

# Sole Risk Provisions in Petroleum Exploration Joint Ventures

## A Caddie

*1. Senior Associate, Simpson Grierson, Private Bag 92518, Auckland, New Zealand. Telephone: 09 9775202, E-mail: andrew.caddie@simpsongrierson.com*

In the writer's view the unincorporated joint venture structure has served participants in petroleum exploration joint ventures in New Zealand, Australia, the States and the UK very well. Being essentially a creature of contract it is inherently flexible and facilitates the joining together of a number of parties who may often differ in size, financial resources and technical capability but who agree their primary joint objective is to find and develop a petroleum field within a target area.

The basic structure of such joint ventures is the joint venture agreement (often referred to as the Joint Operating Agreement or Joint Venture Operating Agreement) which provides the contractual glue, the operating committee which is forum for the process of agreeing joint activities by the setting of agreed budgeted activities and the operator who carries out the Joint Operations on behalf of the Joint Venture ("JV").

Having agreed to form a joint venture with a series of common objectives, why then do most petroleum JOA's enable one or more of the participants to proceed with an independent course of action in certain situations?

The policy answer to this question probably turns upon the flexibility and diversity I referred to above. Within a JV it usually flows from a different technical view held by a participant to that of the operator and/or the rest of the group as to the interpretation of the available data on a prospect the subject of a proposed budget and work programs and/or different financial priorities and/or constraints for a particular participant.

These independent operations are generally referred to as Sole Risk Operations ("SRO").

## Overview

This paper

- discusses some of the concepts surrounding sole risk operations and how they may be characterised;
- considers issues JV participants and their advisers may need to consider when negotiating the terms of sole risk provisions in a JOA; and
- looks at a recent New Zealand case which provides some insights of how NZ courts might interpret such provisions.

## Why Do Sole Risk Provisions Arise?

In most Petroleum Exploration JV's the operator submits a work program and budget to the Operating Committee ("OC"). In due course it is put to the vote. Short of consensus two things can happen. The majority of the operating committee vote **against** the proposed programme with one or more dissenters. Alternatively, there is a majority vote **in favour** of the work program but one or more participants vote against the program.

A participant who has voted for a program but has been overruled by the majority but still wishes to proceed with the program represents the classic **Sole Risk** situation. The second situation where a dissenting participant does not wish to participate in the majority approved program – is generally referred to as "**Non-Consent**".

In each case the joint venture is split between participants wishing to proceed with the project and those that do not.

In some ways, it is difficult to rationalise the whole concept of sole risk provisions in the framework of a joint venture. However from a robust commercial view point the classic Sole Risk situation has appeal.

If a dissenting party wants to test their opinion as to the prospects of success in relation to a given prospect then subject to certain safeguards what is the harm in letting them take the financial risk and drill that well? If they are proved right and the other participants want to come back in and convert it to a joint development then subject to an agreement as some sort of return on the risk what could be fairer? Further, at the time of agreeing the terms of the JOA none of the participants can be sure as to what side of the fence they may sit on should such a situation/opportunity come to pass.

Accordingly it is common for petroleum exploration JOA's to contain a process whereby a participant who voted for a proposal that was rejected by the majority can notify the OC that it wishes to carry it out, if permitted by the terms of the JOA, and accepts that the non-participants can buy back in upon completion of the Sole Risk Operation by:

- (i) fronting with their share of the costs of the Sole Risk Operation ("SRO") as if had been carried out as a joint operation; and/or
- (ii) pay a premium ("buy back premium").

The premium is usually a factor of the cost of the SRO, say 6 times the buy back party's share of the SRO costs had it been carried out as a joint operation.

Non Consent provisions are a little more difficult to rationalise. Whilst the manner in which Non Consent clauses operate is generally very similar to the classic Sole Risk situation it is easy to have less sympathy for their inclusion in a JOA. For example a participant may have voted for the proposal in the anticipation that all will participate and made provision for expenditure on this basis. Allowing a dissenter to opt out means those who opted in will have to front with a greater share of the costs. This could prove something of an inconvenience for a party's internal financing arrangements. For these and other reasons, would be participants may be more suspicious of non-consent provisions and may want to treat the buy back premium and other issues differently to the more easily understood classic Sole Risk Situation. However, time and space does not permit me to discuss the Non Consent limb of sole risk operations further. For the purposes of this paper I focus solely on the classic Sole Risk situation.

To sum up in a sole risk operation ("SRO") the sole risk parties share the risk, costs and rewards of the operation between themselves in proportion to their interest in the sole risk venture. Those choosing not to participate make no contribution to the costs and stand apart from the project, subject to, if the SRO is successful, non participating parties being able to join any further appraisal work or development upon completion of the SRO and payment of a buy back premium.

## Factor to be considered in Sole Risk Provisions

Having decided in principal to accept the concept of Sole Risk Operations, the parties have a number of factors to consider when agreeing the detail of such provisions. These could include:

1. the priority of joint operations to sole risk operations;
2. what types of operations will be permitted as sole risk?;
3. who carries out the role of the operator in relation to the SRO?;
4. what safeguards should non-participants seek from sole risk parties?;
5. sharing of information arising from SRO's;
6. factors affecting the setting of the buy back premium;

**Joint Operation Vs Sole Risk Operations:** The general approach is that the SRO must first have been proposed to and rejected by the OC but the SRO proponent voted for the project. It is generally taken as axiomatic that a SRO that is substantially similar to or in conflict with part of an approved work program may not be proposed. To avoid any technical issues arising on the grounds that a successful SRO has penetrated a reservoir previously discovered as a joint operation some JOA's also insert a requirement that the SRO

must be located a given distance from any joint operation well.

**Permitted Types of Operation:** From a theoretical point of view SRO's could cover all stages of petroleum operations ranging from seismic surveys, exploration wells, through to development of a field. In practice, exceptions are made.

In the New Zealand context petroleum *in situ* is owned by the Crown who controls and administers the process of allocating exploration permits to groups of would-be explorers. Each exploration permit thus comes with a minimum work programme. These are structured so that if elements of the obligatory work programme are not achieved within a given time frame then the joint venture will lose the permit. Thus, where the operator submits a work program and budget to the Operating Committee it is usual to differentiate between those items forming part of the obligatory work programme and those that are additional. Further the JOA might limit the ability of participants to propose Sole Risk Operations until the mandatory work obligations have been carried out.

In relation to permitting a seismic survey to be a SRO there may be resistance to the inclusion of such operations on the basis that it is too hard to subsequently determine if such work contributed to a discovery and if so to what extent. This in turn may impact upon the terms of the buy back premium.

In relation to sole risk development operations participants may decide to limit these to a development arising out of earlier Sole Risk Operations whether or not the same is approved by the majority of the participants.

Debate may also arise around the definition of the likes of what is an exploration well over and above that it entails a penetration of new geological formations not previously drilled or tested. In this regard it is not unusual to see quite detailed definitions to clearly differentiate between an exploratory well, an evaluation or appraisal well with reference to phrases such as outside "*the interpreted closure of any geological structure or stratigraphic trap, which a well has been previously drilled for petroleum with potential commercial significance has been found*". Clearly, in a given factual context the interpretation of these phrases may generate some technical discussion.

For the purposes of this paper we now focus on SRO's involving the drilling of a new exploratory well or a proposal concerning deepening or side tracking an exploratory well that was a joint operation but has reached its target depth without success.

**SRO Process:** Once a proposal has been rejected by the OC a participant is required to give written notice that it wishes to proceed with the project as a SRO. The proposed SRO notice should be required to contain detailed plans, cost estimates, objective depth and formation and all other relevant data and information. Most Sole Risk provisions then allow the other participants a reasonable time period, at

least 30 days, to make a decision as to whether they elect to join in or not. Clearly, if the proposal is in relation to the deepening or sidetracking an exploration well which has been drilled to its objective depth without success a considerably truncated proposal and decision making period is required for operational reasons.

On the assumption the other participants do not elect to participate in the project and it satisfies the other JOA criteria it may then proceed as a Sole Risk Operation.

**Role of the Operator:** For a variety of reasons it is generally the case that all the participants will prefer that the incumbent operator carry out the SRO. That said, the issue of whether or not the sole risk parties have the financial wherewithal to meet the SRO costs and/or any liabilities that might flow from it mean that those acting for operators will generally want to see a right to decline to act as operator in a SRO where the operator is not a participant. Here a fall back position could be that the sole risk parties either agree among themselves or the JOA contains some sort of default provision. For example the sole risk party having the largest participating interest may be deemed to be the operator.

**Position of Non-Participants:** The JOA will contain a clear statement to the effect that SRO's are to be carried out at the sole risk, cost and expense of the sole risk participant's. Supporting indemnities in favour of the non-participants in relation to actions, claims, demands, costs etc arising out of or in connection with the SRO will also be agreed. Where the proposal concerns the deepening of an exploration well the JOA should address the responsibility for additional rig costs.

**Administration of the SRO:** The JOA will invariably set out in fine detail the processes and procedures surrounding Joint Operations. They will cover the roles, functions, duties and obligations of the likes of the Operator, the Operating Committee, the setting of work programs and budgets, the accounting procedures and so on. Accordingly, rather than go to the bother of drafting a separate set of administrative procedures for SRO's the section of the JOA dealing with SRO's will invariably contain a phrase to the effect that save where there is a conflict with the terms of the sole risk clause(s) the other provisions of the JOA will apply "*mutatis mutandis*" or "*so far as applicable*"<sup>1</sup>. Thus for example the Operating Committee will, for the purpose of the SRO, be made up of the sole risk participants and the joint OC provisions apply. This drafting sleight of hand generally works well. However, as we shall see from the Goldie case participants would be well advised to ensure that the terms of the JOA, in so far as SRO's are concerned, are quite clear on matters, such as:

- when a SRO is deemed to be completed and thus the total cost package making up the SRO;
- how the respective participating interests in the SRO operation will be calculated going into the SRO and, very importantly, how they will be calculated if a Non-Participants buy in upon completion of the SRO.

**Sole Risk Information and Data:** As with Joint Operations the operator of a SRO is required to keep the sole risk parties informed as to progress by making regular reports. Given the usual structure of "buy back rights" it seems reasonable that such reports also be made available to the non-participants. This will enable them to be appropriately informed if, at a later date, they are required to make a decision as to whether or not they wish to participate in further appraisal or development work following a successful SRO. Debate can arise around the timing of the flow of such information but it is generally accepted that ownership in respect of such data and information is retained in the hands of the Sole Risk participants.

**Late Joining Elections:** The process and procedures to be followed as to when non participants have the opportunity to participate in a subsequent appraisal or development program as a result of a successful SRO needs to be clearly laid out. In general terms the sole risk participants report back to all JV participants, with the operator putting up a full proposal to further appraise or develop the find the subject of the SRO. All the participants then have a given period to elect to participate. A decision by a non-participant to elect to participate in the next stage triggers the buy back provisions.

**Buy Back Premiums:** Any amount of commercial considerations arise in negotiating the determination of the buy back price. However as a general rule the higher the risk the greater the buy back premium. In other words by taking a financial risk in conducting the SRO the SRO participants can, reasonably, expect incoming parties to meet their share of the SRO costs plus a premium.

This premium will depend on the particular factual matrix. For example a higher premium may be sought if an offshore permit is involved. It is accepted that offshore operations have additional costs and risks as opposed to an SRO in an onshore permit.

However, a number of factors tend to weigh against parties advocating for very large premiums not the least of which is that at the stage of negotiating such a clause, each party is unclear whether the situation will arise and if it does whether it will be a participant or non-participant in the SRO.<sup>2</sup> Further, the costs and potential uncertainties of bringing a commercial find to full production are such that the advantages

<sup>1</sup> Wrightson Ltd v Fletcher Challenge Nominees Ltd [2002] 2 NZLR 1 PC.

<sup>2</sup> In some jurisdictions a buy back premium is often referred to as a penalty. In the New Zealand context this may raise issues as to whether or not a penalty is enforceable based on contractual law principles. However, from a New Zealand perspective, the fact that in this context the premium does not arise as a result of a breach of contract seems to remove any argument that if it is characterised as a penalty it is unenforceable. Butterworths Commercial Law in New Zealand – 4th Edition Burrowdale 169.

of being able to spread risk going forward is, I suspect, in the minds of all when negotiating buy back premiums.

In any event the premium is typically based on the cost of the SRO and in the New Zealand context may be either in cash or in kind or a combination of both<sup>3</sup>. By kind I mean where the premium is structured so the sole risk participants may own and take petroleum produced from the discovery until they have recovered the premium. A pro of taking a production premium production is that it will not represent a cash drain on the buy back participants as would an up front cash payment. Where the production payment approach is taken the JVOA needs to make it clear that if the petroleum is not sold into the market or at arms length then the fair market price shall apply, and how market price is referenced.

Whilst tax considerations are outside the scope of this paper the parties might want to consider the comparative tax and GST consequences of cash versus a production premium.

It also seems reasonable that the sole-risk participants should be entitled to receive the buy back party's share of the SRO the buy back party would have incurred had the SRO been conducted as a joint operation from the onset. In any event expressly or implicitly the trade off between up front cash and payment through production is the timing as to when the buy back party becomes a fully participating party in the decision making process and procedures going forward.

Depending on the size of the premium the parties may also want to consider indexing the outstanding production payment(s) at regular intervals.

## How have Sole Risk Provisions fared in the courts?

It is interesting to note that when one goes looking for cases concerning sole risk provisions they are few. This could reflect the traditional reluctance of the petroleum exploration industry to have their disputes aired in public and/or that the inherent flexibility in the administrative and contractual structure of most JOA's allow the parties to reach a compromise position. In any event, it was of special interest to petroleum exploration lawyers and industry participants when Wild J handed down his decision in the New Zealand case generally referred to as the Goldie case<sup>4</sup>.

## The Goldie Case

The purpose of my analysis of the case is to provide some commentary and discussion as to how some of the issues I have suggested should be addressed when agreeing sole risk provisions were treated in the Goldie case. My analysis does not pretend to cover the case's full factual and legal matrix but focuses on relatively small points of interest in relation to the topic of this paper.

Briefly, the facts are as follows: The Ngatoro oil and gas field is an onshore field located close to the town of Inglewood in the Taranaki region. In 1993 the then licence holders formed a joint venture for the exploration and development of petroleum in the Ngatoro licence area by way of a joint venture operating agreement or JVOA. Subsequently the original parties were granted a petroleum mining permit in 1996. Through various sale and purchase transactions and resulting assignments the interests in the JV as at the date of the comment of the litigation was Greymouth, 59.57%, New Zealand Oil and Gas, 35.43% and Ngatoro Energy Limited ("NEL") 5.0%.

In February 2000 NEL proposed to the other joint venture parties through the JV operating committee that an exploratory well to be known as Goldie be drilled. At this stage Goldie was a prospect identified by seismic survey. However, the majority of the operating committee voted against drilling Goldie. As is the norm, the general scheme of the Ngatoro JVOA was to provide for the participation of all parties in the exploration and development of the permit area, but provisions for operations to be conducted at the cost and for the benefit of only some of the parties were set out. In due course NEL gave notice it intended to drill Goldie, as a sole risk drilling operation ("SRO") as permitted under the terms of the JOVA.

In other words here we have the classic sole risk situation.

The drilling operation was carried out in February 2001 and was successful with a discovery of both oil and gas. The well was put straight into production testing with the crude component recovered and the gas component flared. In May 2001 NEL gave notice to its joint venture parties that it had completed its sole risk operation. That notice triggered a two month period to let the other participants decide whether to back into the SRO. One of the then participants (Shell) elected to back in and gave notice accordingly. Under the terms of the JVOA NEL was entitled to a premium of six times the cost of completing the SRO. NZOG elected not to participate and, of course, took no part in the subsequent litigation.

<sup>3</sup> For completeness sake I note that in other jurisdictions such as the US, where petroleum is privately owned, it would seem that area or acreage penalties, whereby the non-participating party loses or relinquishes part of the joint venture permit area in favour of the participating parties, are also used. In the New Zealand context our statutory framework tends to make this difficult. However, perhaps the apparent acquiescence of the Ministry of Economic Development in terms of allowing Shell to carve out separate interests in a permit area notwithstanding relinquishment of the same in the context of Shell's Commerce Act driven sell down of FCE assets may have nudged the door open a little.

<sup>4</sup> Greymouth Petroleum Acquisition Company Limited and Southern Petroleum (Ohanga) Limited v Ngatoro Energy Limited (High Court, Wellington Registry) CP162/02 13 May 2003 – Wild J

In due course, Greymouth (having purchased Shell's interest), became a joint venture party and the buy back party. Greymouth then wrote to NEL asking for an operating committee meeting (OCM) to address a number of issues. These included the lack of a development plan for Goldie, the flaring of gas, the sale of the gas, costs and the parties' percentage interest in Goldie.

The decision suggests that the OCM was a turbulent affair. NEL refused to accept a Greymouth motion requesting NEL as operator to submit to the OCM a development work programme and budget for Goldie as soon as practicable. NEL closed the meeting. Greymouth in turn refused to accept that the meeting was closed and assumed the chair and the meeting (Greymouth alone) voted in favour of the five resolutions tabled by Greymouth. Shortly thereafter NEL applied to the Ministry of Economic Development ("MED") for a renewal of its gas flaring consent but at that point in time the MED took the position that flaring required the consent of all Ngatoro permit holders and advised NEL accordingly. In due course Greymouth compiled a statement of claim covering some 11 different courses of action.

However from the perspective of Sole Risk Operation provisions a smaller number of the issues are of interest:

- what constitutes completion of the SRO and why was it important?.
- what were the costs of the Goldie SRO?
- when could Greymouth participate in the decision making in respect of the development and operation of Goldie going forward?;
- what was the extent of Greymouth's percentage interest in Goldie;

**Background To The Goldie SRO Process:** Section 6.01 in Article 6 of the Ngatoro JVOA provided that a party may, subject to the provisions of Article 6, carry out in the Licence Area one or more of the following operations for its own account:

- “(i) *drilling an Exploration Well; or*
- “(ii) *drilling an Appraisal Well; or*
- “(iii) *deepening, re-working, sidetracking, completing or testing of any Exploration Well, Appraisal Well or Development Well provided a decision has been taken by the Operating Committee to abandon such well; or*
- “(iv) *the running and setting of a production string of casing and the completion of a well that has been drilled and that has reached the objective depth planned for such well and in respect of which the appropriate tests have been made provided that a decision has been taken by the Operating Committee to abandon such well;*
- “(v) *the preparation of a feasibility study for the development of a Discovery; or*

- “(vi) *the development of a Discovery made, confirmed or determined as a consequence of a Sole Risk Operation.”*

Section 6.03(a) requires a party wishing to conduct a SRO to give notice in writing to the other parties:

- “(a) *... of its intention to conduct such operation specifying the nature thereof, the proposed location and a detailed description of the proposed operation (including objective depth if relevant) together with an estimate of the costs of such operation ...”*

The JVOA then gives each party 180 days to decide whether to join in the SRO. On 30 March 2000 NEL gave notice of its proposed Goldie SRO in accordance with Article 6.03. The notice was appropriately detailed (it was 3½ pages long). It referred to a “sole risk Drilling operation” and gave an appropriate cost of NZD1.6 million which included a dry hole drilling cost of NZD1.23 million.

Where any SRO has resulted in a Discovery, the terms of the JVOA permitted the sole risk party to test to assess the potential of the Discovery. It then requires the sole risk party **to complete or abandon the well in accordance with applicable legislation and regulations and accepted industry practices ...**. *The Sole Risk Party is required to give notice in writing to the non-participating parties on the “... completion or abandonment of any well or the conclusion of any other Sole Risk Operation ...” and “within 2 months after completion, to give the non-participating parties the test results and an itemized statement of the costs of the SRO.”*

NEL had, early in March 2001, before production testing, run production casing and a production string, and established wellhead facilities. The costs of the SRO were by now in the vicinity of \$3.2 million.

In line with requirements of the JVOA on 4 May 2001 NEL gave notice of the completion of the SRO.

**Completion Issues:** Greymouth was essentially arguing that “completion” did not include all the work NEL had in fact carried out and therefore NEL was overstating the costs of the SRO. If correct NEL would be unable to recover these costs to say nothing of the impact on the buy back quantum.

As it happened the JVOA did not define “completion” although it did define “completion costs”. These included the costs of completing the well up to and including the wing valve of the pressure rate flow control equipment at the well head or “Christmas Tree”.

Conversely NEL argued that the term “complete” should, sensibly, include all the operations which would incur completion costs, and the extent to which the well is completed is for the sole risk party to decide. NEL was of the view that the terms of JVOA allowed several alternatives. E.g.. Complete with production casing to support the well or

complete it for production. NEL argued that what constitutes completion is a question of fact not interpretation. If the well had been dry NEL would have had to plug and abandon the well so in the context of a discovery the natural meaning of “complete” was that the well be completed for commercial production. Otherwise if the costs of completion did not include the likes of the costs of running the completion string then they would not form part of the SRO and NEL would be unable to recover them.

Greymouth argued that “completion” should be construed in its ordinary dictionary sense – complete the drilling of the hole. However, given the two month notice period for non-participating parties to consider if they wished to join the SRO Greymouth conceded that for safety and practical purposes the term should extend to and include running production casing.

At this point it is interesting to note that in order to assist in the interpretation issues one of the parties had introduced the US “*Model Form International Operating Agreement*” (“MFA”) as representative of industry norms/good industry practice. Given the absence of protest from the other party the Judge then drew upon the MFA to assist in interpreting the JVOA on a number of occasions.

**Wild J held** that the costs of the Goldie SRO properly included full completion of Goldie. That is the Goldie SRO was completed when NEL run the production string and fitted the surface Christmas Tree. At that point Goldie was ready to have the valves turned and be put into commercial production.

Wild J’s reasoning was along the following lines.

The dictionary of his choice defined “complete” as “not lacking any part” and “fully equipped”. Wild J was of the view that this was more consistent with a well ready for production as opposed to one which was not. The JVOA’s definition of “completion costs” persuaded him that this was the appropriate guide to what was required to complete Goldie. He referred to the MFA as a helpful guide to what was completion and noted the MFA expressly define the word as meaning full completion. Wild J was also of the view that in the normal run of events non participants receiving an SRO notice advising then that the sole risk party would drill an exploration well would readily contemplate and accept that the SRO would include completing the well to the point where it could be put into commercial production if a discovery was made and testing warranted that. Also of significance was the fact that the well could not be left uncased for two months.

Finally Wild J was not prepared to construe the JVOA in a way such that NEL would be unable to recover from the party joining the SRO that party’s share of the cost of running a production string and installing the Christmas Tree given their unavoidable nature.

Accordingly NEL costs in completing Goldie for production form part of the SRO.

## **Rights of the Parties to Develop/ Participate in the Goldie Discovery**

To understand the background to this issue it is worth remembering that NEL’s Participating Interest in the JV was 5% with Greymouth’s being 59.57%. Accordingly, once Greymouth was part of the SRO the dynamics of decision making would change.

NEL’s argument was that it had the right to develop and produce Goldie unimpeded until the SRO Premium was paid. Prior to this point Greymouth had no right to participate in the Goldie SRO, and in particular no right to control production of Goldie.

Article 6 contains the usual wording such that rather than having to go through the process of drafting a separate and full set of administrative processes and procedures with regard to the administrative detail of Sole Risk Operation all the existing detail of the JVOA is brought in by the phrase “*unless inconsistent with any provision of this Article the other provisions of this Agreement shall apply mutatis mutandis to any Sole Risk Operation conducted pursuant to this Article*”. Unfortunately, it would seem that the JVOA did not expressly state when the joining party was entitled to participate in the Sole Risk Operation via the mechanism of the Sole Risk Operating Committee.

Greymouth argued that the Joint Operating Committee provisions should be applied, “*mutatis mutandis*” into the sole risk provision and accordingly it was entitled to participate via the “deemed” Sole Risk Operating Committee immediately. In Greymouth’s view under the terms of the JVOA Greymouth required an immediate proprietary interest and draw the Judge’s attention to phrases such as “*entitled to enjoy with the sole risk parties any right, title or interest in the discovery*”. Greymouth also drew the Judge’s attention to comparable terms in the MFA which supported its view that the joining party participates from the date of the notice.

NEL was arguing that applying the Articles in the JVOA referring to a Joint Operating Committee as if they applied to a Sole Risk situation was inappropriate and not applicable.

The Judge found no force in NEL’s argument that it could not receive its SRO Premium short of having control of Goldie. What NEL was entitled to was a return on its investment not control of Goldie.

In reaching his conclusion the Judge confirmed the meaning of the word “*mutatis mutandis*” as meaning “*as necessary applicable*” or “*insofar as appropriate*”. Accordingly, in the absence of contrary provisions the terms of the JVOA of the Agreement as they related to administrative and operating procedures re joint operations, suitably modified, **did** provide a working framework for the Goldie operation. The Judge was of the view that as the parties had obviously

intended that the JVOA was to work for the parties then it was his task to construe it in a workable manner.

On this basis the Judges findings were that from the time Greymouth backed into Goldie, Greymouth and NEL together constituted a subjoint venture and;

- The Goldie subjoint venture was controlled by an Operating Committee comprising Greymouth and NEL;
- Development of Goldie including any production of petroleum from it was to be as decided by the Goldie Operating Committee;
- Voting at the Goldie Operating Committee was in proportion to the respective interests of Greymouth and NEL in the Goldie subjoined venture;
- That NEL did not have the control rights it claimed pending payment of the SRO Premiums

The extent of Greymouth's interest in the Goldie SRO

As noted, prior to the SRO Greymouth's JV interest was 59.57% and NEL's 5%. However, in the Court proceedings Greymouth was seeking a declaration that its interest in the Goldie Subjoint Venture was 92.26%.

As far as I can ascertain the maths are as follows: add together the two participating interests in the joint venture of Greymouth and Goldie to arrive at a figure of 64.57. Thus the proportion that Goldie's 59.57 is of 64.57, is expressed as percentage, 92.26%. If this approach was correct then Goldie was entitled to 92.26% of the Goldie revenue going forward. Greymouth's mathematical argument was, Greymouth claimed, supported by section 6.10 of the JVOA.

*“The Parties to any Sole Risk Operation shall, within 30 days after the expiration of the 180 day period of notice specified in Section 6.03(a) (or within 24 hours after expiry of the 48 hour period of notice specified in Section 6.03(c), when a rig is on location), agree as to each of their participating interests in the relevant Sole Risk Operation. If they are unable to agree within such period, the Participating Interests of each of the Parties joining in the relevant Sole Risk Operation shall be in the same proportion as its Percentage Interest bears to the aggregate Percentage Interest of all parties participating in the Sole Risk Operation.”*

## Author

ANDREW CADDIE is a Senior Associate in Simpson Grierson's Commercial Department.

His specialist areas include advise on commercial exploitation of natural resources (eg oil and gas, forestry and fishing), Treaty of Waitangi Issues and Maori Business Development.

Andrew has been involved in a variety of work for oil and gas explorers and developers ranging from the preparation and negotiation of Joint Venture Operating Agreements, advise in relation to development projects, and gas and crude sale contracts down to the preparation of standard short-form agreements for use by operational personnel. He has an excellent working knowledge of both the Crown Minerals Act and the Petroleum Act.

However, in the Judges view this section was only applicable if more than one participant elected to be part of the Sole Risk Operation at the time the SRO was first proposed. Further, the Judge was of the view the position was adequately covered elsewhere in the sole risk section to the effect that Greymouth's share was 59.57%.

## Conclusion

From an industry perspective one thing should not be lost sight of in relation to the Goldie litigation. That is the philosophy behind why we have sole risk provisions in JVOA was proven absolutely correct. In other words giving a party the ability to put to the test its minority viewpoint as to the technical chances of success in relation to a particular prospect resulted in the Goldie discovery.

From a lawyer's perspective I suggest the Goldie decision and the likes of this paper warrant careful review the next time you are drafting or negotiating sole risk provisions.

The views expressed in this paper are the personal views of the author and not those of Simpson Grierson.

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