invited analogy with the approach of the Privy Council in *Opua Ferries Ltd v Fullers Bay of Islands Ltd*, which was concerned with the terms of a public register of passenger transport services.[28] In that case, because of a concern for the interpretation to be readily available to members of the public who may have varying levels of background knowledge, the Privy Council determined that it ought not to interpret the public document in reliance on extrinsic evidence.[29] The Court of Appeal took a similar approach, holding that the register must be construed according to its own terms and not by reference to external material.[30] Those members of the public who consult the document would not necessarily have any background information, although it would be assumed that they were of normal intelligence and had read the register with care.[31]

---

28 *Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] UKPC 19, [2003] 3 NZLR 740.
29 At [20]–[21].
30 *Fullers Bay of Islands Ltd v Northland Regional Council* CA210/00, 14 December 2000.
31 At [31].

[105] The document in issue in that litigation is different from the terms of a mining permit. The accuracy of its content depended on information provided by the licensed operator, which was of a nature that justified not resorting to influences on the interpretation beyond the full detail of the entry in the register.

[106] A different balance is to be struck between the interests of the licence holder in provision of transport services and the public, and the closer focus that is appropriate between the regulator and the holder of a mining permit, when assessing the interests of the public in knowing and being able reliably to interpret the terms and conditions on which a mining permit has issued. Interpreting the conditions of a mining permit has more of the flavour of negotiated contractual obligations than is intended to be recorded in the "take it or leave it" terms of a passenger transport service licence.

[107] Greymouth invited analogy with the approach adopted in interpretation of restrictive covenants. In *Webster v Doak*, the Court of Appeal accepted that extrinsic materials constituting surrounding circumstances when the instrument came into being are to be taken into account in construing words according to their natural meaning.[32]

[108] As Greymouth pointed out, once registered, a restrictive covenant runs with the land so that its terms may subsequently bind owners of various interests who had no involvement in its creation. In contrast, a mining permit is personal to the holder and its conditions are intended to regulate the on-going obligations that are to be met by the permit holder, in the course of a continuing relationship with the regulator. I do not see this difference as material in deciding that relevant factual circumstances arising at the time the conditions of the PMP were settled may constitute extrinsic material legitimately taken into account by way of a check on the interpretation arrived at on the natural and ordinary meaning of the words in their context in the PMP.

[109] Different considerations would apply if one was to take into account subsequent conduct as an aid to interpreting the condition. New Zealand courts have been somewhat more liberal than other comparable jurisdictions in recognising limited

---

[32] *Webster v Doak* [2017] NZCA 396, [2018] NZRMA 169 at [13].

circumstances in which subsequent conduct may be taken into account.[33] The subsequent history of dealings between the parties about Greymouth's obligations under condition 6(a) assumes some relevance. This results from Greymouth's claim that the interpretation now contended for by the regulator amounts to a recent change of heart when those responsible for dealing with Greymouth perceived its attitude towards any surrender obligation as problematic. This argument for Greymouth included what amounts to a challenge to the good faith of Mr Jeaffreson, the principal witness explaining the course of the regulator's dealings with Greymouth. However, the conventional task of interpreting the condition cannot be influenced by the manner in which the parties have separately treated the obligations created by condition 6(a) since it was imposed.

The context at the time

[110] At the time of the Kowhai discovery, those in control of the exploration permit pursued an appraisal extension which might have led to a mining permit, or to the surrender of parts of the area of the exploration permit. The initial application for a PMP was for approximately half of the permit area, subsequently expanded to the entire area. The suggestion for a PMP over the larger area but subject to a surrender obligation appears to have been initiated by Mr Dunphy of Greymouth. He apparently had a precedent in mind, namely the Tui permit, which required the permit holder to drill two exploration wells in relatively well-defined locations, within the first 24 months of its grant. If either of those exploration wells was non- hydrocarbon bearing or was sub-commercial, then the permit holder was to make a partial surrender equal to the area enclosing the satellite prospect that had been explored by the unsuccessful well.

[111] Mr Adams took the view at the time that the information provided by Greymouth did not justify commercial gas reserves across all of the area sought for the permit. He recommended that Greymouth be allowed a defined period of up to five years to determine the areal limits of the reserves.

---

[33] *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277 at [7] per Elias CJ, [62]–[63] per Tipping J, [73] per Anderson J and [122] per Thomas J; Jeremy Finn, Stephen Todd and Matthew Barber *Law of Contract in New Zealand* (6th ed, LexisNexis NZ Ltd, Wellington, 2018) at [6.3.4].

[112] Mr Linskaill also commented on the interpretation his experience suggests should be given to condition 6(a) from the perspective of a technical oil and gas practitioner. He considered the terms to be most unusual and was concerned at the inadequate means of assessing the presence of commercially producible hydrocarbons if it was limited to "drilling", and at the lack of specificity in the circumstances that would require an area to be relinquished. He stated that a mandatory reduction in the area of a production licence once awarded seemed to him to be "counter-intuitive, unhelpful, de-stabilising, nor can it readily be justified as being in the long-term best interest of the state". He expressed support for Greymouth's interpretation.

[113] With respect to Mr Linskaill's expertise, which is not challenged, and his professional perspective of what he considers to be the preferable mode of managing the PMP, I do not find his analysis of the wording of condition 6(a) to be persuasive in influencing the correct interpretation of the terms used.

[114] Mr Harford, the geologist working on the application for the respondents, drafted the conditions, including condition 6(a). Contemporaneous documents make it clear that he did so in the belief that Greymouth accepted an obligation to surrender parts of the permit area where its work programme did not include testing by drilling to establish the presence of commercially producible hydrocarbons.

[115] Greymouth was critical of the respondents adducing evidence from Mr Harford. It contends that at the time the permit was being considered, Mr Harford was far too junior to claim a material part in the decision-making. Greymouth also invited an adverse inference at the absence of evidence from more senior personnel who had been involved, to the effect that such personnel would not support the respondents' version of relevant events. Having measured Mr Harford's evidence against the contemporaneous documents reflecting his involvement, I do not accept that his evidence should either be excluded or discounted on account of his relatively junior involvement at the time.

[116] Greymouth representatives, Ms Lara Walker and Mr Dunphy, met with Ministry officials on 7 May 2009. Ms Walker produced an internal report, which she

emailed to Mr Dunphy the same day, summarising the content of that discussion. The notes include:

> [Greymouth] proposes PMP with relinquish area.
>
> [Mark Dunphy] wants relinquishment provision like Tui PMP, [Michael Anastasiadis] thinks there might be some issues with that.

[117] The regulator's memorandum to the decision-maker on 24 November 2009 recommending the grant of the PMP recorded that commercially producible hydrocarbons had not been proven within the permit area except in the vicinity of the Kowhai A-1R well. The memorandum stated:

> 7 The nature of the proposed work programme is structured to provide ongoing production data and drilling results in a timely manner to enable a decision to be made on the retention of the permit area based on detailed and accurate gas and condensate reserve volumes and spatial distribution of commercially producible hydrocarbons across the permit area. If these cannot be proved then the relevant area is to be immediately surrendered.

[118] The point was also made in an appendix to the memorandum as follows:

> 15. Based off the information provided by the applicant there is insufficient production performance data to accurately demonstrate the presence of hydrocarbons over PEP 38742. … However, the work programme agreed to will sufficiently mitigate any uncertainty of hydrocarbon accumulations within four years from the permit grant. If economic (at that time) hydrocarbons are not discovered, such areas outside of the Kowhai discovery will be surrendered.

[119] Greymouth accepted the surrender condition as drafted without making any suggestions for it to be amended in any way.

The Tui permit as a precedent

[120] Mr Dunphy has deposed that his expectation was for the condition that has become condition 6(a) to apply in the same way as the partial surrender condition did in the Tui permit. It appears that that initial expectation has coloured Mr Dunphy's approach to interpreting condition 6(a) since then. In a reply affidavit for Greymouth, Mr Anastasiadis states that a similar provision (to condition 6(a)) was contained in the Tui mining permit, and that it was the precedent for this surrender condition.

[121] The structure of condition 6(a) as drafted by Mr Harford is different from the comparable condition in the Tui permit. Mr Harford has deposed that he did not use the Tui permit as a precedent. The Tui permit was for an area in offshore Taranaki and was granted in November 2005. It is apparent from the terms of that permit that the regulator had defined expectations as to the extent of additional exploration wells that should be required of the permit holder. They were to be located beyond the outer limits of the Tui field as identified, and if either or both of them were non-hydrocarbon bearing or sub-commercial, then the permit holder was to make a partial surrender equal to the area enclosing the satellite prospect.

[122] Those drafting the possible terms for the Kowhai permit raised with Mr Adams (then as consultant to the regulator) how to define the Ministry's requirements for further drilling. Mr Adams' recommendation was that individual horizons to be tested in the work programme need not be specified. That approach was adopted.

[123] Mr Adams has deposed in his affidavit in reply that he did not recommend the formula of words that was adapted in this regard to force a relinquishment of parts of the permit area, but rather he had crafted the words to ensure the appropriate data was captured. However, the advice he provided was in response to an email enclosing a draft of the possible terms of a permit. The request for him to comment specifically referred to schedule 3 of the draft, which included the essence of what has become condition 6(a), including an obligation to surrender areas of the permit that "after drilling have not been proven to contain commercial (at that time) hydrocarbons". It was uncertainty about the stipulations in that proposed condition as to the location and number of outlier wells that would be required that the regulator had asked Mr Adams about.

[124] Accordingly, in a general sense Mr Anastasiadis's recollection is correct in that both the Tui and the Kowhai permits were issued on terms that might subsequently require partial surrender of the permit areas. However, the terms on which that obligation would be monitored were different. For the Tui permit, the regulator was satisfied the permit holder would sufficiently test additional areas within the permit by undertaking two exploration wells, and that partial surrenders would follow if either or both of them did not establish the presence of commercially producible

hydrocarbons. For the Kowhai permit, the regulator elected not to negotiate with Greymouth over the number and location of additional wells to be drilled, so cast the obligation for further assessment of commercially producible areas within the PMP as a positive obligation for the permit holder to make out areas that it could justify remaining within the permit. That different onus justified imposing a substantially longer time period for fulfilment, being initially five years compared with the two years stipulated in the Tui permit.

[125] I find that, at the time condition 6(a) was proposed, the respondents anticipated that it would be interpreted consistently with what I have found to be its natural and ordinary meaning. I am also satisfied that Greymouth accepted that it imposed a positive obligation to make out the presence of commercially producible hydrocarbons in the areas within the permit, in the absence of which it would be required to surrender those parts where that was not made out.[34]

Subsequent conduct

[126] Since its introduction as a condition of the permit in 2009, Greymouth's obligations under condition 6(a) have attracted significant attention. Whilst I do not treat subsequent conduct as a legitimate aid to interpretation of the condition, the parties' dealings with each other in relation to it assume relevance because of Greymouth's claim that the regulator's interpretation is a recent invention.

[127] In July 2012, Greymouth requested the deletion of condition 6(a) in exchange for a partial surrender of the western portion of the PMP, an area of approximately 26 square kilometres (almost 40 per cent of the whole permit area). That did not eventuate, given the view adopted by the regulator that additional parts of the permit area may need to be surrendered. In a 3 September 2012 letter from the regulator commenting on Greymouth's proposal, it was acknowledged that the proposal of a partial surrender had merit:

> … due to the lack of interpreted prospectivity in the western portion of the existing permit area. In our view, acceptance of this partial surrender proposal does in no way [a]ffect, influence or replace the expectation that the permit area could be further amended in light of future appraisal drilling results. …

---

[34] See [134] below.

> The work programme was constructed to allow the appraisal drilling and testing programme … to actively shape and control the geographic land area of the permit, so to reflect the extent of the delineated commercial resource.

[128] Greymouth also requested three extensions of time for compliance with the surrender condition, in July 2012, May 2015 and then March 2017. These extensions were sought to ensure that Greymouth had a reasonable opportunity to drill sufficient wells to demonstrate the presence of commercially producible hydrocarbons.

[129] Further, in negotiations over the adequacy of Greymouth's proposed work programmes, it has been reasonably implicit that the lack of drilling proposed for the western part of the permit area was of limited concern to the regulator as its absence would lead to surrender of that area in any event.

[130] A review of the documents up to early May 2017 suggests that the regulator and Greymouth both treated condition 6(a) as imposing a positive obligation on Greymouth to establish the presence of commercially producible hydrocarbons, if necessary, by drilling. For example, an internal Greymouth note by in-house counsel, Mr Peter Missingham, of a 24 April 2017 telephone discussion with Mr Richard Davey at the regulator records Mr Davey indicating that the regulator was not satisfied there was a compelling reason to entertain the late request for further extension to defer the surrender.[35] Mr Missingham's note records Mr Davey as saying that the regulator would be prepared to take a generous interpretation of what "we" should surrender to accommodate then contemplated testing and any future outstep drilling plans. There is no suggestion that Mr Missingham treated the obligation any differently from Mr Davey.

[131] Notes of a meeting on 1 May 2017 attended by both Mr Missingham for Greymouth and Mr Davey for the regulator record, in relation to the Kowhai permit, that:

> … Greymouth is resistant to a work programme containing successive area surrender requirements. Greymouth would prefer to surrender the appropriate area once. … If Greymouth were to surrender permit area not known to be part of the producible field now, there would be uncertainty around what is justifiable.

---

[35] See [36] above.

[132] Those notes were prepared by Mr Davey but they were conveyed to Greymouth and there was no dispute as to their accuracy.

[133] Assessed in the context of contemporaneous documents and the evidence of events that were occurring, the clear impression is that the parties were seeking resolution of the extent of Greymouth's positive obligation to establish by drilling the areas within the PMP containing commercially producible hydrocarbons. The evidence is inconsistent with Greymouth having only a negative obligation to surrender areas where it had drilled with unsuccessful results.

[134] The correspondence from Greymouth, and notes of meetings about its requested extensions of time for performance of condition 6(a), are all consistent with a concern to procure as much time as possible to discharge a positive onus to establish the areas within the PMP containing commercially producible hydrocarbons. When I raised this inference with Mr Farmer during the hearing, he suggested that, as a conscientious permit holder, Greymouth was as concerned to avoid criticisms of non-compliance in responsibly establishing the scope of negative outcomes, as it would have been if obliged to positively establish the areas it was entitled to retain. Given the very substantial difference in the cost to Greymouth of complying with either the positive or negative versions of this obligation, and its interest in maintaining as large a part of the permit area as possible once condition 6(a) was spent, I do not find that a persuasive explanation. The clear inference is that Greymouth was concerned to have as long a period as possible in which to positively establish the presence of commercially producible hydrocarbons in order to avoid the requirement under condition 6(a) to surrender the areas where that onus had not been discharged.

The respondents' "loophole"

[135] Greymouth's last application for an extension to comply with condition 6(a) was lodged on 14 March 2017. As noted above, while the regulator would have been willing to consider a further extension of time, s 36(4B)(b) required any such application to be received not later than 90 days before the date specified for performance of the condition.[36] Applications outside that prescribed time limit could

[36] See [36] above.

only be accepted if compelling reasons were provided. Greymouth, however, was advancing the same reasons for the extension as it had relied on in 2015, namely that it required a reasonable opportunity to drill sufficient wells in appropriate sequence to demonstrate the presence of commercially producible hydrocarbons. The regulator therefore took the view that, in the absence of a compelling reason, it did not have jurisdiction to entertain an application for change that was filed out of time.

[136] Mr Jeaffreson deposes that he and others involved in considering such applications at the regulator, including Mr Davey, discussed Greymouth's predicament and whether a way could be found to facilitate granting further time for compliance with condition 6(a). A possible solution was conceived by "re-interpreting" condition 6(a) to take what Mr Jeaffreson and the others called "a narrow interpretation". This would involve treating the condition as requiring Greymouth to only surrender any part of the permit area where it had undertaken drilling work and actively proved the negative, in that the area drilled did not contain commercially producible hydrocarbons. This interpretation is the same as that Greymouth has contended for in the proceedings.

[137] If it were to be applied, then to retain the long-term integrity of the original intention of condition 6(a), a new condition would be required to reinstate an obligation to surrender parts of the permit area where Greymouth had not been able to positively discharge the onus of establishing the presence of commercially producible hydrocarbons, within a more generous timeframe. That is the position Greymouth would have been in if the regulator had been able to accept its March 2017 request for an extension of the deadline, and had favourably considered it.

[138] Mr Jeaffreson's evidence is that he called Mr Missingham to propose this means of avoiding the consequence of the March 2017 application for an extension having been filed out of time. Mr Jeaffreson believed the call occurred on a date around 24 April 2017. He deposed:

> I was categorical that this interpretation was on the basis that we would remedy this newly devised "loophole" so that the ultimate goal was still achieved. I believe he understood our position clearly. Mr Missingham seemed very pleased with the idea.

[139] Following a meeting on 25 May 2017, Mr Davey emailed Mr Missingham with copies to other interested personnel. His email proposed terms that would treat compliance with condition 6(a) as requiring only the surrender of areas where drilling had not demonstrated the presence of commercially producible hydrocarbons, and a new condition 7(a) that would require partial surrender of the permit area so that Greymouth retained only the area that had been proven to host commercially producible hydrocarbons. Mr Davey's email commented:

> As we have decided that the wording of 6(a) describes only the relinquishment of land where it has been positively proven at the drill bit to prove the absence of producible field, we consider it appropriate to reword obligation 7(a) to be the inverse. Ie., to retain only the area that can be proven to be associated with the commercially producible field.

[140] Mr Missingham's initial response to Mr Davey's email was a positive one, appearing to accept the proffered interpretation of condition 6(a) coupled with the new condition 7(a). Mr Missingham also requested an even later surrender date for the latter clause, asking if the regulator "would consider the surrender at 126 months, rather than the 114 months referred to".

[141] However, on 29 June 2017, after the proposals had been considered by the Greymouth board, Mr Missingham, along with repeating his request for a further extended deadline for compliance with condition 7(a), proposed that its wording should mirror the narrow interpretation that the regulator had indicated it was prepared to apply to condition 6(a). This would mean that it would constitute only a second obligation to surrender those parts of the permit area where drilling had occurred and not demonstrated commercially producible hydrocarbons. The proposed amendment was promptly rejected by Mr Davey.

[142] Representatives of the parties met on 31 July 2017. Mr Missingham raised the legal analysis now advanced in the first ground of challenge in this proceeding, namely that the regulator did not have power under the CMA to impose a relinquishment or surrender obligation as a condition of a PMP. Mr Missingham's internal notes of the meeting record an agreement that Greymouth would consider a reasonable work programme to meet the concerns voiced at the meeting on behalf of the regulator about

the lack of work done to appraise the areas of the Kowhai permit that had not then been drilled. Greymouth was to revert to the regulator.

[143] On 15 September 2017, Mr Missingham confirmed the advice Greymouth was relying on that a relinquishment obligation could not be imposed under a PMP because the CMA only provided for it in respect of prospecting and exploration permits. That email included a proposed work programme. That still focused on exploitation in the south-eastern corner of the permit area and did not propose mining in any other parts of the permit area.

[144] Towards the end of October 2017, Mr Davey left the regulator and the parties draw very different inferences from handover notes that he prepared at the time of his departure. The material part of Mr Davey's note was as follows:

> John Decker is aware of our preliminary interpretation of obligation 6(a) (the surrender obligation), which was that it required the *evidence of absence* for a surrender. This means that, as no well currently drilled has shown the absence of hydrocarbons then no area should be surrendered. We did not worry too much about this interpretation as we fully expected a more fulsome surrender in the ongoing work programme to be agreed (obligation 6(b)).
>
> However, Greymouth challenged the lawfulness of requiring a permit holder to surrender land in a work programme, given s36 does not provide for it. We have not provided our response to this challenge.
>
> Looking back through the Kowhai permit record (documents and emails from David Witkowski's inbox forwarded to legal team and Ben Harford), the Ministry has had a consistent battle with Greymouth over properly defining the permit area. In 2009 we were reluctant to grant the permit area, but did so on the basis that it would be reduced once the field was better defined – achieved through the work programme. Work programme approval was withheld at least once, and the outlier well drilling and testing programme approval was withheld twice, because we were not happy that it would result in better defining the extent of the field. From the approved outlier drilling programme, Kowhai-4 was proposed to be drilled to the west of the permit to test a Moki aged amplitude anomaly. It was not.
>
> On discovering this material we have a much better understanding of the purpose behind the work programme, which culminates in the requirement to surrender land where drilling has not demonstrated producible hydrocarbons (at that time). The correct interpretation is that a surrender of land must be made on the basis of the *absence of evidence* (rather than the evidence of absence). I.e., Greymouth must surrender land that it cannot demonstrate it can or will produce from. This has yet to be communicated to Greymouth.

[145] In reliance on Mr Jeaffreson's evidence and other documents, Ms Casey submitted that the "preliminary interpretation" Mr Davey was describing was the narrow interpretation first conceived in mid-2017 to avoid the inability to deal with the merits of Greymouth's request for a further extension because of its late lodging. Consistently with that, Ms Casey suggested that the last comment, "This has yet to be communicated to Greymouth", was referring to the regulator's intention to revert to its original interpretation, which required Greymouth to prove the presence of commercially producible hydrocarbons in order to avoid surrendering areas.

[146] For Greymouth, Mr Farmer submitted that the "preliminary interpretation" was the view that had been shared between the regulator and Greymouth since the condition was imposed in 2009. The reference to the different interpretation not having been communicated to Greymouth meant that the regulator would, for the first time, be asserting its interpretation of a positive onus to establish the presence of commercially producible hydrocarbons under condition 6(a).

[147] I am not satisfied that there is any document that attributes to the regulator the "narrow interpretation" prior to it being proposed in April or May 2017 in response to the predicament then created by Greymouth's late lodgement of a further request for extension of the time in which to comply with condition 6(a).

[148] The conduct of both parties up to the late filing of that application in March 2017 and consideration of it in early May 2017 is all consistent with condition 6(a) imposing a positive obligation on Greymouth to establish the presence of commercially producible hydrocarbons for all areas within the PMP, or be required to surrender them.

[149] Greymouth's case included a strong attack on Mr Jeaffreson's reliability and credibility. A specific part of the arguments to discredit Mr Jeaffreson's narrative was the conflict between him and Mr Missingham as to a telephone conversation Mr Jeaffreson had deposed to having occurred around 24 April 2017. Mr Missingham had not previously completed an affidavit but in reply deposed that he "did not have a phone call with Mr Jeaffreson to this effect on 24 April 2017 or on any other day".

[150] I granted the respondents leave on strictly limited terms to reply to this denial, which Ms Casey submitted was completely unexpected. After further research, Mr Jeaffreson confirmed from his telephone records that he had made a call to Mr Missingham on 18 May 2017. Further consideration of Greymouth's discovered documents revealed a handwritten note described as being completed by Mr Missingham, at least partly on that same day. Mr Missingham's note is somewhat cryptic, leading the parties to urge on me different interpretations of it. In the context of other evidence as to what was occurring at the time, it can be taken to refer to the subject matter in dispute. The relevant part of the note is as follows:

> David Jeaffreson 18/5/17
>
> - followed up w what means
> - obligat. = (a) + (b)
>
> ↳ surrender where not demonstrated
>
> · where 'not' indicated
>
> ↳ haven't '<u>not</u>' indicated
>
> - ongoing work progm – per CoC
>
> ↳ wp = what wanted[37]
>
> - submit WP w surrender = 18 mths down track
> - retain areas have proven
> - application to change

[151] I am satisfied this represents Mr Missingham's contemporaneous note of a discussion in which he and Mr Jeaffreson discussed an "obligation", being that in condition 6(a) and (b). The surrender obligation might arise where "not demonstrated", that is, where the permit holder had not demonstrated the presence of hydrocarbons, or alternatively where work had been done that indicated hydrocarbons were not present. Greymouth's on-going work programme was referred to per the

---

[37] The handwriting of the last word is indistinct and may be "worked".

change of conditions application that had been lodged, with the prospect of submitting a work programme with a surrender provision that would apply 18 months later. Such a work programme would provide that Greymouth retained the areas that they have proven to contain hydrocarbons.

[152] The content of the note is substantially consistent with Mr Jeaffreson's recollection recorded in his first affidavit, which is said to have been completed without recourse to Mr Missingham's note. I accept that Mr Missingham's note makes no reference to a "narrow interpretation" that would be subject to the addition of a new condition 7(a) as a "newly devised loophole" which Mr Jeaffreson recalls, but that is not sufficient to cast doubt on the reliability of Mr Jeaffreson's recall.

[153] Nor am I persuaded to reject Mr Jeaffreson's explanation for the alternative interpretation raised in mid 2017 in an attempt to deal constructively with the late filing of Greymouth's request for a change of conditions, by the somewhat clumsy terms in which Mr Jeaffreson resiled from reliance on the narrow interpretation. That occurred in his letter to Mr Missingham on 30 November 2017 that included the following in commenting on condition 6(a):

> On 30 June 2017 we noted an alternative interpretation, which was the relinquishment of land only where it has been proven at the drill bit to show the absence of a producible field, however having reviewed the correspondence at the time of grant and the intention of the condition, it is clear that this alternative interpretation is not correct.

[154] The reality is that the regulator had conceived a narrower interpretation than had consistently applied in an attempt to get around the procedural difficulty created by Greymouth's failure to lodge its request for a change of conditions applying to the PMP within the 90 day limit required by the CMA. When that initiative did not succeed, the regulator was reverting to the original interpretation. The terms of Mr Jeaffreson's 30 November 2017 letter somewhat obscure that reality. Seen in the context of the protracted dealings between the parties, it does not require an alteration to the findings I have made.

[155] Consistently with this interpretation of the note of the 18 May 2017 telephone conversation, the first document from Greymouth asserting the interpretation of

condition 6(a) as a negative obligation was despatched by Mr Missingham on 23 May 2017. That stated:

> Condition 6a of the Permit requires the surrender of those areas of the Permit where two criteria have been satisfied:
>
> a. drilling has occurred; and
>
> b. that drilling has not demonstrated commercially producible hydrocarbons.

[156] I infer that Greymouth asserted that interpretation in light of indications that had been received from the regulator. That was the opposite of Greymouth's concern conveyed previously, and in its 14 March 2017 request for an extension of the deadline, which sought more time to drill sufficient wells to demonstrate the presence of commercially producible hydrocarbons.

[157] I am satisfied the approach to interpretation contemplated on behalf of the regulator after receipt of the March 2017 request was genuinely a new approach at that time and did not reflect confirmation of any earlier indications of the interpretation of condition 6(a) that were conveyed to Greymouth.

[158] It follows that I reject the challenge to the bona fides of the regulator's explanation of a different interpretation of condition 6(a) that was discussed in mid 2017. It also follows that, even if these events subsequent to the original inclusion of condition 6(a) were admissible as an aid to its interpretation, they would not alter the interpretation that I have adopted.

Third ground of challenge: errors of law and fact in alleged surrender demand

[159] From late 2017, dialogue between the parties continued notwithstanding Greymouth's signalled challenge to the power of the decision-maker to impose condition 6(a). Greymouth was prepared to discuss the required extent of an on-going work programme, which acknowledged the prospect in future of a partial surrender of areas within the PMP. The regulator took the view that Greymouth had been in breach of condition 6(a) since 2 June 2017 when it failed to surrender areas within the PMP outside those that it had established to the satisfaction of the regulator were capable of commercial production of hydrocarbons.

[160] In a series of meetings in early 2018, Greymouth participated without prejudice to its rights to deny that any obligation under condition 6(a) was lawful. These initiatives included without prejudice offers to surrender approximately 26 per cent of the south-western side of the permit area and then a larger partial surrender of some 39 per cent of the permit area comprising a strip of the full distance running north to south on its western side.

[161] After a meeting on 22 February 2018, which did not produce an agreement on the area to be surrendered and an acceptable work programme for the future, on 7 March 2018 Mr Jeaffreson wrote to Greymouth in terms now pleaded as constituting an unlawful surrender demand. The letter is characterised as demanding surrender of a significant part of the permit area, which involved an alleged error of law because of the absence of a power to issue such a demand. In advancing a view as to the extent of area required to be surrendered, the letter is also said to reflect errors of fact which are sufficiently material to constitute an error of law on the test in *Edwards (Inspector of Taxes) v Bairstow* and *Bryson v Three Foot Six Ltd*.[38]

[162] The area identified by Mr Jeaffreson as appropriate to surrender was represented by a polygon that he had endorsed on a map of the permit area provided by Greymouth at the 22 February 2018 meeting. Mr Jeaffreson's letter expressed the view that the area proposed to be retained in the PMP was "generous" but that, in respect of the area outside the polygon, there was no evidence of commercially producible hydrocarbons so that area needed to be surrendered in accordance with condition 6(a). Mr Jeaffreson stated:

> If this area is surrendered on or before 16 March 2017[39] at 5.00pm I can confirm that any technical non-compliance with Condition 6(a) from 2 June 2017 will not be taken into account in the assessment of any future applications or bids that may be made by Greymouth companies.

[163] Greymouth contends that the terms of the letter represented a demand for surrender that constituted the exercise of a statutory power or a statutory power of decision. As such, it is arguably justiciable on grounds including error of law in

---

[38] *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL) and *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

[39] The "2017" date was obviously in error. 16 March 2018 was nine days after the letter was emailed.

assuming jurisdiction to issue such a demand, as well as errors of fact in the geotechnical and geological analysis lying behind the view that the presence of commercially producible hydrocarbons had not been established outside the area of the polygon.

[164] The respondents agree with Greymouth that there is no statutory power to demand surrender of areas within a PMP. However, they deny that the letter can accurately be characterised as such and submit that it was no more than a proposal for further consideration by Greymouth with a view to reaching a mutually satisfactory agreement for managing the PMP for the remainder of its 15 year term.

[165] The thrust of Mr Jeaffreson's 7 March 2018 letter was conveying the extent of the surrender of permit areas that the regulator considered appropriate, and the timing within which such a surrender would need to be confirmed in order to avoid the regulator taking the view that there had been material non-compliance by Greymouth with condition 6(a). It did not purport to exercise a power on the part of the regulator to require relinquishment of portions of the permit area. It was, in effect, an ultimatum of the minimum steps the regulator thought Greymouth had to take in order to avoid the regulator taking steps consequent upon a finding that Greymouth had failed to comply with condition 6(a).

[166] The context in which the letter was written involved a stand-off as to whether condition 6(a) was enforceable at all. Greymouth's legal position was a denial that the regulator could enforce an obligation requiring Greymouth to surrender any part of the permit area. In contrast, the regulator treated condition 6(a) as legally enforceable on the interpretation that imposed a positive obligation for Greymouth to satisfy the regulator of the areas to be retained within the permit because of the presence of commercially producible hydrocarbons.

[167] Although communications in this context might understandably be somewhat testy, some of Mr Jeaffreson's language could be criticised for being potentially threatening. For example, Mr Jeaffreson stated that if the area outside the polygon were surrendered before 16 March 2017, any non-compliance would not be taken into account in assessing any future applications. Given the seriousness of non-

compliance, raising it in this manner could be seen as an implicit threat. He later stated that if such a surrender application were to be filed, he would "support a recommendation that no amendment be made to the area surrendered". This could be taken as a threat that if Greymouth did not volunteer to surrender the area, were the regulator to then seek an even larger area, he might not recommend against it.

[168] However, those statements do not transform the overall effect of the letter from a proposal into some form of purported statutory demand for surrender. The regulator accepts that there was no power to impose such a surrender demand and the letter does not have that legal effect.

Challenge to the regulator's factual analysis

[169] Greymouth filed a substantial volume of technical evidence, including from independent experts, on the geological features within the permit area that have a bearing on the presence of commercially producible hydrocarbons in a number of geological formations below the surface. The evidence included an opinion from Mr Adams, who drew on all the information currently available from Greymouth, as well as his knowledge of the formations in surrounding permit areas. His conclusion on the permit area was:

> A surrender of any area within the Kowhai Permit area would involve a surrender of land which contained commercially producible hydrocarbons. In particular, the area to the north-east of the Kowhai Permit has sufficient data from surrounding wells and production to meet the criteria for proven reserves.

[170] Mr Adams was somewhat more circumspect in his affidavit in reply:

> 3.26 Using this information, I take the view that the majority of this permit area is very likely to include, or be capable of accessing, producible hydrocarbons and that surrendering the area demanded by NZP&M would mean surrendering the almost certainly gas bearing western flank of what is the Turangi Field to the East.

[171] Mr Adams' affidavit also expressed an opinion, based on his involvement for the regulator at the time the permit application was being considered, as to how I ought to interpret condition 6(a). He does not purport to have expertise in legal matters and it is not a topic on which his opinions could be substantially helpful.

[172] Greymouth's deponents, and in particular Mr Harry Crighton, its chief operating officer, criticised the geotechnical approach that the regulator's personnel appeared to take in attempting to define the boundaries of the areas within the PMP that should be accepted as capable of commercially producible hydrocarbons. Mr Crighton has 33 years' experience in the oil and gas industry, including as a geologist and petroleum engineer. He described Mr Jeaffreson as focusing on the definition of the free water level (FWL) and gas water contact (GWC) points within the subsurface formations in the Kowhai permit. These locations assume relevance because the FWL refers to the point within a zone that is below hydrocarbons and contains only water. Once the FWL is reached, those assessing the resource can know that there will be no gas present within that relevant reservoir below that point. GWC will occur in areas within a reservoir above the FWL where gas is present.

[173] In the February 2018 discussions, Greymouth representatives used zone 15, which is one of a number of productive zones in the Kowhai area of the permit, as an example of the projections of where the GWC and FWL might be. On Mr Crighton's evidence, conservative estimates were assumed for the purposes of illustration but not as any representation that Greymouth considered those projected limits defined the extent of the area from which commercially producible hydrocarbons could be extracted.

[174] On Greymouth's analysis, the polygon drawn by Mr Jeaffreson on the map it had provided at the 22 February 2018 meeting misinterpreted what the Greymouth representatives had said. Accordingly, it involved material mistakes in attempting to define the extent of the area from which commercially producible hydrocarbons could be extracted. On the basis of all the data relied on in the evidence produced for Greymouth, it appears that a credible case could be made for identifying a substantially larger portion of the permit area as containing commercially producible hydrocarbons.

[175] In responding to these criticisms on behalf of the regulator, Ms Casey suggested that it was unnecessary to determine whether Mr Jeaffreson erred as a question of fact in defining the limit as he did, and if so by how much. This third ground of challenge to the regulator's conduct only becomes relevant if the regulator was correct in asserting the power to impose condition 6(a), and condition 6(a) is to

be interpreted as the regulator contends. In those circumstances, Greymouth has been in breach of condition 6(a) since 2 June 2017 and the issue of what consequences flow from that breach are still to be determined.

[176] Mr Jeaffreson deposed that, if Greymouth had not initiated these proceedings, before reaching a decision on whether to commence enforcement action, the regulator might have provided Greymouth with the opportunity to comply with the substance of the permit conditions, despite having missed the deadline. The regulator would have required evidence that Greymouth's proposed plan of action did, in fact, comply with the conditions. This would most likely have required proof of the delineation of the area within which there are commercially producible hydrocarbons, along with a plan for how those hydrocarbons would be produced. It would also have required surrender of those areas of the permit for which there was no proof of commercially producible hydrocarbons.

[177] Were Greymouth unwilling to comply, the regulator would have considered initiating the statutory process to revoke the PMP, under which Greymouth would have been given the opportunity to contest the assessment of non-compliance. If the Minister then decided to revoke, Greymouth would have the ability to appeal to the High Court and, pending the determination of the appeal, the PMP would remain afoot. Further, were Greymouth to surrender land under the PMP, it would be entitled to reapply for an exploration permit over the surrendered area if it came up as part of a block offer.

[178] I did not understand the regulator to insist that proof of the presence of commercially producible hydrocarbons needs to derive directly from drilling undertaken for that purpose. A theme in Greymouth's criticisms is that material information that can assist in projecting the extent to which commercially producible hydrocarbons exist within the permit area can be derived from means other than drilling. For instance, Greymouth's own experience as holder of adjoining permits relevantly informs its projections of the extent of the resource, as does data that is required to be reported to the regulator by the holders of other permits in adjoining areas. Given the point that has been reached with this PMP, the regulator would risk criticism for unreasonable conduct or failure to have regard to relevant considerations

if it required proof on any basis more narrow than an objective assessment of all potentially relevant data.

[179] The other aspect of the regulator's response is that it continues to have an open mind about the appropriateness of the polygon as defining the limit of the permit area containing commercially producible hydrocarbons. That stance is somewhat at odds with the language used in Mr Jeaffreson's letter, but it formed a part of the defence of the judicial review challenge in terms to which the regulator may be held. Ms Casey emphasised that the matters raised in the proceeding have precluded the regulator taking any steps consequent on a finding of breach by Greymouth of condition 6(a). The CMA provides a process which affords the permit holder opportunities to make submissions to the regulator and, if it wishes, to challenge by a statutory process the regulator's decision as to the consequences of breach.

[180] Accordingly, although Mr Jeaffreson's 7 March 2018 letter may have been infelicitously expressed, its despatch does not amount to the exercise of a statutory power, nor does it reflect a decision by him that amounted to the exercise of a statutory power of decision. It was a formal communication intended to advance the regulator's concern at what it perceived, accurately as a matter of law, to be the permit holder's non-compliance with condition 6(a).

[181] The time taken to advance the issues in the proceedings should have enabled Greymouth to carry out further work in justifying the retention of a larger area than that proposed in Mr Jeaffreson's polygon, and the future dialogue between the parties will no doubt require them to engage on it. However, on this ground of challenge it does not amount to evidence of errors of fact that might be elevated on the *Edwards v Bairstow* standard to an error of law when the circumstances in which Mr Jeaffreson formed that view do not constitute the exercise of a statutory power.

Fourth ground of challenge: interpretation of condition 6(b)

[182] Condition 6(b) required Greymouth to submit for the approval of the chief executive an on-going work programme for the remainder of the permit term by 2 June 2017. Greymouth wrote to the regulator in purported satisfaction of both condition 6(a) and 6(b) on 23 May 2017. That communication set out the work programme

proposed by Greymouth and thereafter it was the subject of discussion between the parties.

[183] In Mr Jeaffreson's 30 November 2017 letter he advised that Greymouth had still not complied with condition 6(a).[40] In the same letter, Mr Jeaffreson advised that the regulator would only consider an on-going work programme once the permit holder had complied with condition 6(a). The rationale for this was that the adequacy of a work programme could not be assessed until the area remaining within the PMP was settled. That letter advised that the regulator considered Greymouth was non-compliant with both condition 6(a) and 6(b). In a subsequent letter on 7 December 2017, Mr Jeaffreson advised:

> In regard to condition 6(b) the submission by the permit holder of an ongoing work programme does not make the permit holder compliant with the condition. This occurs once the Chief Executive has agreed to the ongoing work programme.

[184] Apparently because of the predicament the regulator would be left in if a permit holder submitted a patently inadequate pro-forma work programme, the regulator takes the view that a condition in the terms of condition 6(b) is not complied with until the chief executive's approval of the work programme has been obtained.

[185] As I discussed with Ms Casey during submissions, even if the wording of the condition sustained that meaning, it would be a most unsatisfactory regulatory practice to adopt. It would require the permit holder to project how long the dialogue with the regulator might take to achieve agreement on an acceptable work programme, and then submit the work programme not just by the nominated deadline, but sufficiently before then to take into account the projected length of time to obtain approval for it. That approach could lead to arbitrary and unreasonable results.

[186] The regulator's practical concern is that it needs a means of controlling a permit holder who purports to comply with the deadline by presenting a token and patently inadequate work programme. That is not addressed by requiring that the work programme be one that is also accepted by the regulator within the specified time limit.

---

[40] See [153] above.

The answer to that concern is to imply into the definition of a work programme that it be prima facie fit for purpose in the context of the particular permit. That approach may leave scope for argument on whether a particular proposed work programme meets that prima facie threshold, but I do not accept that the need for a preliminary judgement of that sort renders a condition in these terms unworkable. In drafting such conditions in the future, the requirement for a proposed work programme to be fit for purpose can be made explicit.

[187] The other practical concern motivating the regulator's interpretation was the predicament in which it would find itself if the permit holder would not agree to material changes sought by the regulator to a work programme that has been submitted in a form that is prima facie fit for purpose but inadequate in some particulars. It would be advantageous to the regulator to be able to use a condition such as 6(b) to require compliance with changes the regulator considers necessary, and to treat a failure to accept such changes as a breach of condition 6(b).

[188] However, contending a breach of condition 6(b) in those circumstances is not an appropriate use for it. If, after timely submission of a draft work programme that is prima facie fit for purpose, agreement cannot be reached on material changes reasonably considered by the regulator to be necessary before it can be approved, then the regulator would need to assert other means of controlling the scope of work by the permit holder.

[189] Accordingly, Greymouth is entitled to declarations in the terms it seeks under this ground of challenge, amended only to recognise the minimum standard that must be achieved in the work programme as presented. The appropriate declaration is in the following terms:

> The proper interpretation of condition 6(b) of the Kowhai permit:
>
> (i) requires only that the applicants submit an on-going work programme that is prima facie fit for purpose for the remainder of the permit term within 90 months of the commencement date of the Kowhai permit; and

(ii) does not require the chief executive to agree to or approve the on-going work programme within 90 months of the commencement date of the Kowhai permit.

Fifth ground of challenge: additional error in application of condition 6(b)

[190] A second dispute about the application of condition 6(b) has arisen because the regulator has taken the view that it is necessarily performed only sequentially after condition 6(a) has been complied with. Mr Jeaffreson's letters of 30 November 2017 and 7 December 2017 to Greymouth both took the position that the regulator could only consider an on-going work programme once the permit holder had complied with condition 6(a). The practical concern was that the adequacy of a proposed work programme could not be assessed by the regulator until there was agreement on the extent of the area within which the work was to be carried out.

[191] For Greymouth, Ms Cuncannon submitted that, as a matter of interpretation, the structure and terms of condition 6(a) and 6(b) were expressed as separate and independent obligations. If they were intended to be sequential, it might reasonably be expected that condition 6(b) would so specify, by introductory words such as "after surrender of any areas of the permit under paragraph 6(a)".

[192] In terms of the practical application of such conditions, Mr Adams' evidence included his opinion that the work programme is "neutral or blind to, and applies irrespective of, the permit area to which it relates". Mr Adams considered it irrelevant whether a surrender of acreage has occurred prior to, concurrently with, or after the approval of an on-going work programme.

[193] In considering the workability of conditions 6(a) and 6(b), it is accepted that the process of surrender contemplated by condition 6(a) would most likely involve a period of dialogue between Greymouth and the regulator. Accordingly, one might reasonably expect that if the outcome of the surrender commitment was to be relevant to the scope of a prospective work programme, then different deadlines would have been imposed for their satisfaction. As it is, the imposition of the same deadline for fulfilment of both conditions contemplates that Greymouth can perform those obligations at the same time. Accordingly, on the terms of the conditions and given

the interpretation I have attributed to condition 6(a), I do not consider it appropriate to read into condition 6(b) an obligation that it can only occur after there has been agreement on the extent of the permit area to be surrendered in compliance with condition 6(a).

[194] However, in assessing the range of reasonable responses on behalf of the regulator when dealing with a work programme submitted in compliance with condition 6(b), the reasonable options must include a decision to defer consideration until the area in respect of which it is to apply has been settled. Despite Mr Adams' opinion that the work programme ought to be considered irrespective of the extent of the area to which it relates, the regulator could in some circumstances reasonably take the view that its approval of a proposed work programme does depend on the extent of the area over which the work is to be carried out. If, say, 60 per cent of the permit area was to be surrendered pursuant to condition 6(a), then the regulator might reasonably take a different view on what was an acceptable work programme than if the whole of the original permit area continued to be included.

[195] I have held that Greymouth's submission of a proposed work programme prior to 2 June 2017 fulfilled its obligation under condition 6(b) (providing the work programme submitted was to be treated as prima facie fit for purpose). Therefore it cannot be the case that it has failed to comply with that obligation because it had not, by the same time limit, submitted a surrender proposal that accorded with the regulator's interpretation of what was expected under condition 6(a).

[196] Accordingly, on this last ground of review, Greymouth is entitled to a declaration in the terms sought, namely that the proper interpretation of condition 6 of the Kowhai permit is that compliance with condition 6(a) is not a condition precedent to compliance with condition 6(b). Given the outcome on other grounds of review, I do not consider any further relief on this ground is appropriate.

Results and costs

[197] Greymouth's first three grounds of challenge concerning condition 6(a) and the alleged surrender demand are dismissed. Its fourth and fifth grounds of challenge

regarding condition 6(b) succeed and I have accordingly made declarations as set out above at [189] and [196].

[198] Neither party addressed costs in their submissions. My provisional view is that the relatively more important challenges brought by Greymouth have been successfully defended for the regulator, subject to the regulator failing to defend its stance on condition 6(b).

[199] That suggests an entitlement to costs in favour of the respondents, subject to a proportionate reduction in the range of 20 to 30 per cent of a full costs entitlement to reflect the outcome on the last two grounds of review.

[200] If the parties cannot agree on costs consistently with this indication, or otherwise, then I invite memoranda, in the first instance on behalf of the respondents. If that course is followed then, within 15 working days after service of a memorandum for the respondents, a memorandum on behalf of the applicants should be filed.

Dobson J

Solicitors:
Meredith Connell, Wellington for applicants
Crown Law, Wellington for respondents