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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 29/2020
[2020] NZSC Trans 25

BETWEEN **BATHURST RESOURCES LIMITED**
First Appellant

AND **BULLER COAL LIMITED**
Second Appellant

AND **L & M COAL HOLDINGS LIMITED**
Respondent

Hearing: 8 and 9 October 2020

Coram: Winkelmann CJ
Glazebrook J
O'Regan J
Ellen France J
Williams J

Appearances: J E Hodder QC, R J Gordon and D P MacKenzie for the Appellants

A R Galbraith QC, D R Kalderimis and N K Swan for the Respondents

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CIVIL APPEAL

MR HODDER QC:

May it please the Court, Hodder with my learned friends Mr Gordon and Mr MacKenzie for the appellants.

WINKELMANN CJ:

Tēnā koutou.

MR GALBRAITH QC:

If the Court pleases, I appear with Mr Kalderimis and Ms Swan for the respondent.

WINKELMANN CJ:

Tēnā koutou. Mr Hodder. Just a preliminary matter, I understand that the people who were to be joining us by VMR are currently unable to do so because the provider is unable to give them a virtual meeting room. So the Ministry of Justice technical people are trying to fix the problem but unfortunately they are unable to hear or see.

MR HODDER QC:

Thank you, your Honour. We have prepared a short outline which I have handed to Madam Registrar but if this could be given to the Court I'll have her distribute those. Can I say that the third page is in A3 which isn't a cunning plan to defeat the page limit provided but on looking at it I realised it was not easy to read and so, if the Court will forgive me, we've decided to produce it in A3 so it's slightly more visible.

Can I perhaps start by explaining what that document is? As you will see from the top left-hand corner it's from the case on appeal. It's actually an exhibit to the evidence of Mr Tacon who is the Chief Executive of Bathurst, and the material within the box is taken directly from that except we have added references in the blue and pink legend or descriptions just on the left-hand part of the page. What it shows is the coal price. The bench mark price is the blue sort of block graph going through and you will see that it covers the period from 2001 to 2017 and one can see that it might've looked good from

about 2008 onwards for a while and looking really good in around 2011/12, didn't look so good after that and, while we haven't followed the track through, I think it's safe to say that the coal price has continued to fluctuate.

The blue boxes identify what was hoped to happen and I'll come to that shortly. So the blue boxes are not reality. They are aspirations and they indicate what was supposed to happen at certain times, and I stress that that was not reality because if we go to the bottom right-hand box it refers to 6.1 million tonnes of coal having been produced. That has never happened. I think it's about 50,000 tonnes is what has been produced, but in the High Court judgment there's a footnote that suggests that the High Court may have misread that as being what was actually produced. It was not. Blue is non-reality. Pink is reality and the stages along the way are set out on that basis, and we've added two footnotes at the bottom to indicate the dates which weren't in the original document, the attachment to the evidence. The first is to indicate when the third deed of amendment, which introduced what everybody calls clause 3.10, occurred in the second half of 2012, and the second footnote refers to the discussions which are described in our submissions as the 2013 clarification, just to put those things into context.

And in terms of getting access to the mine or as to the relevant area, the escarpment area, it's the last pink box below the blue graph where it says "AEO". That's access granted in June 2014. That's the point at which Bathurst's entitled to walk onto the ground with a shovel, as it were, and start thinking about mining. That's the point at which that happens. Everything before that is tied up with – everything before that, after the agreement has been signed back in mid-2010, is going through the regulatory maze that in fact this process went through, including in fact coming to this Court at one point on one aspect of it.

So that's the outline that provides, as it were, an historical context of the circumstances that the cases arises in.

The previous two pages of text simply indicate roughly where, with the Court's leave, I hope to go. We put in a bit of detail around the first items which are the contract and the DFS, which is the definitive feasibility study, which I'll be coming to that's referred to and was part of the contractual arrangements.

Then there's a bit more on objective interpretation, and then the order is planned to be roughly following the written submissions.

Clause 3.4, which is the first performance payment, and then we just list the rest of them. The royalty deed in clause 3.10. Some issues around common sense includes 3.10. Questions about the implication of terms, and then the proper purposes argument which seems convenient to deal with that now rather than wait until I've heard my friends on it orally, and if times permits and the Court is assisted by it I'm happy to address, at least in a tentative way, Sir Andrew Tipping's paper which the Courts provided to all parties at the end of that process. That's the plan at the moment, that's convenient.

So the starting point is the contract and if we then turn to the contract we find that, and I'm not sure whether their Honours prefer an electronic reference but my reference is 302.304. Is that sufficient for the Court to find…

GLAZEBROOK J:
Possibly. I say that because last time I was having real trouble with this but I'm going to persevere.

WINKELMANN CJ:
For the contracts I'm going to look at the hard copy simply because I like to mark them up and I can tell you that the contract is in Case on Appeal, exhibits volume 2.

GLAZEBROOK J:
So at 302…

MR HODDER QC:

302.0304, Ma'am.

GLAZEBROOK J:

I've got it, thank you, and I might just have a back-up as well. So volume 2 of the exhibits.

WINKELMANN CJ:

Tab 34.

MR HODDER QC:

Now I suspect members of the Court have looked at this. This document has become, I think, to all counsel involved in this case, something like a slightly obscure and not always welcome relative but it's been around with us for quite some time and, while it's familiar, it's still sort of mysterious in some ways perhaps, shall we say.

Anyway, what I wanted to do was to address the architecture of the contract to start with, and so to start, if I may, with the definitions. It's reasonably obvious but if we turn – again is it helpful to use the pages in the case or pages in the document? I'm at 308 of the bundle or it's page 1 of the document. But anyway, so you can call this 1.1 in the definition, and I mention that because there in the first definitions we see the word *agreement* which makes it clear that it includes the schedules. That's of significance because the schedules include the royalty deed. So the royalty deed is not some standalone document sitting outside the agreement. It's an incorporated part of the agreement and it's schedule 2 to the agreement.

The purpose of the agreement, at least at the highest level, is to sell shares in what was then called L&M and is now called Buller Coal Limited, and we find that in clause 2.1 and it's also part of recital B, and then the business of the company is defined in terms of coal exploration. Again, back in clause 1.1 in definitions, and the assets are essentially permits, applications and

information. That's a defined term we also see on the first page of the contract.

In terms of permits and applications, there are two numbers that might be useful to bear in mind at least briefly and one of those is EP 40628 and then there's also a particular mining permit area which I'll come to, and it may be simplest to do that by way of a map and in terms of – again, perhaps testing how this works, but there's a supplementary volume 1 in the case on appeal which has been given the number S01. The document I'm referring to commences at S01.3260. So are the volumes that comprise the DFS or definitive feasibility study.

GLAZEBROOK J:
Do we have an electronic number or…

MR HODDER QC:
I don't have a number apart from the one I'm giving you, I'm afraid, but if – might have a…

GLAZEBROOK J:
So supplementary…

MR HODDER QC:
Supplementary volume 1.

GLAZEBROOK J:
Okay, right, possibly.

MR HODDER QC:
And it's called in mine S01.3260.

WINKELMANN CJ:
This is the supplementary to the case on appeal?

GLAZEBROOK J:

Yes.

MR HODDER QC:

Yes, and…

WILLIAMS J:

Can you give me that number again, please, Mr Hodder?

MR HODDER QC:

S01.3260.

WILLIAMS J:

It's the DFS?

MR HODDER QC:

Yes, the DFS.

WILLIAMS J:

It is the actual DFS.

MR HODDER QC:

And the point of going at this point, I'll come back to this, but if we go to page 3265 you should find the map, and for present purposes that is helpful, your Honours.

GLAZEBROOK J:

Yes, Unfortunately, I've probably got to try and find a – it's the wrong way up, I think. Maybe not. Yes, it's the wrong way up on the screen.

MR HODDER QC:

The one that we have is sort of a – you have to turn it landscape way.

O'REGAN J:

It's upright instead of flat but I think you can still read it.

MR HODDER QC:

And the point of taking the Court to that, but it may not matter too much whether it's up-side or sideways, is that it outlines in the blue area most of the permit, well, the permit areas for EP 40628 which we saw reference to in the agreement, so that covers quite a lot of ground, as you see, and in particular there's the orange bit towards the bottom, if one looks at it in a landscape fashion, which is marked CMP 51279. Now has your Honour…

GLAZEBROOK J:

Sorry, it's…

MR HODDER QC:

Sorry about that. So the small orange shape, which I'm sure there's a geometric description for it but I'm not quite sure what it is, but that orange shape is the area where the escarpment mine area of around 200 hectares is, and that's the main subject of the definitive feasibility study, the DFS.

In red, further up and some distance away, is the Deep Creek area. The Deep Creek area was added, as it were, to the DFS at a later point during the course of the 2010 and there was what was effectively what was called a PMS, a preliminary study, was undertaken and that, those two documents together, comprise the DFS at the end of the process, but the initial focus was on Escarpment and Escarpment is the orange bit at the bottom. So that just gives the indication of where it is and you can see the Westport town indicated off to the left-hand side, looking at it in landscape fashion.

So that's what is being sold. What was being sold were the shares in the company. The company owned the assets. The assets were essentially the permits and the applications, the information relating in particular to Escarpment because that was the, sort of the, clearly the first target of all this exercise.

In terms of what it was going to cost, then if we turn to page 302.0313, or page 6 of the agreement, we get to clause 3.4. Perhaps it's easier to start

with 3.1. There's an aggregate consideration, comprises the deposit, then the settlement cash consideration, then the performance payments, the performance shares and the royalty. All those were regarded as aggregate consideration, and the point that we mention in our submissions, probably more than once, is apart from the deposit everything else was contingent. So the settlement cash consideration, which was – so the deposit's 5 million, the settlement cash consideration 35 million. The settlement cash consideration requires satisfactory completion of the conditions precedent. Among those is the satisfactory completion of the DFS itself. There's also some consents that are required.

Then the performance payments. So the heart of this appeal and the litigation throughout. The performance shares are payable, that is to say in effect L&M gets a shareholding in Bathurst at a certain point, and then finally the royalties are to be paid in terms of the royalties deed, royalty deed, at various rates on sales of coal. So the cash consideration under (b) is contingent on settlement. The performance payments are contingent on certain triggers. The performance shares likewise on a trigger, and the royalties depend on selling coal. And that's obviously the position as stated in 2010.

If one comes down to 3.4 where we're dealing with one of the main issues in the case, the performance payments are defined in terms of being US40 million each, payable by reference to the first 25,000 tonnes of coal which has been shipped from the permit areas, and likewise the second one is payable in terms of 1 million tonnes of coal which has been shipped from the permit areas.

The fact of the performance shares under clause 3.5 over the page indicates that, in addition to the fact that this was an idea rather than an actual operating mine, that this was going to be not just a simple one-off sale and purchase and the parties go their separate ways but it was an ongoing connection that was required and, indeed, the exercise contemplated that L&M would become a not insignificant shareholder in Bathurst.

Likewise the contract indicates that there was to be a connection with the equity market and so in clause 8(f), which we find on page 325 of the case on appeal or page 19 of the document, clearly with reference to the idea of the performance shares, the purchase is to take all reasonably necessary steps to have its securities quoted on the NZSX as soon as practicable.

WINKELMANN CJ:
Sorry, what paragraph? What clause is that?

MR HODDER QC:
That was 8(f) and it's on page 19 of the agreement or page 326 of the bundle, "Quotation of shares".

WINKELMANN CJ:
Yes, got it, thank you.

MR HODDER QC:
Now Bathurst was quoted on the ASX throughout this period, and I think it was on the NZX for a while and then came off again, but the point was that there would be an equity market connection in relation to this exercise.

If one goes towards the end of the document, just a matter to mention. One of the individuals who features in the document, the document is actually signed on page 334 or page 27 of the document and you'll see it's executed for L&M by Brigid McArthur. Now Brigid McArthur drafted the agreement as well as signing it for L&M and she features at various points in this narrative. Mr Loudon, who was sort of the main force behind L&M at this time, indicated in evidence that he didn't read the contract. He relied on Ms McArthur. That's in the evidence at 201.0192.

And while I'm in this area of the contract, going back a page, on page 26 of the agreement or 333 of the case, we find clause 16.9 which is the "Entire Agreement" clause, standard form but it says that "it supersedes and extinguishes all earlier negotiations, understandings and agreements, whether

oral or written", and then goes on to say including, for the avoidance of doubt, a letter of intent but not excluding an interim arrangements letter.

So that's the general structure of the contract. Selling the assets, contingent consideration, ongoing connections and, indeed, the equity market is part of the overall equation as well.

Turning then to the definitive feasibility study, that's defined back in clause 1.1 and we find that on page 2 of the document or 309 of the case, and we see that it's defined in terms of a study to be undertaken as to the development of that area of EP 40628 known as the escarpment and therefore detailed in what was then an application number 51279. That's the orange bit we saw on the map which is included in appendix 2 of the, that is to say, the application was included in the appendix to the agreement, and that is to be undertaken in accordance with clause 6.6.

So the reason why in these submissions and below there's been a degree of emphasis on the DFS from Bathurst is that it's an integral part of the agreement. It's referred to in the agreement. So as we'll come to, if we're looking for context, you don't have to look outside the agreement. This is inside the agreement and explicit. So it's an express condition precedent and we find that in clause 4.1. The conditions precedent start on page 8 or page 315 in clause 4.1 and they include Overseas Investment Act 2005 and Crown Minerals Act 1991 consents which I'll come back to, but on the next page, which is page 9 or page 316, we see that (e) requires the definitive feasibility study to be completed to the reasonable satisfaction of Bathurst, and then 5.3(a) goes on to confirm, this is on page 10 and page 317, that that particular condition, ie, in 4.1(e), is the subject of using reasonable, sorry, (b), the purchaser is to pursue those and all reasonable endeavours to procure those and the vendor uses its best reasonable endeavours for satisfaction of the others, but the DFS is in the hands of the purchaser, but 5.3(a) goes on that each party will provide each other with assistance.

More specifically in relation to the DFS, we go to clause 6.6 on pages 13 or 320, which confirms that the purchaser is responsible for the procuring the completion of this DFS. It refers to the Marston firm as being the party responsible for that study. It goes on to explain what those obligations are, but 6.6(b) there's co-operation with the vendor in any comments the vendor may have on the draft, ensuring those accounts are taken into account, and providing any further drafts, and below that the vendor to lend such reasonable assistance as is required for the purposes of completion of the DFS.

And so the point that we make about that is that it's not just something that's off to the side. It's something that both parties are engaged in. It's a matter of providing information which starts off being information that's held by L&M to enable Bathurst to complete a study of Escarpment to make sure that they want to complete the contract, to complete the settlement of the contract.

WINKELMANN CJ:
So it's a due diligence?

MR HODDER QC:
It's a due diligence form in which both parties are participating and it's a –

WINKELMANN CJ:
Which is not that unconventional, is it, because L&M has the information?

MR HODDER QC:
Yes, and there's an information transfer process going on, of course, and that's part of the exercise that Bathurst gets new and better information from the very process itself.

In terms of reliable indicators, and I'm hoping not to go to very many cases because time is pressing, I did note that things at an earlier time weren't quite so pressing as they might be now but if I –

WINKELMANN CJ:

Well, as to that, Mr Hodder, what do you mean *time is pressing*?

MR HODDER QC:

Well, you've got two days and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989 (HL) they took I think six or seven to argue the case, so I'm just thinking that comparatively –

WINKELMANN CJ:

All right. I was just wondering what timeframe you were operating under. Carry on.

MR HODDER QC:

Yes. Well, we're obviously operating in the decade of 2020 but I was about to explain that in the good old days, if they were the good old days, then when *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) were decided I think it was five sitting days in the House of Lords and *Reardon Smith* I think was six, although you then have counsel –

GLAZEBROOK J:

And they say we're getting longer now.

O'REGAN J:

Shorter days though.

MR HODDER QC:

Yes, Sir. I do think that in those days English counsel simply read great screeds of cases which no doubt took up an exciting amount of time.

So if the Court has our bundles then at tab 14 we have *Reardon Smith*. I just want to give a short quote, if I may, which comes from page 995 which says: "In a commercial contract," this is at the bottom of the page, 995, H, "In a commercial contract it is certainly right that the court should know the

commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating," and it's our submission that in this case this is clearer than almost any case the Courts will have to consider because all of that can be found in the very document contemplated by the contract, namely the DFS. It does explain the genesis, the background, the context and the market.

WILLIAMS J:
What line are you on there, please, Mr Hodder?

MR HODDER QC:
This is the very bottom of page 995 of *Reardon Smith*, your Honour, the last sentence on that page.

Now there's various other statements about that and the topic is discussed in various matters, not least the majority judgment in this Court's judgment of *Firm PI1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 and elsewhere, but that in many ways we say remains the position, that *Prenn v Simmonds* captures what's required and what's permissible.

So it's contractually referenced, it's mutual and it gives you all those things that I've just referred to. So we say that's the kind of thing that is relevant evidence because it's an integral part of the contract itself. Beyond that it gets more complicated.

So turning if I may to the DFS itself, which takes us most simply to the supplementary volume 1 that we hopefully found a little earlier. Then that's again S01.3260, and if members of the Court have it…

WINKELMANN CJ:
Yes.

MR HODDER QC:

Then if we turn to 3264 we have the introduction. Now this is a version dated November 2010 but the point that's made here is that the structure of this is that there was an initial version dated June 2010 and that's the date on which the contract was entered into, June 2010. Work carries on and the final version which you're looking at here is November 2010 but if the Court moved on to 3300 in this volume, or 3299, you will see that everything there is dated June 2010, so the information about Escarpment you see from 3300 onwards is the June information and we say that's relevant in the instance. It's what informs the circumstances at the date at which the contract is entered into. The second one informs the position at the date the contract is settled.

WINKELMANN CJ:

So can you just go through that again? This is within this document at 3300, is it?

MR HODDER QC:

This is a continuous document, as it were. By the time you get to November 2000 they'd bolted on the earlier June 2010 and there's some other material.

WINKELMANN CJ:

Okay, so that's like an attachment?

MR HODDER QC:

It's an internal attachment, correct, your Honour. The actual document starts at 3260. The 2010 part starts at 3299. And so if it's convenient to start with the 3299 material – but I should have said that the later material includes Deep Creek, so if you remember the red part of the map we looked at, that's a preliminary study of that, but the other part, the June part, we're now on page 3299, is solely about Escarpment, and so if we focus on that for present purposes because that's around the date of the contract and start at page 3310, you see again the map that we were looking at although not quite so easy to read and the escarpment area is highlighted in red.

GLAZEBROOK J:
At least it's the right way up here.

MR HODDER QC:
But yes, it doesn't come with a magnifying glass, your Honour. And then there's a description of it and the outline of it is on page – and the executive summary starts on page 3312, and the first paragraph, what's proposed is an open cut coal mining operation and it's intended to produce 1.5 million tonnes of run of mine coal, that's ROM, and one million tonnes of product coking coal. The use of coking coal is in steel making. It isn't able to be used at Glenbrook because that doesn't operate that way, and so the market for this is essentially overseas, and so what they have in mind is a mine life of six years, this is Escarpment only, six years, 2011 through 2016, and as we'll come to see they in mind a million tonnes a year of coking coal being produced and sold during this process.

Page 3314 indicates that using a discounted cash flow rate of return there were expectations that were positive, reference to the product per tonne, sorry, costs per tonne which we'll come to, and at the very bottom paragraph there's a reference to the fact that coal revenue has the most sensitivity to project economics, and you'll remember the blue line graph on that document that's part of our map. And various forecasts are referred to in the next couple of pages.

Now recalling that one of the disputes between the parties is about what this has to do with the sea, if we go to page 3318, we look at the average production costs and we see those are identified in various ways but if you get down about 12 items and you get to Port Westport.

GLAZEBROOK J:
Sorry, 33?

MR HODDER QC:

3318, Ma'am. So at this point production costs are covering what's happening at Port Westport, what's happening to get from Port Westport to Port Taranaki, what happens when you get to Port Taranaki, and that, of course, is entirely consistent with the idea that this is material that's going to be exported overseas.

Turning onto 3321, and into the third full paragraph commencing "Based on the above", it talks about their annual mine plan production and it talks about Escarpment producing 100% coking coal product and a minor amount of second product added to the primary coking coal and mining 2011 to 2015, and then in the last, next paragraph, mentions that the coal is to be hauled three kilometres to a CPP, a processing plant, where it will be washed, and, as we'll see shortly, that's relevant in terms of the boundaries of the permit areas.

GLAZEBROOK J:

Sorry, I've just lost your page number again.

MR HODDER QC:

That was 3321, Ma'am, and I was referring to the third full paragraph and the fourth full paragraph.

Page 3324, there's an explanation of a slurry system they had in mind. So there'll be a slurry system which would take product from the CPP, the processing plant, down a treatment facility at sea level never Fairdown and also near the railway line.

3326 is associated with the transportation logistics and it goes through and explains in the first paragraph there'll be rail at Fairdown, that's what the slurry ends, and there's a rail loadout facility. Various trains will take the material to Westport, Port Westport, which is 10 kilometres away. They're then dumped. The ships are loaded and they're sent to Port Taranaki, and then the third paragraph explains they'll be unloaded into a transhipment facility. That

transhipment facility was contemplated to be a large Cape size vessel which would be moored there to hold the coal while it is then subsequently picked up by Panamax size carriers and taken up to markets in Asia or possibly Australia, and then over the page, the first paragraph: "The mine will be at full production in 2012," and you'll recall from the graph on the first page that was ambitious, and then there's a discussion of risk assessments below that, and as contracts are in part about risk allocation one notes the first bullet point is about permits which took an awfully long time. At the bottom of the page, such matters as foreign exchange rates, coal price forecasts and related to that, of course, the demand for coal. So these were risks identified at the time, that those sorts of things could occur.

What was to happen to this coal is described in various detail but perhaps it's worthwhile spending a bit more time on the coal transportation material because it's a useful map. If we go to page 3487, you will see there's a more general discussion. So if we now move from the executive summary, so at 3487, section 10 is the product coal transportation plan, and the map on 3488 indicates what it had in mind, that is to say that there's a rail route from Fairdown –

WINKELMANN CJ:

Just pause for a moment. It's kind of tricky. We're just trying to get to 3487. It's quite tricky to move in these documents.

MR HODDER QC:

So 3487 is where section 10 starts, and 3488, next page, has the map that indicates what's contemplated. That is then shipped to Port Taranaki from whence it is shipped beyond that. And this may again cause problems but on page 3490 there's another map which is in – sort of upside down as it were. If I can briefly do that so it doesn't cause too much damage to anybody's neck, if we start with the mining area which is the MP 51279 red shape at the bottom that we've already seen a couple of times and you'll see that that's on the edge of the purple line which is the edge of the permit area for 406328, and then just above that you will see the CPP. It says "CPP & Slurry" and that's

what the coal was to go. So it was going to go across the permit area boundary line to get to the processing plant, and then from the processing plan, then it would work its way down a slurry to get to Fairdown, and Fairdown is up on the sea edge more or less, about half way along the coast line in this map, and that's where it's picked up by rail and transferred to Port Westport from whence it goes to Port Taranaki and from whence it goes to Asia or possibly Australia. And so that, we say, is reasonably clear.

The Taranaki arrangements are set out on page 3494. In the third paragraph it explains that the consortium proposes to supply a purpose-built vessel to ship coal. The next paragraph talks about an interim shipping arrangement with slightly smaller vessel, and the last paragraph explains that it's proposed to tranship coal from Westport to export ships via a purpose built transhipment vessel anchored in deep water and that will have a stockpile capacity of 60,000 tonnes.

And over the page on 3490…

O'REGAN J:
3495?

MR HODDER QC:
3495, I'm sorry, 3495. In the second last paragraph, the bullet points, explaining some of the elements that are required in terms of the Port Taranaki investment.

And then the marketing study commences at 3498. It explains at the first paragraph that metallurgical, also referred to as coking, coal is the feedstock for producing metallurgical coke, one of the most important raw materials used in blast furnaces that create pig iron which in turn leads to the production of steel. So the short point of this is the evidence of this is well known. In this part of the West Coast there's good supplies of coking coal which are useful in the steel industry overseas.

The next paragraph goes on to explain that Marston has done an analysis of the marketing and refers to the discussions it produces later of the dynamics of the worldwide steel market, the metallurgical coke market and the metallurgical coal market.

Goes on to discuss steel and then for our purposes it's probably convenient to carry on with the second volume of the supplementary volume which carries on with that material. Now again, if the Court may have – this is S02 at this point, S02, and I'm at –

WINKELMANN CJ:
Is it 3510?

MR HODDER QC:
Yes, it starts at 3510 and if we turn to 3512, the heading is "New Zealand Metallurgical Coal", referring to New Zealand exports of two million tonnes of coal annually since 2003.

GLAZEBROOK J:
I'm sorry, I don't – 3512?

MR HODDER QC:
3512, yes, Ma'am. S02.3512.

GLAZEBROOK J:
I don't have a heading on that page.

MR HODDER QC:
There's a heading at the bottom of the page, Ma'am.

GLAZEBROOK J:
Bottom of the page, all right.

MR HODDER QC:

11.1.4. Over the page there's a discussion of the escarpment project starting about a third of the way down the page and it says, the quality review, Marston was able to evaluate the international marketability of the coking coal to be produced from the escarpment project.

On page 3516 there's an analysis of the escarpment coking coal price forecasts and you will see that in table 11.2 there's reference to Japan/Australia contract prices, et cetera. The numbers don't matter our purposes but that's the international market prices that are being compared, and then under the heading below the table there's reference to the point that in addition to the coking coal that can be produced from the escarpment project, the potential exists for placement of thermal coal that can be sold into the export market, thermal coal being coal that's used to produce heat in the short term.

WINKELMANN CJ:

I've lost the thread about what this document is. Is it part of the original…

MR HODDER QC:

This is a continuation of the DFS.

WINKELMANN CJ:

It's part of the condition precedent. Okay.

MR HODDER QC:

I'm sorry, Ma'am?

WINKELMANN CJ:

It's part of the document – the assessment that was done is for the condition precedent?

MR HODDER QC:

Yes. The headings indicate, throughout the document we're looking at, it's the definitive feasibility study in June 2010. That's the month of the agreement. And there's a great deal of detail around that but I don't need to labour the point, I think, and then…

WINKELMANN CJ:

And the point of all of this that you're taking us to is to show the importance of coking coal, the focus on shipping actually in a ship?

MR HODDER QC:

The main point of taking you to this is to underline our point that the whole raison d'être for this exercise was export coal production.

This was a major project contemplated, a million tonnes a year, had nothing to do with the local domestic market. It was about export coal production. That was the expectation at the very outset, the whole point of the exercise.

I don't believe I need to take you to the Deep Creek aspect which is then added to the version that we finish up with by the end of – by November, which is the point when the contract settles. That simply says yes, Deep Creek is not on a fast track, this is only a preliminary study, but if you add the two together it still looks not bad, and Deep Creek has a higher percentage of non-coking coal to be produced out of the exercise. But the general concept is one of blending where possible to get the coke into the export markets.

There's one other condition precedent which we saw which was about the Crown Minerals Act which is probably worthwhile mentioning because it does raise one of the contract interpretation issues at a wider level as to what is and isn't appropriately considered. You'll recall that I mentioned that in clause 4.1(b) of the contract there's a requirement for Ministerial consent to changes of ownership, the mining interests, and at this point – and those cover changes of control of ownership. So at this point the contract

contemplates a change of control in the company. It will be no longer controlled by L&M. It will be controlled by Bathurst. So consent was required and that was a condition for the benefit of both parties in terms of the contract.

WINKELMANN CJ:
4.1(b), did you say?

MR HODDER QC:
4.1(b), yes.

WINKELMANN CJ:
(b)?

MR HODDER QC:
Yes. And again I – if we go then to what is volume 2 of the exhibits and the reference is 302.430, this is a letter in July which is giving effect to that condition precedent or making the application to do so. The letter is written by Ms McArthur, already mentioned, on behalf of L&M as the first paragraph says, for that Ministerial consent, and in the course of it there's discussion of the DFS itself which we find on page 432 at paragraphs 21 and 22. I mention this document because it raises the issue about whether it's post-contract, whether it's admissible extrinsic evidence or not. We say it does fit within the categories that are recognised and we submit should continue to be recognised because it's mutual conduct, there's involvement of both parties, it's explicit, it's directly related to the terms of the contract and it's in close proximity to the entry into the contract and it precedes the settlement of the contract, and so the Court may recall that in our submissions we say that if there is evidence, post-contract evidence that's mutual, overt and proximate, then it is relevant and admissible and we say this is this kind of evidence. So it's evidence at one level of the centrality of the DFS which is what the relevance of paragraphs 21 and 22 are. It also references the fact that what's contemplated is export, and you'll see this in paragraph 5 where it talks about the use of Westport facilities. That means Westport port facilities, and also the discussion of the Buller project commencing at paragraph 17. It's

New Zealand's premier coking coal district. Paragraph 18, there's rail, port, power and other infrastructure in place. They attach Bathurst's presentation to investors, 19.

Paragraph 25 talks about mining, and the reference, went into the language here, but then it says the coal will be transported by rail to Westport. Paragraph 17, the use of the Westport coal facilities. From Westport, the coal will be shipped to export markets, mainly in Asia. And paragraph 29, on current coal prices the initial export sales are expected to yield in the order of $NZ350 million per annum. So it's a major project but that target, that's what success looks like, is $350 million of sales, those are export sales.

It also summarises the triggers under the contract in paragraph 31, in terms of shipment of the first products, and in paragraph 32 there's reference to the royalty deed, explaining the royalty deed is a fundamental part of the sale and purchase transaction and that's why consent is required.

34 explains that the royalty has tiered rates, namely 10%, 5% and 1.75%, to encourage payment when due of the two performance payments, $40 million cash components, et cetera.

So a useful summary, we suggest, of the terms of the agreement for sale and purchase within a matter of a couple of weeks of the contract being entered into and written by the draftsperson of the contract.

And for completeness on that topic, if we go to the next page after that ends, which is 302.436, this is a document dealing with one of the other conditions precedent which was the overseas investment approval. This letter is to go on Bathurst letterhead.

GLAZEBROOK J:

I'm sorry…

MR HODDER QC:
302.436.

O'REGAN J:
Point zero four three six.

MR HODDER QC:
Sorry, is zero important? In that case 0436.

WINKELMANN CJ:
Normally is in numbers.

MR HODDER QC:
I'll avoid that error again, I hope. So 302.0436. It is from the same period, mid-July, explains at the end that questions in relation to the application be directed to Ms McArthur. It probably wouldn't require a great deal of forensic imagination to think that this was drafted by Ms McArthur because the language is almost identical in various places to the letter we've just looked at.

So again our points in emphasising this permeate both major issues in the case. The first is that this is a case about export coal. That's what the opportunity was. That's what the prize was, and if one thinks about the word *performance*, which we'll come to, then performance is to be measured and understood in terms of those aims or, in Lord Wilberforce's terms, genesis of the transaction.

It's also the case that this is not a subjective view. This is a view that is reflected in the terms of the contract, the document, namely the DFS, to which both parties contribute, and indeed the letters I've just taken the Court to where there's a mingling, as it were, of the interest with the contribution of Ms McArthur in that way as well in providing the drafter's own, as it were, summary of the agreement.

At this point if I can turn and –

O'REGAN J:

Can I just ask you, was there anything in the feasibility study that dealt with the possibility of selling coal locally?

MR HODDER QC:

There's a reference in the part that deals with Deep Creek about something called *direct shipped* and it's not completely clear to me whether that's talking about something that is non-export coking coal or not. It's a bit ambiguous. Certainly in the escarpment part of the DFS, no, that's entirely focused on either pure or blended coking coal. There's no reference to sales in the tables or projected sales. All those sales are contemplated to be exports and included in the costs are the costs of Westport and Taranaki.

O'REGAN J:

So were they not expecting to get this lower quality coal that they sold to Holcim?

MR HODDER QC:

Mr Tacon's evidence was that when you're constructing a mine you're going to come across some mine stuff you don't want and which you won't process and that's why the word *construction coal* cropped up. There's some criticism of that as being an invented phrase but it's what he used. But you're really trying to get to the export coal which then has to go to the processing and the coal we're talking about that went to Holcim, the cement works, was unprocessed. It was simply put onto trucks and taken to Holcim and they used it until they closed down which they had always expected to do, and that amounted, let me think, to about $10 million of sales.

WINKELMANN CJ:

So is your answer that their evidence was that they expected that in the course of accessing the higher quality coal they have to go through this lower quality coal?

MR HODDER QC:

I think that was an opportunistic decision made when they go there in 2014, not when they were entering the contract in 2010. There's no reference to that in the DFS at all. So if one's looking at the position as at 2010, the prospect ahead is one of getting to that coal and getting it out to export which is where the fancy prices were then.

So if I can turn briefly to the more academic, as it were, aspect of the appeal and one of the reasons no doubt why the Courts granted leave here, which is objective interpretation, obviously all counsel have taken on board the Court's comment that it's not asking to revisit *Firm PI1* and there's no quibble or attempt to bypass that in anything we want to say. So we say that the objective approach to contract interpretation is well settled, not just by *Firm PI1*. We say that if one goes back to the Wilberforcian era, if I can put it that way, then nothing new is being said beyond what was said in *Prenn v Simmonds* and *Reardon Smith*. There is an objective approach and there's a limited amount of material that's useful. And the reason for that, and again I'm maybe sort of saying the obvious, but when parties have committed themselves to a document, and this is, we're talking about a major commercial transaction here, then the final document is the source of the obligations. There aren't two documents. There's one document and it utilises language which the parties are able to engage on and jointly they control it. That's the point made among other places in the House of Lords' decision in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619. It's also referred to at paragraph 17. It's also discussed in *Firm PI1* and indeed in this Court's decision in *New Zealand Air Line Pilots Association Inc v Air New Zealand* [2017] NZSC 111, [2017] 1 NZLR 948.

Are paragraph references helpful in these matters or not, your Honours?

GLAZEBROOK J:

It's fine. I'm sure we can find them.

WINKELMANN CJ:

I don't think we need them.

MR HODDER QC:

The other thing that's made, and it's not in the New Zealand cases so much but in the *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27, [2008] 3 SLR(R) 1029 case from the Singapore Court of Appeal which we referenced in our materials, and this mostly centres around paragraph 131 of that, the point is made by that Court that the control of the parties extends to aspects of interpretation. So you find in contracts such as this one a clause that talks about aspects of construction. Do you take into account headings or not? And then you have the entire agreement. And so these are ways in which the parties exercise some control over what the record of their agreement means in terms of the way it's going to be interpreted in the future, and the point again made in *Firm PI1*, also made by the Court of Appeal in the *Ward Equipment Limited & Anor v Preston* [2017] NZCA 444, [2018] NZCCLR 15 case is that's a permanent form whereas human memory is frail, indeed human life is frail. People will move on. Well, careers are frail as well. People move on. People are not available. The record stands and that's why the objective approach focuses on the document.

WINKELMANN CJ:

Is the point you're making really that the objective interpretation's effectively an evidential kind of an approach? It's the best evidence?

MR HODDER QC:

It's the best evidence, and that's, as we apprehended, the position it has been for some considerable time but particularly it can be based on those two judgments from the 1970s I referred to. So it's a best evidence approach. It's not exclusive evidence but it's the best evidence, and the better the evidence you get from the agreement the less you need the extrinsic evidence.

So again, no argument that the context and background can extend to objectively ascertainable circumstances but as was said in *Firm PI1* to the extent they can be reliable established, and again we say that the DFS is as reliable as it gets. It's what is a key to the contract being settled.

Another aspect from the Singapore Court of Appeal, but also from the High Court of Australia, is how do you frame the test about the objective analysis?

WINKELMANN CJ:
Which High Court of Australia case are you referring to?

MR HODDER QC:
The High Court of Australia case is *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2014] HCA 7, (2014) 251 CLR 640 which is in our supplementary bundle. It's the 2014 decision and at paragraph 35 there's a formulation that's been cited in a series of subsequent High Court of Australia decisions. But both in *Zurich* from Singapore and *Electricity Generation* et cetera from Australia, they frame the test in terms of what reasonable business persons would take the contract to mean, and as the Court appreciates one of our criticisms of the Court of Appeal judgment is that it takes the concept of the objective bystander and then takes that as being the Court's role and goes on from there. If one takes the approach of *reasonable business persons* then there's a more constrained approach to these matters and it's our submission that had approach been followed the Court of Appeal might not have got where it did get or it shouldn't have got to where it did get. And also using the approach of reasonable business persons, one avoids the question of hindsight. It's reasonable business persons and their view at the time the contract was entered into.

WINKELMANN CJ:
Just taking you back to that point about the best evidence, what do you say then about the parol evidence rule which was once thought to be a substantive rule of law?

MR HODDER QC:

Well, it probably – I haven't gone back and done a historical study of my own on it but it reflects the same basic thought that once the record of the agreement has been established it's that point at which the parties have committed. The parties may have a different opinion the following day but on the day they agreed they recorded their arrangement in writing, at least if we're talking about written commercial contracts, and so what is you have is that snapshot effect of the agreement. That's what gives you the best evidence, and the parol evidence tries to discourage, or does discourage, things outside that. That's not, I should add, what we're contending for here. What we're contending for here is the more liberalised version one gets from *Reardon Smith*, et cetera. So you have background because without background and some context then it just becomes an almost impossible task.

WINKELMANN CJ:

So on this analysis the Evidence Act 2006 is the key thing now really?

MR HODDER QC:

Yes, in, well, as I say the Evidence Act properly applied in this way would capture all that. But the concept of what is helpful and what's relevant is always going to be kind of the issue itself. So I don't know that we can sensibly address in any detail the writing on all of these topics. As I said, I'll have some thoughts on Sir Andrew Tipping's material later on. But for the purposes of this appeal we suggest the Court has the opportunity to provide a nudge towards simplicity and efficiency and as we apprehended that's what *Firm PI1*, the majority judgment, sought to do, and in our submission the judgment under appeal doesn't contribute to simplicity and efficiency, and we base that submission on departures from the main themes, as we understand them, of *Firm PI1*, the first theme being that if you've got a detailed written text you give respect and primacy to the drafting.

ELLEN FRANCE J:

Sorry, Mr Hodder, just going back to the DFS, so are you really – do you rely on that really to show for your genesis point?

MR HODDER QC:

Genesis and market and context, yes, all of those.

ELLEN FRANCE J:

Well, what do we do with market and context and…

MR HODDER QC:

I'm using Lord Wilberforce's language in *Reardon Smith*. Effectively, those words are variations on a theme.

ELLEN FRANCE J:

Yes, well, that's why I was asking.

MR HODDER QC:

They might all be comprised with context but they include market and they include genesis. So the genesis of the transaction, we say, is reflected by the fact that it's focused on escarpment and export coal mining. It also describes the context. It also describes the market. I don't know that I'm seeking to draw any distinction between the language. I'm adopting the entire sentence, as it were, of Lord Wilberforce's.

Firm PI1 as we understand it also, and conversely to the first one I was mentioning, seeks to at least contain extrinsic evidence and, broadly speaking, as we read it, is consistent with what one would find from reading *Prenn v Simmonds* and *Reardon Smith*. So relevant background, genesis, market, et cetera, and again we say that the third point out of *Firm PI1* is in a sense be very wary about commercial absurdity arguments, and as we'll come to in relation to clause 3.10 we say the judgment below is an, essentially based on a commercial absurdity argument.

One other matter which might be gratuitous in a sense but in terms of other jurisdictions this Court has the ability and the responsibility to choose, as it were, whether it finds merit in various final appellate decisions or trends in jurisprudence from around the English-speaking world at least. In our

submission there is room for the Court to give consideration to geography and economics in relation to that, and as New Zealand in terms of its economic activity is closely tied to Asia Pacific then that's one of the reasons why we have a reference to the Singapore Court of Appeal. We say they were careful and thoughtful decisions in *Zurich* and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43 and the approach taken by the High Court of Australia in *Electricity Generation* and the subsequent cases is not very far removed from us. They do require an ambiguity, I think, in Australia before they get to the question of any extrinsic evidence. So not suggesting there's any need to follow what happens there, simply that it's appropriate to consider whether it's possible to be reasonably consistent with what is happening in both Singapore and Australia. So there's an international dimension to the exercise the Court has engaged on.

So if it's convenient I was then going to turn to clause 3.4 which is about the first performance payment and –

GLAZEBROOK J:
It might be a convenient point just to raise the issue, in your submissions you do talk about a joint venture aspect. Obviously if it is a joint venture, and I'm not suggesting we accept that or even that you're necessarily pushing it in quite the way that might sound, but if you do have a joint venture you have a good faith requirement.

MR HODDER QC:
Yes.

GLAZEBROOK J:
And there are good faith requirements, for instance, in Canada that's been perhaps a seepage from the civil law but nevertheless accepted to apply in a common law sense as well and I suppose the question in relation to this, and again you might want to address this just in a factual sense, but whatever good faith might require, if it is a requirement, or if – and to some extent that discretion argument I think made by your friends fits within this, is what the

contract mightn't allow you to do is to say: "Well, we don't and the we'll carry on mining in this area. We'll mine in another area because we don't have to pay royalties."

MR HODDER QC:
Yes.

GLAZEBROOK J:
So it's really asking you to deal with both the joint venture good faith, the general good faith, and this, at some stage, and I'm not in the least bit suggesting that you interrupt your submissions to do this now because it will more generally fit in as you make your submissions going through, but I thought it was just worth putting that down to say at some stage can you deal with that.

MR HODDER QC:
Of course. Can I offer an interim response but I will come back to it when I get to the proper purposes response from us? The first is that the joint venture language has been offered in the submissions by L&M. It's not a word that I believe we've used.

GLAZEBROOK J:
I thought you did.

WINKELMANN CJ:
I thought you did too.

MR HODDER QC:
What we have said is the interests aligned.

GLAZEBROOK J:
So what did you say? I actually had understood it from your submissions.

MR HODDER QC:
I hadn't…

WINKELMANN CJ:

I had understood it too but perhaps – anyway, you can proceed.

GLAZEBROOK J:

We might have misunderstood obviously.

MR HODDER QC:

Well, I'll have to check whether we did. I didn't think we had used the word *joint venture* as an exercise or something. We may have said it's akin to it but it's certainly not designed to be a joint venture.

GLAZEBROOK J:

No, no, that's I said I know you weren't using it in a conventional sense but…

MR HODDER QC:

It was far from a joint venture. The royalty deed goes to some pains to say it's purely a contractual relationship for various reasons and all the effort is being put in after the sale by Bathurst. So Bathurst is the one that has to bear all the costs. It has to do all the work to get the permits, et cetera, once the contract has been settled. So there's no – joint venture normally requires effort on two wides. There's no effort required of L&M after settlement. So that distinguishes it from the normal joint venture.

WILLIAMS J:

I thought your point was that there's an ongoing relationship in the sharing of risk and that's reflected in 3.10.

MR HODDER QC:

There is – that's an aspect of it. So partly the first point your Honour's making, that it's a long-term relationship, goes to how much weight you put to the original terms of the language because as time passes it becomes the best record, and the second point is yes, there are economic consequences for both parties as this goes on. So the – when one gets to success, if one gets to $350 million a year then both parties are succeeding and they share in

that success and to that extent it's a joint sharing in success, no question about that, in different ways. One gets the payments and the royalty payments, and the other is getting the balance. So if one wants to use the word *joint* to describe that then we don't disagree with that, but there is a connotation around the phrase *joint venture* which carries the various obligations that Justice Glazebrook mentioned and in some ways the best answer to those is probably in the *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200, [2013] BLR 265 (CA Civ) decision of the English Court of Appeal which we address in relation to the proper purposes argument, that says yes, you might find obligations of various kinds and you might find that there is an implied term in some cases but you take care to avoid overriding specific provisions by more generic concepts by good faith, and that's I think been the English position for some time and it's confirmed, as I say, in the *Mid Essex* case. My recollection, although I haven't studied it closely for these purposes, is the Australian Courts, at least the lower Courts, have been more willing to find joint venture and good faith obligations in a range of contractual situations.

GLAZEBROOK J:

Yes, I think that probably is fair how they've dealt with that. Canada, of course, just imports those good faith obligations under contract, as I say probably in a seepage from civil law but it does apply generally, and I haven't studied those cases to see what that means in a context like this, but…

WINKELMANN CJ:

Do you think it would be helpful, and are you coming onto this now, to give us your account of what the fundamental transaction was between these people, between these entities, because there is a significant tension between the position of the appellants and respondents on that?

MR HODDER QC:

I can – we've made various endeavours in that respect in the written submissions but at this point, your Honour, we would say that the essence of the transaction, if I've understood the question right, is that there was to be

the sale of assets which carried with them an opportunity. That's the core essence of the agreement and that opportunity was to develop an export coal mining operation. That was going to take –

WINKELMANN CJ:

And on your account then that was an opportunity which, once those initial payments were made, the appellant was free to take up or simply to leave lie?

MR HODDER QC:

Yes. Well, it has various obligations it must adhere to and some of those are set out in the royalty deed. So it's meant to accord with a mining plan and keep the permits going on various obligations. So there were a series of express provisions like that but what it doesn't have is any requirement for minimum mining or a requirement to mine until it goes broke because it's uneconomic.

WINKELMANN CJ:

Well, it does have some requirements for minimum mining at least, doesn't it, because it has to – well, I should say we are interested to hear you in relation to the deed of royalty and in particular I think it's clause 8.

MR HODDER QC:

I'm coming to that in due course, but at this stage I can say that there is no finding that there's been a breach of clause 8.1 and those obligations have been satisfied. So, for example, the obligation to comply with the mining permit conditions in the work programme, there's been clearance, as it were, from the Ministry of Economic Development I think it was at the time, whatever it's now called, that they were content with the way in which the mining permit was being operated, and again that's consistent with this economic underpinning of all this, that this exercise is one to achieve successful export coal mining. Underpinning that was the idea that they would be able to get permits, which took a long time, and then it would be economic to continue to develop the mine, which hasn't yet been done, and then to be able to sell the coal economically.

WINKELMANN CJ:

So it was an opportunity which was assessed carefully before it was taken up.

MR HODDER QC:

Yes.

WINKELMANN CJ:

And on your analysis once that opportunity was taken up at any point Bathurst was free to let it just lie fallow?

MR HODDER QC:

If the risks to Bathurst were such that it didn't wish to pursue the matter further then yes, that's the risk allocation. But it's –

WINKELMANN CJ:

So when you look at that material it's apparent that both parties saw this as an opportunity that was going to go. If their feasibility statement was taken it was – the tone of it is not that Bathurst is possibly going to let it lie. That's not the tone. The tone is it's a major operation which is being got under way and a huge amount of investment.

MR HODDER QC:

Yes. And there's an assumption that there will be profitable – it has to be successful export coal mining and what happens is that the contract, there may be many relationships like this, but the contract is negotiated in a spirit of optimism. As you see from the graph prices are $300 a tonne or thereabouts, and then things don't go well. They get to below a hundred dollars a tonne and life doesn't work like that when your costs are well over a hundred dollars a tonne.

WINKELMANN CJ:

So I'm quite attracted to the idea that it – it seems to me when I look at the background and the information it would seem unlikely that the respondents

would have thought that Bathurst could just do that, but your answer to that would be that they just failed to protect against it?

MR HODDER QC:

Yes, this was – well, what parties – there's no specific provision in these contracts to deal with the situation that they've got themselves into which is that they got to the point where some coal, not export coal, was sold to Holcim, 50,000 tonnes or thereabout, and then things stopped because the economics didn't justify going any further. That isn't expressly dealt with in any particular way. There's no clause that says this is how we're going to deal with this scenario. So you then go back to the contract. What does the contract require? And do you find something that says there's a minimum requirement? And you don't because the whole thing is contingent. You don't know you're going to get access to the property, you don't know you get a mining consent, you don't know whether you're going to be able to profitably sell the coal.

WINKELMANN CJ:

So you could read 8.1(b) as a minimum requirement. It's not nicely expressed in terms of minimum tonnage but it's expressed in terms of effort.

MR HODDER QC:

It's not the most clear provision in the world but we say it has a reasonably natural meaning in its context which says when you are mining and selling you'd use your best endeavours to get the best price going. It's consistent with a whole series of other provisions of the mining deed that are trying to avoid any sales other than at best market price.

WINKELMANN CJ:

Yes, are you going to come to 8(b) later, are you, because it seems to me that you can read it as importing three obligations. Conduct mining operations. Those are in accordance with good mining practice and with a view to maximisation of coal sales at the best available price.

MR HODDER QC:

Yes, and that – our argument is that has as a premise that it has to be economic to do so. It's not able to be readily translated an obligation to mine no matter what.

WINKELMANN CJ:

So you'd say that those words have to be implied into that obligation. It's qualified.

MR HODDER QC:

We say they're to be read in a way that they don't create an obligation to mine at that level. They simply describe the way in which you are to operate if you are mining.

WILLIAMS J:

Well, what if it's economic to mine but you've just got a better deal somewhere else?

MR HODDER QC:

Well, on the general approach to economics if it's profitable to mine you'll mine both. As long as you're making money you to it.

WILLIAMS J:

Apparently not.

MR HODDER QC:

Well, that's the evidence for Bathurst is that it isn't clear that it's profitable to mine at Escarpment at this point.

WILLIAMS J:

Yes, well, the reason it might not be profitable to mine Escarpment is it's going to cost you $40 million.

MR HODDER QC:

Well, that's part of it.

WILLIAMS J:
Well, there you go.

MR HODDER QC:
Yes.

WILLIAMS J:
So the profitability is written into the contract. You wouldn't read profitability as if the requirement to pay $40 million is part of the profitability equation?

MR HODDER QC:
There has to be an aspect of – well, let me go back a step. The contract is based on economic incentives. That's why you have the varying royalty rates. That's effectively what is contemplated. So Bathurst is designed to go out and do these and incur the costs because it has an economic incentive to do so. That is, it's profitable to Bathurst to do so and it has to be profitable to Bathurst to do so at the time it gets there. If it gets to a point where it has to spend the money, it's probably not so much, well, only partly in relation to that, it has to spend a whole lot of money on developing the mine, which it hasn't done yet, and it's not worth doing it, then it doesn't do so.

WINKELMANN CJ:
Isn't there an argument though that that's why they have that condition precedent, that they went away and did a very careful feasibility study and satisfied themselves it was profitable? That's why they looked at the sensitivity analysis?

MR HODDER QC:
Well, that could only take you so far. Both parties knew there were risks, that's why there's that long list of risks in the DFS, those risks running from whether and how long it took you to get a permit, what the demand for coal was, what the coal price would be, and so there was no guarantee of any kind that they would in fact be mining at the end of the exercise if the risks went the wrong way. There wasn't by Bathurst entering into the contract, taking on all

the risks and being required to mine if it didn't make economic sense. That's because both parties are focused on the idea of a successful export mining operation.

ELLEN FRANCE J:
But doesn't that awareness of the risks undermine your argument that it's all contingent?

MR HODDER QC:
That it's all, sorry, Ma'am?

ELLEN FRANCE J:
That it is all contingent. That's as I recall you saying.

MR HODDER QC:
No, I probably had thought that the contingencies were related to the risks, so the first risk was that the DFS wouldn't turn out very well in which case you wouldn't get the next, the first, the second tranche of 35 million, and the rest of it depends on there being actual successful mining. That's a risk and a contingency. They're related in our analysis.

WILLIAMS J:
So this really comes down to, given the liability, the contingent liabilities in this contract, there was a better deal down the road and the wording in this contract is loose enough for you to be able to avoid that contingent obligation and it's not the Court's role to fix that. These are all grown up people.

MR HODDER QC:
That's not, obviously, the language I would use, your Honour, but –

WILLIAMS J:
No, but that's the essence of your argument, isn't it, really?

MR HODDER QC:

Not quite. We'd say there's no liability. All that the contract describes is contingent consideration. There's no liability to pay anything.

WILLIAMS J:

Yes, but you've accepted the payment of $40 million is part of the profitability analysis and the payment of $40 million is a contingent contractual problem. It's got nothing to do with coal prices.

MR HODDER QC:

In terms of the assessment that Bathurst has to make in terms of whether it's going to proceed, it has to work out what all its costs are as it proceeds to the next stage. How much is it –

WILLIAMS J:

So I'll take that as a "yes", so –

MR HODDER QC:

Well, it covers more than just that. That's the point I'm making. You have to decide how much money it's going to cost for the infrastructure. So one of the issues that's going on at the moment is that because they've gone into the joint venture, an actual joint venture with Talley's, and got access to the old Solid Energy assets, they have been able to acquire through the joint venture, or the joint venture has acquired but they can get access presumably through the joint venture, to all that infrastructure they don't have to pay for, so they're getting there but it's just that they're going the way that makes most sense given the infrastructure they've acquired that way.

WILLIAMS J:

But in the end your argument is that it's not the Court's job to fix a loosely worded contract and your motives are irrelevant?

MR HODDER QC:

In broad terms. That's really broad but yes. The –

WINKELMANN CJ:

So can I just – sorry, carry on.

MR HODDER QC:

The final response to that is that yes, those risks were known but the core risk was that it had to be economic for all parties and that if it was economic for Bathurst then L&M would succeed as well. If it wasn't economic for Bathurst it would not, and that's the context in which we resist the idea that there was a liability for anything after the contract was settled. At that point there was no money owed to anybody.

WINKELMANN CJ:

On your analysis then this contract in fact operates as an option? You purchase – you pay a small amount up front and after that Bathurst has complete freedom to make a decision whether or not to mine that site?

MR HODDER QC:

Well, two aspects of that, Ma'am. I would quibble that US40 million is a small sum. That's a substantial sum up front which is if you put it that way. The second is that Bathurst –

WINKELMANN CJ:

Well, relatively small compared to what's coming, right? Anyway, carry on.

MR HODDER QC:

Well, compared to $350 million a year of revenue over six years, it is a small sum. That's what the expectation was.

WINKELMANN CJ:

Yes, but let's not quibble about that.

MR HODDER QC:

Right. And – I've lost my track on your second –

WINKELMANN CJ:

So I was asking you, on your account then what they did was purchase an option to either exploit or not –

MR HODDER QC:

Yes.

WINKELMANN CJ:

– because on your account it doesn't really matter whether this is profitable or not. They don't have to prove it's not profitable. They can just choose not to exploit the site.

MR HODDER QC:

Well, there's a major qualification to that and it goes back to the questions your Honour was asking me a few minutes ago. They are required to comply with all their obligations under the contract and those obligations include the obligations under the royalty deed, and it's our submission they have been complying with their obligation under the royalty deed and there's no finding in the Courts below that they weren't.

WINKELMANN CJ:

And what do you say those obligations under the royalty deed are?

MR HODDER QC:

Their obligations are to pay royalties as and when they arise and they have to keep the mining permits in good repair. They have to comply with the operative mine planning at the time consistently with what the authorities require.

WINKELMANN CJ:

But it's not an obligation to mine?

MR HODDER QC:

No, it's not an obligation to mine. There is no written obligation to mine as such. That all depends on the economics.

WINKELMANN CJ:

Because there is another way, and I appreciate it hasn't been argued this way, but there is another way of reading all of this which is that you've done a bad deal and you've committed yourself to mine there and get the best possible price.

MR HODDER QC:

Well, I'm sure that's what my learned friends will say for L&M very soon. It's also effectively what underpins the Court of Appeal's judgment. But…

WINKELMANN CJ:

But not in reliance on clause 8.1(b)?

MR HODDER QC:

Neither of the Courts can make a finding on clause 8.1(b).

GLAZEBROOK J:

One of the difficulties I think with an obligation to mine, apart from it not being there, is what exactly does that mean?

MR HODDER QC:

Yes.

GLAZEBROOK J:

And I suppose the elephant in the room here slightly is does it mean you can decide not to mine there if a better deal comes along which gives you exactly the same ability, and you say that's a matter of economics?

MR HODDER QC:

Yes, and I repeat what I –

GLAZEBROOK J:

And in any event could have happened without clause 3.10, without anything else in terms of this contract?

MR HODDER QC:

It could've. We could've had a different regulatory regime. If you're going to have a regime that says you don't have coal mines because they're regarded as unfriendly to the planet then that's a regulatory intervention that wouldn't provide any ability for either party to have a successful export coal mining operation.

GLAZEBROOK J:

So it was a risk that was anticipated at least in the DFS, the regulatory one and the pricing one and the –

MR HODDER QC:

And the delays, and the pricing one and the demand one and the –

GLAZEBROOK J:

– and whatever else there was when you showed us those risks.

MR HODDER QC:

Yes. They're spelt out in some considerable detail in the latter part of the – I didn't take you to the full detail of it. There's the list I took you to. But there's a paragraph in each of those that carries through. But naturally enough we endorse Justice Glazebrook's proposition that it's difficult to know what an obligation to mine means. Does it mean if you get to a point where you are going to have to spend X million dollars on building infrastructure and you don't have X million dollars you're in breach?

WINKELMANN CJ:

Yes, well, that's a simple answer, isn't it?

MR HODDER QC:

Well, we don't find that in the contract.

WINKELMANN CJ:

Well, it is interesting though that there was this extremely detailed analysis done, as you say, collaboratively, effectively, as to what the mining operation would be before the contract was committed to.

MR HODDER QC:

It was a detailed feasibility study. It wasn't giving a guarantee that there would or an obligation that it was going to be proceeding. This was the point at which Bathurst was going to spend 35 million US. That was a significant sum and it did so on the basis that it had a positive DFS, which is what the contract contemplated it would do if it got that…

WINKELMANN CJ:

Which is, as you say, a significant sum consistent with an intention on both parties that a mine will be – that there would be mining.

MR HODDER QC:

But again it's the economics. Well, your Honours are focusing on the area. We say that this whole structure, and the dynamics are based on the economics, so if the economics make sense both parties succeed. The impression one has from looking at the documents at the time, including the DFS and the contract, is that both parties assumed that it would be able to be a very successful operation, $350 million a year revenue, nobody's going to quibble. It's going to be all steam ahead, if I can use another nautical concept.

But in any event, the key point, we would say, if you've got an 85-page agreement for sale and purchase, including a detailed royalty deed, and nowhere can you point to an obligation to mine, then it's difficult to say that this was framed on an obligation to mine. It isn't. It's based on economic incentives.

WINKELMANN CJ:

No one has argued to date then that clause 8.1(b) is an obligation –

MR HODDER QC:

There has been argument about that but it hasn't really got any traction.

WINKELMANN CJ:

And why is that?

MR HODDER QC:

Because the more natural reading of it is, in our submission, is one that says if you're mining this is what you must do. It's consistent with other aspects of the royalty deed which are trying to make sure that full price is paid for the coal and there's no sidestepping of that issue. But it's a different dimension from the idea that you are required to mine even if it's not profitable.

WINKELMANN CJ:

So I think I started this discussion some time ago by saying to you that if it had been said to the parties at the beginning, or at least L&M, that L&M would have been surprised to hear that view of the deal they were doing, and I think you said they might have been, they would have been? Well, you don't have to say –

MR HODDER QC:

Well, nobody contemplated it. It's hard to know. I can't do any more than speculate about what parties might have done or whether they would have renegotiated aspects of the agreement had they thought about this, but they didn't and –

WILLIAMS J:

Is it right to say they didn't contemplate it because these were all seasoned mining campaigners and they understood commodity price fluctuations, especially coal. In fact, Mr Loudon said: "No one needs to teach me about

oscillating coal prices. I've been there." So they must have, you know, this stuff happens all the time, including probably during their careers.

MR HODDER QC:

Undoubtedly, and they would also have – well, again I can't do more than speculate because there wasn't evidence that focused on this, but it's perfectly, in our submission, perfectly appropriate to think that two seasoned coal business persons would say: "If it's not economic to mine, of course you're not going to mine. That would be crazy."

WILLIAMS J:

Or maybe they'd get their lawyers to write down a mining obligation with some detail.

MR HODDER QC:

Indeed.

O'REGAN J:

Presumably they'd be then qualified by saying unless it was – you didn't have to do it unless it was profitable to do it.

MR HODDER QC:

Yes, they could do that but they simply don't address it so then the rest of the machinery operates, but much of the discussion that I've been having with your Honours in the last 10 minutes or so, sort of the other animal in the room is the idea that somewhere there's a clear mining obligation and we respectfully say you can't find one in this contract.

O'REGAN J:

Well, it comes back a little bit too to this discussion about whether it was a sale or whether it was some kind of joint operation, but if it's a sale it was for Bathurst to decide what happened after it had paid for it.

MR HODDER QC:

Yes, and that's effectively what the royalty deed says when it says management decisions are for it and it's not a – it is a contractual relationship. So if we've used the word "joint venture" then I probably should have taken it out entirely in our submissions but if it's there in some way or other, the nature of that jointness is simply that shared success. If it's successful then there is a sharing of it, if there isn't, there isn't, whereas the L&M argument is: "There's no success but we want more money."

WINKELMANN CJ:

So I've been grilling you so hard I've missed it's 11.30. Morning tea break, Mr Hodder.

MR HODDER QC:

As your Honour pleases.

COURT ADJOURNS: 11.34 AM

COURT RESUMES: 11.52 AM

WINKELMANN CJ:

We were at clause 3.4 before I interrupted you.

MR HODDER QC:

I was heading in that direction but the interruption has been stimulating. Can I say a couple of things about that? The first is…

GLAZEBROOK J:

Around clause 3.4 or are we still on the interruption?

MR HODDER QC:

No, I haven't got there yet. I'm still –

WILLIAMS J:

Around the stimulation.

MR HODDER QC:

I'm still exploring hopefully the latter parts of the interruption before we come back to it, but there are a couple of points I would wish to make. The first is I've had a chance to check on that joint venture phrase and there's a sentence that refers to "reconceptualising the ASP as a quasi-joint venture", and the full sentence says: "BRL seeks before this Court, as it did below, to reconceptualise the ASP as a quasi-joint venture." As you might guess, that's not our sentence but our friends' sentence at paragraph 7 of their submissions. What they footnote is our paragraph 1.4. What we say is: "As jointly announced to the market, successfully meeting the aim," that is the export coal mining aim, "was to involve the sharing of risk and reward – and to provide a 'win/win' outcome." So nowhere else have we used, according to the word search, the phrase "joint venture" in our submissions, which is what I had expected.

WINKELMANN CJ:

On that bank analysis why were the respondents interested in the listing of the company?

MR HODDER QC:

Because of the performance shares. They would then become a tradeable item.

The second aspect is – perhaps it's worth at this stage, because at some stage we're going to get there, is just to say a bit more about the royalty deed. The Chief Justice has raised aspects of it but can I take the Court to the royalty deed for a moment or two which is at 303.0491.

O'REGAN J:

Was there a separate one from the one that was a schedule to the agreement or is…

MR HODDER QC:

There is. That's the separate one.

O'REGAN J:

Is that what you're taking us to? All right.

MR HODDER QC:

It's – as far as I can –

O'REGAN J:

Is it different from the one that was in the agreement?

MR HODDER QC:

No.

O'REGAN J:

Sorry, just give us the number again.

MR HODDER QC:

That was 303.0491. The answer to Justice O'Regan's question is actually in a letter at 303.0506 where there's a certification by both parties that it's in the same form when it's executed. So my general response to the Chief Justice before the adjournment was that, and coming back to clause 8.1(b) in a sort of roundabout way, so at 0494 the key concept is "Gross Sales Revenues".

GLAZEBROOK J:

Sorry…

MR HODDER QC:

This is at 303.0494 in the royalty deed.

WILLIAMS J:

Just give me the clause because I'm working off the attached deed.

MR HODDER QC:

It's clause 1.1. It's in the definitions.

GLAZEBROOK J:
It's very irritating working electronically but I'm trying. 494 and gross sales revenue, right?

MR HODDER QC:
Correct, Ma'am.

GLAZEBROOK J:
And the point from that is?

MR HODDER QC:
Well, there's an accumulation of matter so it's the gross sales revenue derived from the sale of coal, with no deductions being made on any account and regardless of whether or not the mining is profitable. So it's a comprehensive proposition. It says: "We want all the money you get," or: "We want our share of all the money you get."

WINKELMANN CJ:
Whether or not the mining is profitable?

MR HODDER QC:
That means you can't say: "Well, we didn't make any money on that, therefore no royalty is payable on it."

And then moving on to this quite – it's quite explicit on this. So 303.0496 which is clause 4.3, the Court will see that all amounts payable are to be paid in the denomination of the relevant gross sales revenue, which we say goes to the point this was effectively sold in different currencies, without any deduction or set-off except required by law, payment by direct transfer, and then on the next page at 4.6: "Shall only sell coal at arm's length terms and the Grantor shall not do anything that would have the effect of defeating or reducing the Grantee's royalty entitlement," and if there is such then there's a deemed royalty regime which is discussed in 4.6 and elaborated elsewhere, and then late payments attract interest. So it's very tight provisions around the

payment of those, and then going on to page 501 or clause 13.1, we see that the relationship is a contractual one, doesn't operate to provide any right to participate in decision-making.

WINKELMANN CJ:
What clause have you gone on to, sorry?

O'REGAN J:
13.1.

MR HODDER QC:
That's page 0501, 13.1. The relationship is a contractual one only. No right to participate in decision-making regarding mining operations. No obligation to assume responsibility for costs by L&M. Going back a page, which is to clause 8.2, the intention is that the royalty runs with the permits, but as a contractual right. And then if one comes back to clause 8.1(b) then we say that the reference to conducting mining operations requires that there be some mining operations and then you apply good mining practice and with a view to maximising coal sales at the best available price. To turn that into an obligation to mine no matter what, which is what the argument for L&M might require, we say just doesn't stand up.

And the approach taken in the Courts below, in the High Court judgment this topic is discussed at 194 and 195 and at 195 his Honour, Justice Dobson, noted that the government agency had been satisfied with Bathurst's performance and was satisfied that the minimum work programme had been completed, and in the Court of Appeal at paragraph 67 the Court of Appeal noted, and on this we agree with them, that clause 8.1 includes, contained generalised obligations which did not constitute a lever to compel Bathurst to get on with mining.

WILLIAMS J:
Your point is that it's about how you mine, not whether you mine?

MR HODDER QC:

Correct. Yes, your Honour. And we say there's nothing elsewhere that comes within any argument that there is a mining obligation of any kind.

WILLIAMS J:

That lever reference.

MR HODDER QC:

Yes.

WILLIAMS J:

You referred to a paragraph?

MR HODDER QC:

67 of the Court of Appeal judgment, the Court saying there were no levers, and we say that comment captures the point that I've been struggling to make for a while with your Honours, that if there were meant to be levers they'd be there. They're not.

WINKELMANN CJ:

The difficulty, so the logical difficulty is it's unusual for parties to go to so much care to regulate how payments will be made on sale and to create those obligations in relation to how payments will be made but to leave completely open whether or not the mining will occur. So it just seems that it's a strange contractual structure on your account.

MR HODDER QC:

Well, possibly. I mean our version of the contractual structure is at the time these documents are written there's sort of a moderately heroic assumption that there will be successful export coal mining and when that occurs then this is what's going to happen. Every cent has to be accounted for for the royalty purposes. But it doesn't say there will come what may be mining including if it's not economic to do so in the view of the party that's incurring the further costs.

So if the Court pleases, I was at that point going to turn to 3.4.

WINKELMANN CJ:
Yes.

MR HODDER QC:
And clearly enough if the Court has 3.4 it's at 302.0313, if one's following the bundle references, or page 6 of the document itself.

WINKELMANN CJ:
So this is 3.4 of the contract?

MR HODDER QC:
3.4 of the agreement for sale and purchase, yes, Ma'am. Now again I start from a proposition that this is defined as part of the aggregate consideration but it's entirely contingent and there's no liability for it until such time as a trigger has occurred, and the real issues that the Court has to consider are when that trigger is and how it's to operate.

So the language in 3.4(a), which is the focus for present purposes, is that there'll be $US40 million within 30 days of the date on which the first 25,000 tonnes of coal has been shipped from the permit areas. Now the permit areas are defined by that line we saw on that the map that I took you to earlier on, or two maps I took you to earlier on, and we know in particular that the coal processing plant is outside the permit areas.

Now coming back to what this means, Bathurst, ie, we can't say that it obviously means you put it on a ship and then take it across the boundary of the permit area. The permit area is up on a mountain so it's not going to work that way, so it has to mean something other than an entirely literal approach. So then the question is what does it mean? Now the L&M version is to say, well, it means shipped. It just means coal has been transported from the permit areas and incorporated as by any means and for any purpose. The Bathurst version of what that means is that coal has been exported from the

permit areas and gone into the seaborne coal market, which is the market that is the genesis and context for the ASP, the agreement for sale and purchase.

So Bathurst –

WILLIAMS J:
Well, wouldn't that make more sense if "from the permit areas" was before "has been shipped" so that it read "25,000 tonnes of coal from the permit areas has been shipped"? Isn't that how you'd write that?

MR HODDER QC:
Well, you're starting with a proposition you have to do some reworking because you can't literally take *shipped*, so the question is what's the – you're then going from text and purpose –

WILLIAMS J:
Well, unless *shipped* means something other than on a boat.

MR HODDER QC:
Not entirely.

WILLIAMS J:
If it meant on a boat, you wouldn't have "shipped" connected to "from the permit areas". You'd have "coal" connected to "from the permit areas" and "shipped" after that.

MR HODDER QC:
And the coal, by definition this clause is talking about coal from the permit areas. It –

WILLIAMS J:
So it would be better if it said "coal from the permit areas"?

MR HODDER QC:

Well, if one's trying to rewrite the clause you could write it any number of ways. We're trying to –

WILLIAMS J:

Well, I'm trying to suggest to you that what you're – you're suggesting that this is the only logical way to read that and I'm suggesting to you if that was the drafter's intention you wouldn't have had "shipped" before "from the permit areas".

MR HODDER QC:

Can I make it clear I'm not suggesting this is the only reading? I'm accepting there's a reading that a choice has to be made here because a literal interpretation won't work. That's common ground. The literal interpretation won't work. The question is then what's the best meaning to give it, and that then takes us to the combination of text and purpose. Now we could each try and rewrite, all of us can try and rewrite the clause, but the question is what is it trying to achieve in this context, and that's what I'm about to come to, if I may, but I don't – I've offered a version which says coal has been exported from the permit areas, but it could be – we could re-arrange the phrases within that in a number of ways and permutations. So I'm not saying there isn't another available interpretation. I'm simply saying that when you have regard to the context and the purpose and the genesis then the better one is the one that incorporates the export component.

WILLIAMS J:

I'm just suggesting that on your hewing to plain wording a draftsperson with skill wouldn't have drafted that meaning that way.

MR HODDER QC:

The only response, well, the initial response, that is, the point where the wording won't work literally you have to do something else.

WILLIAMS J:

Or just take the view that *shipping* doesn't mean what *shipping* used to mean in the nineteenth century.

MR HODDER QC:

Well, that's what the Court of Appeal says and we say, well, you have to stand back and think about that in relation to what I'm saying.

WILLIAMS J:

Sure, okay.

GLAZEBROOK J:

Well, isn't – I'm not sure your friends say it means transported from the permit area no matter what. I would have thought that you'd be reading "transported and sold" which is what happened in this case. So you're saying it has to be transported and exported for sale.

MR HODDER QC:

Yes.

GLAZEBROOK J:

But an equally available meaning is "transported and sold" and that's my understanding of your friends' argument because they tie that into the royalty deed.

MR HODDER QC:

I had understood them to be, and I –

GLAZEBROOK J:

So even if you put it for – as soon as you took it for processing, because it goes across the permit area which is a bit fortuitous because you can put – you could have a processing thing within the permit area. It wasn't what was contemplated but…

MR HODDER QC:

Correct. The position may have been stated beyond the general proposition but the proposition consistently to this point has been that you'd simply substitute "shipped" for "transported". That's been the L&M argument. The reference to "sale" may be an addition that has arrived in recent times, and so that has been the argument that we have been mostly concerning. But in a sense it probably doesn't make too much difference. The real question comes back to whether or not Bathurst is entitled to rely on the proposition that this is a contract about an export coal operation, and if it is then simply getting it across the boundary line certainly doesn't do it and if it requires any sale then you finish up with sort of a purely peripheral sale of $10 million to Holcim, of coal to Holcim, which is what this is, that doesn't sort of fit into the scheme of what the parties contemplated either as being a trigger to pay $40 million. It doesn't represent any relevant performance, and so we come back to the key point here which is not –

WINKELMANN CJ:

But how do you get – sorry, can I just ask you to go through your conventional contractual interpretation logic there? So you're saying the genesis is export coal. That's the genesis.

MR HODDER QC:

But I'm still deeply planted on Lord Wilberforce's sentence, and the proposition is that if we're trying to interpret the agreement we have regard to the genesis and the market for the transaction and we find that in the DFS and that is all about the seaborne coal trade for Escarpment, and if we do that and we are thinking that these are called performance payments as they are consistently and defined as such, then it raises the question performance in relation to what? Taking some coal over the permit area and selling 10,000 tonnes to Holcim as an expedient while you're trying to do some construction doesn't suggest performance in relation to the genesis or aim of the transaction, and so it's when you put it in that way rather than kind of the tunnel focus on the word *shipped* that we say the matter comes back to the question of purpose. This is a trigger. Clearly the whole point of 3.4(a) and

(b) is there's a trigger for these payments. What is that trigger about? It's about performance. What does performance mean? It means you go back to the purpose of the transaction. The purpose of the transaction is to get towards a successful export coal mining operation, and that requires doing two things effectively. You have to have mine infrastructure in place and you have to have an export pathway. Neither have occurred. So performance hasn't really got down the track at all. Well, to be fair, there are three things. You have to have permit capacity, or permit establishments, which have been done. You have to have the construction of a mine, which hasn't been done, and you have to have an export pathway, which hasn't been established either.

So we say performance, or you can call it success, means converting the opportunity that I've been referring to earlier on, and it simply hasn't happened. And so you then in our respectful submission say: "Well, what's the performance about?" What is the performance actually marking in terms of this particular project and the contract which surrounds the project?

So that's tied into the idea of genesis that we've talked about and my reliance on the *Reardon Smith* sentence. We say that the DFS provides an excellent explanation of what this involves and why you would use the connotations of *shipped* to describe something that's relating to the export coal market because nobody air freights coal and there's no land mass that we can export to that has steel mills that you can get to by land.

WILLIAMS J:
Can you – I'm just trying to get my head around facts here. Where was the over-burdened coal, if you want to call it that, the wrong coal placed?

MR HODDER QC:
Well, there's two aspects. The run of mine coal is, once you get going, that's your normal standard mining coal. What –

WILLIAMS J:

Right, so this coal that was sold to Holcim –

MR HODDER QC:

This 10,000 coal wasn't that. It was –

WILLIAMS J:

I understand that. So where was it?

MR HODDER QC:

Where was it? It was on the permit area. It came from the permit area.

WILLIAMS J:

I know that but I'm just exploring the shipping point. Where was it put?

MR HODDER QC:

Well, it was put on a truck. There was the piles in, I think in the permit area, put on a truck and then taken sort of as it were up the back way to Holcim as opposed to going down the way that was planned which was to go to the – because it didn't get processed.

WILLIAMS J:

Right, so I'm just looking at these plans. Does seem to suggest that the coal that's taken out of either of these two areas starts its journey on one of the areas, is that right? The larger permit area.

MR HODDER QC:

I'd think – well, I'm not sure I understand the question yet.

O'REGAN J:

You're talking about the proposed transfer?

WILLIAMS J:

No, I am, yes.

O'REGAN J:

Yes, whereas this wasn't done that way.

MR HODDER QC:

Are we talking about the smaller area, the actual mining permit area?

WILLIAMS J:

Yes, so when coal was taken out of this area, the smaller area, the escarpment area, and stockpiled, where was it stockpiled to?

MR HODDER QC:

Well, the only coal that was taken came from Escarpment. It didn't come from any other area within the permits.

WILLIAMS J:

That's what I'm talking about.

MR HODDER QC:

Yes. Where was it stockpiled?

WILLIAMS J:

So where was it stockpiled?

MR HODDER QC:

I think it was stockpiled on the permit area on the escarpment area itself but I need to check that.

WILLIAMS J:

Right, so it's not shipped, at the point of stockpiling it's not been shipped by any definition?

MR HODDER QC:

I don't think so but I do need to check that I've got that right.

WILLIAMS J:
So you couldn't argue that 8.1(a) is triggered by stockpiling if the stockpiling is occurring in the permit areas?

MR HODDER QC:
No, you couldn't.

WILLIAMS J:
Okay, thank you.

MR HODDER QC:
But I will check as to where that stockpile was. I haven't got it to hand.

So recalling that as at 2010 nothing had been built. Likewise at 2015 nothing had been built in the way that was required for the key infrastructure. There had been access, some access into it and some levelling but at a relatively low level.

And then the point that we've also made which goes back to points I've been making which is that one then looks to see if one can respect the use of the term *shipped*. Now one argument, as Justice Williams has been putting to me as well, the draftsperson thought that "shipped" just meant "transported". Well, that's possible but it doesn't, in our respectful submission, explain why you would you would use the word "shipped" rather than "transported" and if it is a seaborne coal market operation then it does make sense that that is reflected in the way you interpret clause 3.4.

O'REGAN J:
Well, it must mean than "transported", it must mean "transported *and* sold", mustn't it? I mean, transported and put in a stockpile slightly off the permit area wouldn't have triggered it, you wouldn't have thought?

MR HODDER QC:

Well, we haven't had that argument in particular, but until, at least in this Court I think the argument was it simply meant “transported”, it was this, as it were, a kind of a slip, it was thought by the draftsperson, who should have used “transported”.

WINKELMANN CJ:

You don’t contend it also means “sold”, do you, or you did?

MR HODDER QC:

That it was.

GLAZEBROOK J:

Well, you do really if you're saying “exported”, because you're not going to export it to put it somewhere.

MR HODDER QC:

Yes, it’s implicit, an export that’s been sold.

WINKELMANN CJ:

And what part of – what, property has passed and you’ve been paid or – it’s just reading a lot into the words is what I’m thinking, to the word “shipped”.

MR HODDER QC:

It’s not perfect, but my meaning of that is that it has been, a contract has been entered to ship it for export.

O’REGAN J:

Well, given the context with the royalty deed as part of the document, you’d have to assume that it mean shipped in way that triggered a royalty payment.

MR HODDER QC:

Yes. And, I mean, I can’t really take it any further in relation to that, means if you take transport it has that implicit in it perhaps as well, and certainly the

arguments in the lower courts didn't on the "sold", it was simply on "transported" as being a pure substitute for "shipped".

This has been addressed to some extent in the Court of Appeal judgment, and it may be simplest if I go through and comment on the Court of Appeal judgment because they give a half a dozen reasons for their views, each of which we respectfully dissent from. So if it's possible to go to the Court of Appeal judgment it may be the most efficient way for me to finish off on this topic. And I'm not sure, if your Honours are working off the case on appeal then it's 101.0135, and this discussion on the clause 3.4 starts at 0154 – well, actually more accurately it ends at page 154. So if your Honours have that you'll see at paragraph 61 the Court ends by saying the High Court's "essential reasoning is at 53 to 58", and that too is our reasoning apart from the question of the financial statements references.

So if we go back to paragraph 53, this is what the Court of Appeal has endorsed and, firstly, at paragraph 53 the proposition which they endorse in the closing parts is the quotation from the High Court judgment that the Judge was "not satisfied that the nature of the performance was confined to the subset of potential production of coal for export".

And so our respectful response is exporting coal wasn't a subset of the exercise, it was the raison d'être of entering into the contract. And at 54 the Court said, well, the use of the different language in the royalty deed, ie "mined", the definition of gross royalty payments in the royalty deed talks about coal being "mined", whereas this talks about "shipped", we say there's significance in that language, the High Court and the Court of Appeal said no, but in our submission the use of the word "shipped" shouldn't be regarded as an accident or an oversight, it has a connotation, and the connotation is consistent with the purpose of the arrangement.

Paragraphs 55 and – 55 is the one that the Court doesn't rely on this, that's what they say at paragraph 62. On to paragraph 56 where we get to definitions, and they quote from the High Court judgment. It says, well,

they've got a choice here but it's not appropriate to confine it "to transport on board a sea-going vessel", and without coming to a conclusion on that in 57 it could go either way. Our submission is again the context and that in terms of either the definitions and the expert evidence that was called by Bathurst we say in a case that involves New Zealand law and New Zealand operations then New Zealand usage evidence was helpful and relevant. But that was discarded by both Courts.

And then at 58, comes back to the point that there was no distinction between different types of coal in the sale agreement, in other contractual documents or in the contemporaneous record of negotiations. Well, putting aside the question of whether the negotiations take us anywhere, what we say is there's no reference there to the clearly central document which was the DFS, and so it was sufficient, according to paragraph 58, quoting again the High Court judgment, it was enough to send this modest amount of coal to Holcim in an unprocessed state because it was coal that came from permit areas, had a commercial purpose once it was transported away for delivery. Now I accept that's an available meaning but in our submission to do best justice to the context of the agreement it's not the right one.

And then at paragraph 60, when we get to the Court's own analysis before it having reflectively adopted what comes before, as it says in paragraph 60: "We do not accept Bathurst's submissions … nor do we consider the Judge erred in the conclusion he reached that 'shipped' in clause 3.4 meant, simply, 'transported'." And that was the way in which the case was argued in the earlier stages. And then again it says: "While the focus of the project was export coking coal, it was not the project's exclusive focus."

Now one can, of course, say that in the permit areas there is a degree of coal that isn't coking coal. I accept that. But when you look at what drove the entry of the parties into this transaction, that's what you get from the DFS. It was the prospect of $350 million a year of export coal revenue. That's what underpinned this arrangement.

WILLIAMS J:
From the references you took us to in the DFS, it wasn't actually coking or thermal. It was export.

MR HODDER QC:
It was all export.

WILLIAMS J:
Didn't really matter.

MR HODDER QC:
Yes.

WILLIAMS J:
In a sense your argument doesn't depend on type of coal at all but destiny, or destination.

MR HODDER QC:
Well, it explains the thrust because it's a coking coal area and most of this coal was going to be coking.

WILLIAMS J:
Sure, but the DFS itself says: "And there'll be some thermal coal and we'll export that too."

MR HODDER QC:
Yes.

And then finally in paragraph 60 the Court says, well, if they really meant export tonnages then the parties would have agreed to a more sophisticated formulation, and that this isn't just a "mangled description of export tonnages", which is what they're talking about 3.4(a). In other words, the parties could have said something different, and as we say in our submissions at paragraph 7.7 by reference to the Lewison text on *The Interpretation of*

Contracts at paragraph 2.13, you can always say that we've got a contractual interpretation dispute. It doesn't take us anywhere. What we're trying to do is find out what the words use in the context.

WINKELMANN CJ:
Well, it can. It's context specific, isn't it?

MR HODDER QC:
Yes. So…

WINKELMANN CJ:
Sometimes it's right to say it.

MR HODDER QC:
So we say that the cumulative effect of all those matters means you come back to the question what would reasonable business persons who understood the trigger provided by clause 3.4(a) to mean? Did it mean what the Courts below have said, 10,000 tonnes of coal to Holcim unprocessed, or does it mean something connected to the export trade which is what we say? That's the essential issue. The Courts below have been against us. We respectfully submit that they were wrong. And that's probably about as much as I can usefully say on it.

GLAZEBROOK J:
Can you just comment on the proposition that you can't really have it both ways and I think possibly both parties try and have it both ways. They say concentrate on the words. I mean your friends will say concentrate on the words to 3.4 but let's not concentrate on the words for 3.10. You say the opposite.

MR HODDER QC:
I'd like to think I've managed to skirt around that problem.

GLAZEBROOK J:

I think you have carefully but perhaps if you just comment anyway.

MR HODDER QC:

Let me try. The proposition I'm advancing is that one should try as much as possible to give primacy to the language. But in all cases, and again I'm back to Lord Wilberforce, it's important to have regard to the background which includes the genesis and the context and the market. In a case where the language doesn't work directly because we say the literal doesn't work here, the literal maritime transport from the permit area, then you look more closely at background context and when you do that you finish up with the opportunity and the project described in the DFS. That carries with it connotations of performance and success in relation to export coal mining and the argument put forward by L&M and is in our respectful submission one that seeks to achieve a performance payment before there has actually been performance is the relevance.

GLAZEBROOK J:

One of the difficulties I suppose is that if performance is something which you could say is, in that it triggers a royalty obligation, has clearly triggered a royalty obligation, and so if instead of exporting it became economic to sell within New Zealand are you suggest you'd never have paid the performance payments? Because again that would be slightly odd. You have an operation that is a coal mining operation, not exactly the one that's been worked through in the DFS, it would trigger a royalty obligation but not a performance payment in terms of the contract. Now obviously what actually happened, you say, is you're selling something just to defray some costs and it's not part of the project. But you can take that – say the project changed from being a purely export to a purely internal does trigger the royalty payments but somehow not the performance payment.

MR HODDER QC:

The essence of the evidence – I haven't got the detail here but I can marshal it maybe in our submissions – is that there wasn't any expectation that there was market for this amount of coal.

GLAZEBROOK J:

No, no, I understand that. But it turns out there was and…

WINKELMANN CJ:

Hypothetically.

GLAZEBROOK J:

Hypothetically.

MR HODDER QC:

As a hypothetical my response –

GLAZEBROOK J:

You're saying it's so hypothetical that it couldn't have been in the contemplation of the parties I suppose is what you'd answer?

MR HODDER QC:

It contravenes the raison d'être of the exercise, as discussed in the DFS.

WILLIAMS J:

Well, it can't be quite right because they knew there was thermal coal there and everybody knew there was a domestic market for thermal coal if overseas goes belly up. So, I mean, these are businessmen, their job is to make money.

MR HODDER QC:

The scope for thermal coal in New Zealand is quite limited compared to what was being contemplated here. The whole purpose of this is coking coal.

WILLIAMS J:

I understand that, but…

MR HODDER QC:

So the reason, I mean – I'm repeating myself. Your Honour understands where I'm coming from. I don't dispute that there is coal that might not be suitable for export within the permit areas taken overall, that's true, but this was a project that was focused around the Escarpment and the whole purpose of the Escarpment coal was for export, and that's the early stages, the stages during which these payments would be achieved. So if Escarpment worked the way it was intended to then those payments would be all sorted out.

WILLIAMS J:

Yes.

MR HODDER QC:

If there was some disaster and the export trade fell over, then you've got a completely different deal, you may even have frustration-type issues in terms of what was contemplated.

WILLIAMS J:

I wonder whether a reasonable businessperson even with knowledge of the DFS might say that 3.4(a) is too vague for Bathurst to get a free ride and if you weren't going to profit from it you shouldn't have sold it, you should have thrown it away, because that's what you said you were going to do? Can't have it both ways, a reasonable…

MR HODDER QC:

Well, that depends on the concept of what the free ride is, I suppose, and the scope and scale of it.

WILLIAMS J:

Well, you don't trigger the second payment.

MR HODDER QC:

Well, I'm having difficulty conceptualising that as a free ride at the moment. But again that sounds a bit like Justice Glazebrook's hypothetical that you switch from an export operation to something else.

WILLIAMS J:

I'm just saying we've got this hypothetical reasonable businessperson stuck with the situation of the contract that says after 25,000 "you owe 40 million US", what would the reasonable businessperson say, given that unplanned "you didn't stockpile it for throwing away, you sold it".

MR HODDER QC:

We would say that the reasonable businessperson or persons would pause and say: "Why would you be getting performance payment at this stage, what's that got to do, performance of what in relation to the project?"

GLAZEBROOK J:

A sale.

MR HODDER QC:

Sorry?

GLAZEBROOK J:

Just pure sale, that triggers a royalty payment, would be the answer I think that could be given.

MR HODDER QC:

And we would say you can take that some of the way, because certainly by this stage you've achieve your consent and you got there and you've got enough ability to extract 25,000 tonnes. But what you haven't done is got the key aspects of what your raison d'être is, you haven't got the relevant infrastructure for export mining, you haven't got an export pathway.

GLAZEBROOK J:

That might just be a bad bargain that was within Bathurst's ability to decide to sell or not to sell.

MR HODDER QC:

Well, it's a bad bargain that would actually adversely affect both parties because if it's imposing a cost at that point where there hasn't been performance then it raises risk to the entire venture whereas both parties are trying to succeed in this venture, and their success involves the performance along the lines of an export coal operation. So imposing a $40 million cost in these circumstances before this performance means you prejudice the entire project.

WINKELMANN CJ:

So your submission is this is structured where there is a trigger which is based on performance and because the subject matter of the transaction is export, exporting coking coal, so development of an export market for this coking coal and the exporting of it to that, the trigger can only sensibly be framed in terms of shipping offshore in export terms and that's really…

MR HODDER QC:

Exactly. Performance, the objective is performance of that export coal mining operation in relation to that export coal mining operation.

O'REGAN J:

You passed over the point from the High Court judgment that the Court of Appeal rejected but I just wonder what you say about that. The fact that Bathurst acknowledged this liability in its accounts for a couple, two or three years.

MR HODDER QC:

Unsurprisingly, on that topic we agree with the Court of Appeal. When one puts financial statements out that's not in the context of a legal dispute. It's a statement on which they could well be wrong. It's not conduct which is

mutual. It's not conduct which is proximate to the time of the agreement, and the basis on which the opinion is formed is not available and so we say that on that point the Court of Appeal was correct. If both parties had say that at the time of the contract then perhaps that would be a factor, but what both parties said at the time of the contract is what's in the contract.

So if the Court permits then I would then move to clause 3.10 which takes us to the royalty deed because that's at the heart of this as well. Clearly enough we get to clause 3.10. The Court's against us on clause 3.4 because it was for us on **(inaudible 12:32:46)** we don't get here, so let's acknowledge that that's the basis of it. But in our submission the genesis of the arrangement is no less relevant to the clause 3.10 issue and again I submit that both parties anticipated, as one can tell from the agreement and the DFS, that there would be the completion of mine infrastructure and the establishment of an export pathway, and both parties would lose if Bathurst prematurely ceased to carry out operations because it was in default and couldn't pay a $US40 million payment. And so it's in 2012 that the question arises what would happen if clause 3.4(a) was triggered and it wasn't paid. Would that be a default? And clearly that's plainly relevant to the issue of capital raising, and that's part of the narrative. But at this point when this issue arises in 2012, and referring back to the timeline, was still some considerable time away before there's any access to the mine for Bathurst, let alone mining. It's 18 months away from being able to step inside the site. So there's no access, there's no construction, there's no mining and there's no royalties. So the question is what is the answer to the question what happens if 3.4(a) is triggered and is not paid?

That takes us to the third amendment deed, and the Court will find that in its entirety in the case, the page reference is 304.0920, and again we know from the evidence, and the Court's seen this in the submissions, that this is drafted by Ms McArthur and she sends out the draft under cover of an email that says, well, this records the mutual expectations of the parties. So if we have the deed at 304.0921, we see in recital B that it's recording the parties' agreement to clarify a matter in relation to the performance payments under

the agreement, and as I understand there's no contest that that matter to be clarified is what happens in the event that obligation is triggered to make a performance payment and it doesn't happen. And within the contract, as the Court knows from reading the judgment below, and we can go there if necessary, but clause 9.7 says, well, you may have rights of default. There are also other provisions I will come to shortly which raise the question that maybe that's not so clear-cut, and so then the clarification comes to what is it that is being clarified and how is the question being answered. So the language that's used in recital B is to clarify and in the new text which is called 3.9 here but everybody accepts it's 3.10, it's for the avoidance of a doubt. So that raises, of course, the question what is the doubt and what is the clarification?

Going back to the agreement for sale and purchase at clause 9.7, which we find at 302.0327. The vendor, L&M, shall have the same rights as are specified under clause 9.3, except 9.3(b), in the event of any non-payment of the performance payments.

GLAZEBROOK J:
Sorry, can you just – I'm sorry, I'm just finding where I was, so if you could just go back to where you are now.

MR HODDER QC:
302.0327 and clause 9.7.

GLAZEBROOK J:
Sorry, it's just not the easiest to navigate, so – yes, thank you.

MR HODDER QC:
So it's clause 9.7 which cross-refers to 9.3 which is on the previous page, 0326, and 9.3 talks about remedies for default. It's originally phrased in terms of a settlement notice, so to that extent it's spent, but it's picked up by reference under 9.7 and you recall it doesn't have (b) but it has (a) and (c) so

you can sue the defaulting party for specific performance or you can sue the defaulting party for damages.

Also relevant in this context, just going back to the royalty deed, which is from 303.0491, and to clause 4.1 which is on page 0495, now again I anticipate the Court is familiar with this but 4.1(a), (b) and (c) set out the hierarchy of royalties, 10% until the first payment date, 5% until the second payment date and 1.75% thereafter. That in a sense creates its own economic incentive. And then it goes on to say: "For the avoidance of doubt: subject to clause 4.2, the royalty shall be payable at the rate of 10% … from the date on which this deed becomes unconditional," which goes back to the 2010, "until the end date," which is defined in terms in 4.1(c) as the final cessation of mining operations in the permit areas, "in the event that the first payment date does not occur." So the relationship between 4.1(d) of this deed and clause 9.7 of the agreement has to be managed and understood.

So we submit that that is what had to be clarified. What was the interrelationship between those provisions? Was 4.1(c) completely irrelevant, did it override, what was the position? In our submission it isn't clear, and that is the matter that is being clarified by the third amendment deed back at 304.0921

And so coming back to the question, the question being what happens if the payment is triggered but not made, does that mean that clause 9.7 is available to bring a default claim? And we say it's clear that –

GLAZEBROOK J:
Just so I just totally understand the argument, you say it's the relationship between 4.1(d) –

MR HODDER QC:
(c).

GLAZEBROOK J:

– of the royalty deed…

MR HODDER QC:

4.1(d), sorry, and 9.7.

GLAZEBROOK J:

And 9.7?

MR HODDER QC:

Yes, Ma'am.

GLAZEBROOK J:

And the argument is that 4.1(d) appears to contemplate that…

MR HODDER QC:

The higher royalty rate.

GLAZEBROOK J:

The higher royalty rate if…

MR HODDER QC:

Even if there hasn't been…

GLAZEBROOK J:

Even if – well, sorry, the higher royalty rate in the event that the 40 million has become due but is not paid?

MR HODDER QC:

That's right. The first payment date's defined in terms of the actual payment of the money. So it's been triggered but it hasn't been paid, the date of payment is the first payment date, this is sentence is talking about that interim period, yes, your Honour.

So we say, going back to the deed at 304.0921, the question has become is clause –

GLAZEBROOK J:
And which deed are we talking about? This is the amendment deed?

MR HODDER QC:
The third amendment deed, yes, Ma'am, 304.0921, the 2012 deed.

So the question being what happens and is clause 9.7 available to be used against Bathurst, we say the clear point of the new clause 3.10 as I'll call it, the answer is no with a proviso. So the core proposition in 3.10 is that the parties acknowledge and agree that a failure to make when and as due a performance payment is not an actionable breach of or default under this agreement. So, pausing there, that's the protective defence, you can't use clause 3.7, that's the clarification. The rest of it is what I'm, for shorthand if I can call it the "proviso" but it could be called the "qualification", that is for so long as the relevant royalty payments continue to be made under the royalty deed. And so the real issue for the Court is what does that proviso mean, how is it to be applied?

WINKELMANN CJ:
I'm struggling with your argument. Because you're saying it's resolving the relationship between 9.7 and clause 4.1(d)…

MR HODDER QC:
Yes, Ma'am.

WINKELMANN CJ:
Isn't it (b)?

MR HODDER QC:
4.1?

WINKELMANN CJ:

Oh, sorry, no, is it (d)? Because (d)'s where the payment date doesn't occur, which is in fact, so the trigger's not…

MR HODDER QC:

I may have misspoken, I'm talking about 4.1(d).

WINKELMANN CJ:

Yes, (d)

GLAZEBROOK J:

Being the higher royalty rate doesn't **(inaudible 12:43:40)** forever.

O'REGAN J:

Which payment date doesn't occur if the payment isn't made.

WINKELMANN CJ:

Well, it doesn't occur because…

WILLIAMS J:

So you say (d) deals with the non-payment situation and 9.7 doesn't apply to it?

WINKELMANN CJ:

Yes…

MR HODDER QC:

We say there's a question mark about that.

WILLIAMS J:

That's for the avoidance of doubt that was always the intention.

MR HODDER QC:

Yes.

WINKELMANN CJ:

Well, it just seems to me that (d)'s actually talking about a situation where in fact the payment day doesn't occur because the quantities aren't harvested, extracted.

MR HODDER QC:

Well….

WINKELMANN CJ:

You don't think so?

O'REGAN J:

That was the doubt, wasn't it, it was what they were trying to resolve by 3.10.

GLAZEBROOK J:

That was the doubt.

MR HODDER QC:

So there are two arguments. One says 9.7 applies absolutely, no question about that, the other says 4.1, well, I might say 4.1(d), contemplate clearly enough that there's gong to be a circumstance where there's no performance date which has been triggered but has not been paid and what happens is you pay the higher royalties during that period. Now, which of those is to prevail? That's not clear, not immediately clear, and what is being clarified in the 2012 deed is that very question. And the point that I was making is that if we take the first four lines of it what it's saying is the answer is no, you can't use clause 9.7 in that circumstance.

WILLIAMS J:

Well, without, wouldn't the position be without the third amendment both 9.7 and 4.1 would apply?

MR HODDER QC:

Possibly. For my purposes it doesn't actually matter. What I'm trying to –

WILLIAMS J:

No, no, I understand the point but you're taking one of the options out.

MR HODDER QC:

Well, the fourth option, I guess, is complete confusion but yes.

WILLIAMS J:

Quite.

MR HODDER QC:

But yes, your Honour is right. It could be that they both apply in some way although it's an odd scenario. You'd expect that if it's – again, that's the reason why there's doubt raised and that's in our submission the clear doubt that's contemplated by this deed, and just as the Court knows in our submissions what the Court of Appeal judgment does is says: "No, no, there's no doubt here. There's no doubt at all." So the reference to the word *doubt* in the deed doesn't matter. We just have to ignore that and we just go ahead and interpret it and come up with something that's commercially reasonable.

WINKELMANN CJ:

I might be reading this wrong, I'm sorry. I'm sorry if I'm being slow, but it seems to me that 4.1(a) is the one that addresses the situation in which the payment becomes due but it isn't paid, which means you pay it at the higher rate, and I would have thought that that clause was resolving the tension between that so you could – the question was, was this an option to defer payment, or were – so you weren't in breach whilst you carried on paying that higher royalty.

MR HODDER QC:

Your Honour is right. Both 4.1(a) and 4.1(b) contemplate payment carrying on even if a payment's not made, and so 4.1(d) in that context is, as it says, for the avoidance of doubt.

WINKELMANN CJ:

Yes, well, I'm just saying your reading of 4.1 in that circumstance is – I find it confusing because 4.1(a) is dealing with the situation that we have. 4.1(d) is dealing with a different situation. It seems strange to provide two clauses dealing with the same situation.

MR HODDER QC:

At this stage I'm not entirely clear that I've understood why 4.1(d) is dealing with something different from 4.1(a), your Honour.

WILLIAMS J:

Well, (d) relates to the situation where no payment is ever made.

MR HODDER QC:

No, it doesn't.

WINKELMANN CJ:

No, doesn't fall due because the quantity hasn't been –

WILLIAMS J:

Yes, but it says "does not occur".

O'REGAN J:

Yes, but in that case you wouldn't be paying royalties.

MR HODDER QC:

Well, that means does not occur in the period.

WINKELMANN CJ:

No, I know, so it doesn't occur, so you're still carrying on paying your 10%.

WILLIAMS J:

You pay your 10% but you don't pay the 40 million.

MR HODDER QC:

At that point.

WILLIAMS J:

Under (a) you have the option of stopping the 10% by paying the 40 million. That's how I read it.

WINKELMANN CJ:

I mean it is, you're quite right, it is a strange thing but the critical thing is it seems to me that 4.1(a) creates, you could say it creates an argument that you have an option to either carry on paying at the higher rate or pay a performance payment.

MR HODDER QC:

Correct. Yes, and I had seen that as more clearly in 4.1(d) but I'm happy to agree that it's in 4.1(a) as well.

GLAZEBROOK J:

Well, it may not be an option. It may be, as I think somebody said, an incentive to pay and actually akin to interest on the payment clause.

MR HODDER QC:

And I…

GLAZEBROOK J:

But without it being done that way.

MR HODDER QC:

Yes. If one goes back to Ms McArthur's letter –

GLAZEBROOK J:

You just say there's a doubt.

MR HODDER QC:

There's a doubt.

WINKELMANN CJ:

Well, it's quite ironic that 4.1(d) is included. It is obviously duplicative. It's intentionally so because it's included for the avoidance of doubt.

MR HODDER QC:

Well, for my purposes I need – I'm simply contending there's a doubt created in the agreement on this matter.

WINKELMANN CJ:

By the avoidance of doubt.

O'REGAN J:

3.10 resolved it.

MR HODDER QC:

And on that basis we say that makes sense of the third amendment deed because it's trying to clarify a doubt and trying to avoid a doubt and it does so in two steps. The first step is to say: "No, you can't use clause 9.7 or take any default action." That's the first four lines, and then it has the proviso, and in our submission the issue for the Court is what does the proviso mean.

GLAZEBROOK J:

And the proviso being as long as you're complying with the royalty deed, is that –

MR HODDER QC:

For the words commencing, "For so long as," correct, your Honour. And that's what takes a significant amount of the time.

WINKELMANN CJ:

So really it's better to say, on your argument, that clause 3.10 addresses the doubt which is created by the relationship between 4.1(a) and (d) of the royalty deed and clause 9.7 of the agreement for sale and purchase?

MR HODDER QC:
That covers it fairly, your Honour, yes, thank you.

So what we submit is that in terms of the proviso a key feature is the fact that the royalty deed provides detailed provisions about a whole range of topics that go to this. So, for example, the royalty deed tells us what triggers payments of royalties. It tells us that they are sales of coal as and when made. That's the essence of it. It comes from the gross sales revenue definition. It also tells us the rate at which the royalties are to be paid, and that's, and the appropriate rate will depend on clause 4.1 that we've been looking at and, as has been discussed, that creates an incentive. That letter from Ms McArthur we looked at early on at the time when they were seeking Crown Minerals Act consent refers to this and describes it in terms of the incentive effect. It's not a perfect incentive but it's clear that it does create an incentive. And then the other feature of the royalty deed, which I've already mentioned, is there are no minimum requirements in it. So if one asks does the royalty deed provide a minimum rate of royalties or minimum product, either in percentage or absolute terms, the answer is no. The obligations of 8.1 are, as the Court of Appeal itself said, generalised obligations. So those are the key features of the royalty deed, and it's our submission that what the proviso does is say: "You have the protection provided by the first part of clause 3.10, provided you comply with the royalty deed," that's the essence of it. That preserves the economic incentive and it makes, in our submission, entire sense.

Now this is all going on before any royalties are paid at all, because they still haven't got to the mine. So again this is in the anticipation of what might happen. And so again it's probably convenient if I go to the Court of Appeal's own analysis of this and respond to it –

WINKELMANN CJ:
So can I just ask you, Mr Hodder, so on this analysis then if Bathurst elects to pay the higher royalty, once it doesn't pay the performance , the first, the

performance payment, it is therefore obliged to pay 10% until the end of the agreement?

MR HODDER QC:
Until it pays the performance payment.

WINKELMANN CJ:
So it says – all right...

WILLIAMS J:
Or until the end of mining.

MR HODDER QC:
Or until the end of the agreement, at which stage I think it's liable for the performance payment.

WILLIAMS J:
No, I don't think so, because it says that the payment hasn't occurred.

MR HODDER QC:
Yes, I'll withdraw that, I withdraw that, I –

WILLIAMS J:
Well, anyway, it doesn't matter, it's not an issue.

MR HODDER QC:
It's not an issue. But anyway I'll withdraw that.

In any event, the point that I'm focusing on is you're with us so far in terms of the proposition about the fact that there's a no answer provided in 3.10, then the qualification or the proviso explains what's required and that, we say, can be simply characterised as being for so long as you are paying the relevant royalty payments under the royalty deed and broadly you are complying with the royalty deed, then that's the qualification, as long as that applies then the protection continues, all of which we say works pretty straightforwardly.

The Court of Appeal didn't agree, self-evidently, and that discussion starts in their judgment at page 101.0160. So, 101.0160, the discussion starts at paragraph 82, and it starts with the proposition that the argument that's being, and I've just outlined, is "commercially unrealistic and inconsistent with the context" and "at odds with the meaning the words would convey to an objective observer tasked with interpretation of the amendment". "Commercially unrealistic" is effectively commercially absurd, that's what the Court's saying without as it were recording any particular warning of the kind that are provided in *Firm PI1*, and the "objective observer" here is the Court of Appeal, not sort of distancing itself by reference to "reasonable businesspersons" but personifying that itself.

In paragraph 83 it concludes that the trigger would be "permits for the Escarpment Mine would have to be in place", with which we agree, "along with sufficient funding to achieve that degree of commercial mining". Well, yes, there had to be enough funding to get to the point where they sold 10,000 tonnes to Holcim, but that's unrelated to the export coal pathway and the relevant export mine infrastructure, as you've heard me on more than once.

So in paragraph 84 is where it gets more, we say more troublesome. We don't accept the submission that the sale agreement already permitted deferral of the first performance agreement, and they go on to say only this would explain "to an objective observe", ie only this would avoid their commercial absurdity conclusion, "why L&M would take the enormous risk inherent in Bathurst's interpretation". But the issue is doubt, not that there was an already permitted deferral which was a matter of clarity. So essentially what the Court is saying is that the argument would be perceived at the outset of the exercise, the outset of the analysis, would be commercially absurd.

And then in paragraph 85 the criticism is made in the second sentence – the first sentence says, well, if the sale agreement meant you had no concerns about deferral what's the problem? Well, that doesn't address the question of doubt. The Court then says: "Bathurst's reasoning works backwards from the

terms of the amendment." Well, in a sense that seems not a bad place to start, rather than working backwards that's what we have to interpret. Anyway, the Court says: "We start in a forward direction and start with the sale agreement." And they say, well, having worked out what "shipped" means, ie "transported", or perhaps "transported and sold", "we think it is perfectly clear to an objective observer what it means". So that's a judicial conclusion, the Court's come to a conclusion about a doubt and said: "There is no doubt," and it's saying this in a number of places but this is really the first time. Clause 9.7 "preserves all remedies", in short "L&M could sue at once when payment was not made. That right was unqualified." So no doubt, and that leads on to the rejection in paragraph 86 of the argument I've been explaining to the Court and says: "Clause 4.1(d) of the royalty deed does not confer an option to defer the first performance payment. So again that's a judicial conclusion. And then it goes on to confirm, as it were, that doubt or a lack of doubt by saying at the end of it clause 9.7 was available: "That is why Bathurst was concerned about matters in late 2012," et cetera "and why it sought the amendment". But at this point the Court has gone into the subject of intention, which was addressed by this Court in the *NZ ALPA* case where the Court was concerned about that, and the reference is in paragraphs 83 and 85. So the Court has gone to a subjective exercise. In the *ALPA* case it was about why the proponent of the amendment was doing what it was and what followed from that, and the same thing here.

WINKELMANN CJ:

Sorry, where do you say the Court has gone into enquiring the subjective intention?

MR HODDER QC:

It's addressing in the last part of 86 why Bathurst was looking for this, why it sought the amendment.

WINKELMANN CJ:

Isn't it considering the context of that amendment, which I don't think you've really taken us to, which was this issue about disclosure to the NZX, and is that not…

MR HODDER QC:

Well, no, because my argument about the doubt and the context goes back to what the question was that's being answered and is being identified as having to be answered by the deed. The Court of Appeal doesn't go there because it doesn't find any doubt, and when it talks about why it sought the amendment it's talking about Bathurst's own subjective view, not the question that arises from the agreement.

WINKELMANN CJ:

I myself rather thought that the Court may have been perhaps, a little bit imprecisely, but referring to the context there…

MR HODDER QC:

Well, the reading that I'm submitting for is –

WINKELMANN CJ:

What's going on here, they're saying: "What's going on here?", it's not really removing doubt, what they're really doing is fixing up a situation with the Stock Exchange announcement.

MR HODDER QC:

Well, I think I resist that, your Honour. In the context of paragraph 86 and, indeed, that sentence, we would submit that the Court of Appeal is saying, it's looking at why Bathurst sought the amendment, it's a subjective view relating to Bathurst, and what I understood the Court's *NZ ALPA* judgment, that goes across the boundary of what's permissible.

WINKELMANN CJ:

Yes, but they're all aware of why Bathurst sought the amendment, that was the context of it. There were discussions regarding Bathurst's need to make an announcement to the Stock Exchange, so that is the commercial, that is the context, the matrix of facts, whatever, how you work the genesis, the…

MR HODDER QC:

In our submission it's not really distinguishable from any *ALPA* situation, but that's our submission.

WINKELMANN CJ:

Right.

GLAZEBROOK J:

Well, isn't your submission really that Bathurst through it was unclear and wanted it clarified, as it said in the amendment itself, that there wasn't an obligation to pay…

MR HODDER QC:

Yes, it is.

GLAZEBROOK J:

It wasn't seeking, if you were looking at a subjective view, it wasn't seeking to say we know it's become payable and we're seeking an amendment to say it's not payable.

MR HODDER QC:

Well, our proposition is that the deed, the third amendment deed –

GLAZEBROOK J:

It wasn't payable at that stage, actually, come to think of it, so…

MR HODDER QC:

Nothing was payable at that stage, yes.

GLAZEBROOK J:

This is hypothetical.

MR HODDER QC:

It was. But we say that both parties through the deed are seeking the answer to the question and providing the answer to the question whereas –

GLAZEBROOK J:

And that was in the context of knowing they were going to make a statement in a capital raising context to say it's not payable?

MR HODDER QC:

Yes.

WINKELMANN CJ:

So what I was asking you about was is it necessarily the case that as you say here the Court is impermissibly having regard to Bathurst's subjective intention or is it rather in fact referring to the commercial context of this negotiation, and you're saying it's the former?

MR HODDER QC:

We're saying it's the former. I'll come to the entire agreement clause shortly, and then the – a convenient point perhaps to conclude.

GLAZEBROOK J:

But do you need to though because the commercial context is that you want to make a statement about something that says it's not going to be payable if you pay at the higher royalty rate? That's what – because that was unclear in the judgment as it was, and that's where they came together.

MR HODDER QC:

Well, perhaps we're at cross-purposes. As I read the end of paragraph 86 the Court of Appeal is saying Bathurst sought this amendment because it knew

that clause 9.7 would have it being sued. We say that was a matter of doubt. That's the context for the amendment.

GLAZEBROOK J:

Well, that's what I'd understood you to say so…

MR HODDER QC:

Yes, and that's it. So it may be that it doesn't take us anywhere but if I'm right as to what the Court of Appeal is saying in that last phrase then it, as you say, it looks subject – looks for something that's objective rather than mere context and that's the debate.

WILLIAMS J:

So you're –

GLAZEBROOK J:

Well, you'd say it was, but there's no evidence that Bathurst thought it was anything other than certain, did they, or you say they're just inferring that's what they must have thought?

MR HODDER QC:

Yes, there was. I'll come to that after the break but there definitely was.

WILLIAMS J:

Well, isn't the best evidence of Bathurst thinks uncertain the fact that they expressed that in the deed?

GLAZEBROOK J:

Yes.

MR HODDER QC:

Both parties expressed that in the deed.

WILLIAMS J:
Exactly, so what seems to have happened is the Court of Appeal has ignored the mutually expressed –

MR HODDER QC:
Correct.

WILLIAMS J:
– and written view about doubt and superimposed the subjective, it's own view of the subjective view of one of the parties that's inconsistent with a mutually expressed statement about the state of their minds.

MR HODDER QC:
And they do that on a number of occasions, yes, your Honour.

WILLIAMS J:
Sorry, you probably said that several times already and I didn't write it down properly.

MR HODDER QC:
Well, I'm coming to it. At paragraph 88, which perhaps is a convenient point to finish off on, but you'll see there that point, the Court has come to the view that the 2012 amendment was not intended to change, rather than clarify, rights under the sale agreement, and it says that's implausible, and so the consequences of the previous analysis lead to that proposition and indeed there's kind of a hindsight there being applied as well. And then, probably intruding into the lunch hour, but at 89 the Court goes on to say, well, why would L&M do that? The general point at 89 is that if you have this effect then it's a bad bargain. L&M only gets nominal royalties. And then it goes on to discuss the bargaining context in paragraph 90, again getting into the negotiations, and then the key point for the Court of Appeal's analysis is at line 4 of paragraph 90: "The amendment sought was a concession by L&M." Not a clarification, not an avoidance of doubt, but a concession, and it's that concession that leads the Court of Appeal to say there has to be some

consideration and if there has to be some consideration then there isn't any obvious consideration here and therefore it doesn't make any commercial sense, ie, it's commercially absurd, and at that point we say there's a problem.

WINKELMANN CJ:

Yes, and I suppose just to be clear, although it may be imperfectly expressed by the Court of Appeal, I had understood the Court of Appeal to be interpreting this in the context that it applied at the time which was that Bathurst had this difficulty with its announcement. It suited everybody to say, well, actually there's a little bit of uncertainty here, and rather than say and in fact Bathurst is in breach and we're –

MR HODDER QC:

Yes, but at this point we're into the negotiations in a way which we say is outside the scope. But the point that's underpinning all this is –

GLAZEBROOK J:

But you say in any event this was before there was any question of anything happening whatsoever. This was a non-ability to access and nothing happened at all is the context it's been negotiated, is that right?

MR HODDER QC:

Nothing had happened at this stage. Yes, we're still some distance from anything actually happening under the contract. This is an abstract enquiry about what might happen and try and clarify it, as your Honours have said, with a view to making statements in the market which is part of the overall framework of this arrangement. But at this point, as the Court has seen, the Court has got a firm view that this'd be a commercially absurd outcome and it can't possibly be the case that this is about the avoidance of doubt or a clarification. This is actually some change.

GLAZEBROOK J:

Well, you say it maybe became commercially absurd in the circumstances but at the time it was negotiated it was anything but.

MR HODDER QC:
Well, we wouldn't accept the latter proposition, of course, your Honour.

GLAZEBROOK J:
Well, I know but one –

MR HODDER QC:
But even if it were, we'd say the first part still holds, yes. And then in 91 it really dismisses the question of "for the avoidance of doubt". Those aren't words of revolution, says the Court, and this can only be of limited consequence, and there was no counter concession being granted. So again the proposition has turned from "what is the doubt that is being clarified" to "what's the consideration for this deal" which is a major change, says the Court, because there was no doubt to start with. So that's the sequence. The judicial conclusion is no doubt the need for something to explain why this deed comes into force and the avoidance of the fact that the deed itself refers to clarify and avoiding doubt. That's the essence of that. There's more to go on this part but I'll perhaps do that after lunch.

WINKELMANN CJ:
Thank you, Mr Hodder.

COURT ADJOURNS: 1.06 PM

COURT RESUMES: 2.16 PM

MR HODDER QC:
Thank you, your Honour.

If there was one brief matter I can tidy up in relation to a question that Justice Williams asked me earlier today, which is about where the stockpile was, and regrettably I was overlooking the fact that in our written submissions at paragraph 7.13 we have a photograph of the site which has a stockpile in the middle of it.

WILLIAMS J:
Right.

MR HODDER QC:
So the answer to your question is yes, it's on the Escarpment site but in the permit area.

WILLIAMS J:
It's on Escarpment, not on Deep Creek?

MR HODDER QC:
No, Deep Creek's a long way away. So this is just on Escarpment, this is where the stockpile is. And, as I say, there's an aerial photograph at 7.13.

Before lunch I was discussing the Court of Appeal's analysis of clause 3.10 and I think I'd got to around about 90 through 92. But the real point about this is by that stage the Court has decided that this is not about doubt, it's actually, there is no doubt about clause 9.7, and therefore this was a concession and therefore the question arose as to what consideration there was for this concession, and it didn't think there was enough, and therefore this seemed odd.

At paragraph 91 the Court notes that "no counter-concession or other material consideration was given by Bathurst" and it footnotes the Privy Council, *Sunflower Services Limited v Unisys New Zealand* [1997] NZLR 385 (PC), but on my reading that case merely says that a variation agreement did alter pre-existing rights but only so far as its express terms altered those rights and no new obligations could be taken into account that weren't express. It's not clear to me that the question of counter-concessions was a major factor in reasoning of the Privy Council.

Paragraph 93 then goes on to address this question of consideration and says the objective observer would infer that the agreement "proceeded on the shared assumption that continuing payment of royalties only would have to

compensate L&M for the delay". Well, there's no evidence about this being discussed as a matter of fact and it's no obvious in the face of the document itself. What could be concluded is that both parties saw merit in Bathurst being protected against any risk of default in the event it didn't make a payment under clause 3.4 when it came time and that the condition on that was compliance with the royalty deed and paying the higher royalty rate. That preserved Bathurst and the general overall project.

And so the Court then in 93 goes on to say, in the last couple of sentences, that it focuses on the words "for so long as the relevant royalty payments continue to be made". But in doing so the Court detaches itself, as it were, from the phrase that follows about the fact that this is to incorporate the royalty deed, and we say that that split changes the sense dramatically.

WINKELMANN CJ:
What do you say to the point that I'm about to make, and I'm not sure if it's even put exactly like this anywhere else, that the outcome that you're suggesting verges on the commercially absurd? This is a contract that assumes that you, on your interpretation, you can defer the payment of the performance sum by paying this higher royalty rate, 10%.

MR HODDER QC:
Yes.

WINKELMANN CJ:
But on your interpretation you can defer the payment of the performance amount by paying 10% of nothing, so nothing?

MR HODDER QC:
Correct.

WINKELMANN CJ:
But that seems to be, that's commercially, that undercuts the commercial structure, which is to give – the commercial structure there is that you can

defer paying a lump sum by paying a higher royalty rate, so you would pay more. So it assumes you defer paying a large lump sum by paying a higher royalty rate.

MR HODDER QC:

Right. But the underpinning of your Honour's proposition is that there is money being made and royalties are being paid. At this stage we're still some years away from what's happening and so it's an abstract proposition. Nobody quite knows what the royalty rates are going to be. If the royalty rate is high, sorry, if the coal price is high and then goes well there are incentives in place to pay it or at some point along the way. If they're low and it makes no sense to mine then there will be no royalties. There's nothing in this deed to suggest it only applies in the former situation and not the latter. So we say that the "proviso", as I have called it, simply incorporates the full terms of the royalty deed, which is based on payments where there is mining of coal. If there's no mining of coal there's no royalty payment, both parties understood that.

WINKELMANN CJ:

Yes, but ex hypothesi if you've got the situation where a lump sum payment is due, you can avoid paying it on your analysis simply by ceasing to mine and making your royalty payments you're due to make, which is nothing.

MR HODDER QC:

In the expectation that you hope the market will come back into alignment and the economic incentives get you back into the business an d either it's the higher royalty actually being paid or the lump sum gets paid.

WINKELMANN CJ:

Yes, but that would mean that you could have mining up into a certain point where you come due to pay this payment and then you just simply stop mining and you still don't have to pay anything because you're payment 10% of zero.

MR HODDER QC:

Well, that depends on the economic incentives that were perceived ex ante. So at this point Bathurst has already paid $40 million US and the only way it's going to get a return on that is by mining, and if it does mine it's in its interests to do so and if it does the royalty payments will be made. But if it doesn't make any sense to mine it won't.

WINKELMANN CJ:

Okay. So your answer that that's not a commercially absurd outcome, that you can avoid an obligation to pay $US40 million, which is accrued otherwise, simply by stopping mining and…

MR HODDER QC:

What your Honour's putting to me is one of a range of scenarios that might occur. The scenario that people had in mind at the time that these, both the original and the later, occurred, was that there would be successful coal mining, prices would be a level that justified all that and the economic incentives would be in play.

WINKELMANN CJ:

Yes. So what I'm putting to you is that the structure of the agreement is that you defer paying, there's a concessionary aspect to the agreement on any interpretation of that clause, which is you can defer paying that lump by paying a higher royalty payment, and you're saying properly read you can defer paying it even by paying nothing because you don't have an obligation to pay it?

MR HODDER QC:

Yes. One of the scenarios is the one your Honour is putting to me. It's not that I'm, given your Honour speculates, but the normal scenario wouldn't be that one, but that's *a* scenario and it's not excluded.

GLAZEBROOK J:

Well, what you say the commercial incentive, as I understand, behind the deferral was, that by the time that extra 40 million because due even under a very successful mining operation there was not going to be 40 million to pay, it had to be raised by capital raising?

MR HODDER QC:

That was the factual situation that arose, yes.

GLAZEBROOK J:

Exactly, and so in fact the incentive was to enable that capital raising in the sense that – which was to both parties' benefit – because if there was going to be an immediate call for that money when there wasn't the money to pay for it then everybody was going to be in trouble and you wouldn't be able to raise capital in order to continue to exploit the resource.

MR HODDER QC:

Correct, and everybody understood that Buller was a special purpose vehicle. It was only going to have capital that it raised through – and Bathurst – were going to have raise those funds through the equity market in some form based on the prospects of the mine performing.

GLAZEBROOK J:

And if the capital was going to be raised and immediately have to go rather than going towards continuing the successful mining operation then both parties would lose out in fact.

MR HODDER QC:

Correct. There was no prescription about when that was going to be raised but clearly it was contemplated that was what would happen, but as your Honour says, the underlying point throughout this is that both parties' interests were in this venture going ahead and if there was a temporary blip then the best thing to do was to kind of hunker down and wait till that passed and carry on. That's what clause 3.10 allows, among other scenarios.

WINKELMANN CJ:

I don't know that any of that answers my point though which is that when you just look at that as a commercial transaction, as a payment schedule, it assumes that you pay a higher royalty rate to obtain a deferral of payment. So L&M gives away immediate payment in return for a higher royalty payment.

MR HODDER QC:

Well, that's what the Court of Appeal says. We say that it's a question of resolution of doubt and it comes up with the best solution seen at the time that the deed is entered into.

WINKELMANN CJ:

I'm not talking about whether or not you're right about this but I'm just saying if you look at that and look at how it would appear to an objective observer, that's what the nature of the deal is, that you can pay the 40 million or you can pay this higher royalty rate. That's what it looks like on the face of the agreement.

MR HODDER QC:

The deal was the same as 4.1(d) we were looking at before.

WINKELMANN CJ:

Yes. That's what I'm – I'm not –

MR HODDER QC:

So there's nothing –

WINKELMANN CJ:

I'm not disputing – I'm just saying on the face of the original deal even, if you accept your interpretation about what the original deal operated as, you can defer, it's pay 40 million or instead of paying that, pay a higher rate and you can get dropped down to a lower rate when you finally pay the amount of it. It – yes.

MR HODDER QC:

Yes, and at some point – and again that's the economic incentive applies. At some points it will make sense to pay those $40 million payments because if the price is high enough, and I think we've done some calculations it's to the high 200s or over 300, then you definitely would pay it because it makes good sense.

ELLEN FRANCE J:

On your approach, I'm not sure. How do you explain then the words "for so long as"?

MR HODDER QC:

Then that's the requirement that you continue to comply with the royalty deed.

ELLEN FRANCE J:

Well, isn't it the other part of – you don't – it's not an actionable breach for so long as?

MR HODDER QC:

Well, there's two –

ELLEN FRANCE J:

So if you're not paying I suppose it's a…

MR HODDER QC:

As I apprehend it, your Honour, clause 3.10 is contemplating two at least potential obligations. One is to make the payment of the performance payment and that's the protective part of the first part of clause 3.10. The second is that there'll be ongoing obligations. Those ongoing obligations are found in the royalty deed and you pay the right rate of royalty at the right times when you're making sales. But it doesn't carry – I mean the sting of all this is it doesn't carry an obligation within the proviso to have continued mining, which is where the Court of Appeal gets itself to.

WINKELMANN CJ:

And what about the notion it has to be a payment?

MR HODDER QC:

Payment. Again, that comes from the royalty deed. The royalty deed sets the determining of when royalties are payable.

WINKELMANN CJ:

Yes, but this is not payable. It's payment. It assumes that the payments are being made. How can you be making a payment when you're making no payment?

MR HODDER QC:

Well, payments under the royalty deed are payments required by the royalty deed. That's what we say. So in effect we say that what clause 3.10 is going in the proviso is incorporating the terms of the royalty deed. And so if one asks when are royalty payments to be made, the answer is when they are due under the royalty deed. When are they due under the royalty deed? When coal is sold.

O'REGAN J:

Is there anything to tell us what *relevant* means there? Relevant royalty payments?

MR HODDER QC:

No. Our position has always been that *relevant* just tells us which rate of royalty is being applied because this could apply to the first or the second performance payment. It covers both. And so in terms of the second you're talking about a 5% starting point rather than a 10% starting point.

ELLEN FRANCE J:

Well, if the relevant royalty payments are not continuing to be made, I'm don't quite understand how you say the first part operates.

MR HODDER QC:

Can I just clarify which first part your Honour is referring to?

ELLEN FRANCE J:

Of 3.9. Isn't the – I suppose I'm trying to understand how you've seen the clause working, because it seems – am I right, your interpretation is really divorcing the "for so long as" part from the first part.

MR HODDER QC:

Our interpretation which relates – your Honour's question, as I apprehend it, relates to the point in the proviso that starts with "for so long as" and we say that's a coherent phrase, "so long as" through to "royalty deed", and it means no more and no less than that there is compliance with the royalty deed. If there isn't compliance with the royalty deed then all bets are off.

GLAZEBROOK J:

So if you'd sold one tonne and hadn't paid any royalties then you're not complying with 3.10?

MR HODDER QC:

That would be one form of non-compliance. There would be others no doubt but that would be one of them. And so you start with the protection. You then have the qualification or proviso, we say not surprisingly the proviso requires adherence to everything else that's expected of Bathurst, and that's the way it's done, by referring to the royalty deed obligations which is where those obligations are found.

ELLEN FRANCE J:

It just seems slightly odd language then to talk about the payments continuing to be made for so long as.

MR HODDER QC:

Well, again, our interpretation of that simply carries on with the proposition that there is compliance and to the extent that there are mining operations

going on then there will be a continuation of royalty payments which is required by the deed but if there aren't there's no obligation to pay royalties and the proviso continues to operate. What it's concerned to do, we submit, is that it doesn't allow Bathurst the benefit of the first part without complying with its obligations under the royalty deed. But what it doesn't do, because where that takes your Honour, Justice France's, question, takes you back to the Court of Appeal that says, well, that means that there must be some kind of expectation or obligation to actually have continuing mining, and that's a radical thought that isn't picked up anywhere in this document or anywhere else. And again, this is all happening before any mining starts. This is in the abstract.

WILLIAMS J:

My sense is at the time that this agreement is entered into and your people are small players decamped from Australia trying to set up in New Zealand, tell me if I'm misarticulating that, and a good price is agreed at on a "we all win together or we all sink together". That is, if Bathurst isn't making any money, L&M isn't going to make any money either, and that all at one level seems to make sound sense except that, of course, Bathurst isn't a little player any more. It's even bigger than the medium-sized player it was planning to be. It managed to get lucky because Coal Corp came on the block and now it's the biggest player and still stuck, and still keeping L&M stuck on the "we all sink together" scenario that these provisions appear to contemplate when in fact Bathurst hasn't sunk at all. It's done rather well.

MR HODDER QC:

Well, Bathurst has formed a joint venture so the joint venture has got extensive scale. Bathurst on its own is –

WILLIAMS J:

Well, it's got 65% of it or whatever it is.

MR HODDER QC:

Yes, but it's got – it doesn't – that's not the same thing as Bathurst having grown in that particular scale.

WILLIAMS J:

It does seem to be predicated on the idea that if mining is not profitable then both sides lose.

MR HODDER QC:

Yes, and Bathurst's not making any money out of Escarpment either.

WILLIAMS J:

No.

MR HODDER QC:

It hasn't made any return on its $40 million.

WILLIAMS J:

No. So you say what's going on outside this is irrelevant?

MR HODDER QC:

Yes. And again, that's not part of the original deal, it's not part of anything we can find evidence about in the time this happens either. So we take the agreements on their face and the circumstances of being forward looking, and the proposition is yes, kind of the parties will have to share the fortunes but if the fortunes don't include economic sense in mining this particular block at a particular time then nobody makes any money. So Bathurst remains incentivised to get some return back on its $40 million. At certain levels its incentivised to both mine and to not just pay the higher royalty rate but to pay the performance payments. And this arrangement is confirming that that's a legitimate approach to take.

WILLIAMS J:

So on that basis the debate becomes whether wrongful purpose, one, is relevant and, two, whether this is the fact that Bathurst has survived elsewhere.

MR HODDER QC:

Well, yes, that's what happens. If L&M can't succeed on this or on an implied term then its only possible argument is a proper purpose argument on the basis of this is some kind of discretion. But that has its own difficulties, which I'll come to.

WILLIAMS J:

Sure. Okay, thank you.

GLAZEBROOK J:

I'm assuming you also say it's very difficult to have any sensible implied term, especially if you're looking at it at the time the agreement was entered into when you don't even know whether your getting a permit or access – and actually the same applies to 3.10.

MR HODDER QC:

Yes.

GLAZEBROOK J:

Because you can't say, well, you'd have to say the implied term is that if you get a permit, if you do this, if you do this, then, and you'd say: "But then what?"

MR HODDER QC:

Yes.

GLAZEBROOK J:

And that's even without 3.10.

MR HODDER QC:

Yes. And, as your Honours know, both the High Court and the Court of Appeal had some difficulty in actually formulating what that implied term would be, which is rather telling in itself.

GLAZEBROOK J:

And you agree it has to be an implied term actually from the inception of the contract, even leaving aside 3.10, or do you…

MR HODDER QC:

If the proposition is that there's a mining obligation then we say –

WINKELMANN CJ:

Are we only to your implied term part of your submissions?

MR HODDER QC:

I'm sorry, your Honour?

WINKELMANN CJ:

Are we on to your implied term part of your submissions? I'm just wondering where you are.

MR HODDER QC:

Not fully, but I'm just responding to Justice Glazebrook. So the answer is yes –

GLAZEBROOK J:

Well, I think you said that if they lose on implied term then that's wrongful purpose, so I was just coming back to the implied term.

MR HODDER QC:

Well, that's the –

GLAZEBROOK J:

Or interpretation, I suppose.

MR HODDER QC:

So the L&M arguments have to cascade. The first is interpretation, the second is implied term, and the third is improper purpose. But I'll come to improper purpose separately. At this stage, if I may, I will continue on the interpretation aspect, which the Court of Appeal is undertaking.

And so the proposition that there's no commercial sense at all from L&M's perspective, which is in the heart of paragraph 96, has a whole series of assumptions about what the obligations are and what the economic incentives are, and in the end we're back to this concept of commercial absurdity without using the actual phrase directly and, to a degree at least, apply a certain degree of hindsight.

So, just on paragraph 97, the Court says whatever it is it's not met by merely nominal royalties from sales of stockpiled coal. That's in fact what's happening, there are occasional sales and there are royalties. But the Court has to formulate a term which gets around that, and that's what they proceed to do. So, 98, they note the idea that sounded "extraordinarily vague", in effect they accept that it's going to be vague but they say it doesn't matter, in paragraphs 98 through to 101, because on their view Bathurst is simply not in the ballpark in terms of production and whatever that implied, whatever those obligations are, the unwritten obligations are, to make the proviso work, Bathurst isn't close there. But we say it is notable that the new obligation which is implicit in this is not able to be clearly articulated and that the point about clause 3.10 and within the third amendment deed is it's on its own terms it has removed uncertainty, done that by providing protection and by requiring as a term of that, as it were, condition of that, that there is compliance with obligations under the royalty deed, most obviously to pay royalties as and when due. So we say that's gone some distance from an interpretation of the language of the deed itself and in terms of that there are a couple of points. The first is that when that deed is provided, and this is page 304.0894, it comes under cover of an email from Ms McArthur saying it's been prepared to reflect the mutual expectation that any non-payment of a performance payment is not a default, but has as its consequence the

preservation of the higher royalty rate under the royalty deed. To the extent we take that into account, there's no suggestion there of a minimum obligation or an ongoing mining at, of a continuing non-minimal level. It is, we respectfully say, coherent on its own terms and means no more and no less.

Not only that, the Court of Appeal analysis of this issue ends at paragraph 101 and – or in a sense it does because at paragraph 103 it goes on to say that the essence of the implied term that L&M has advanced has been embraced already by the express words that they have interpreted and therefore implication of a term is unnecessary. As the Court appreciates, we say it's not necessary because they've already done it. They've engaged in an implication exercise without addressing the requirements of such an exercise, and I'm coming to that but before I do can I mention, of course, the 2013 clarification.

So as our timeline shows, about a year later this issue arises again and the question is raised again. There's still no sales, no access provided at this point but it's hopefully getting closer. So this clarification which we've described in our submissions in section 9 in some detail so I'll be brief. We say it is useful admissible evidence of conduct because it's directly related to the language of the contract. It's mutual, it's explicit and it's considered, and in that process the exercise comes back to where Bathurst says it was, that is to say, clause 3.10 means that the protection applies for so long as royalties are payable under the royalty deed as and when due. Now the Court of Appeal says nothing about that at all. In our submission, it was a relevant factor that had to be considered and it's confirmatory of the approach that we've advanced in relation to the deed seen in its own terms.

The other aspect of this is that the Court of Appeal has either focused on what it perceived to be or there was a degree of evidence about the negotiations and the "who sought this agreement" and the bargaining strength and so on and so forth. In our submission, that is difficult to do in the face of the entire agreement clause because once clause 3.10 is adopted and becomes part of the overall contractual arrangements, then it also is subject to the entire

agreement clause, which was clause 16.9, and so that, to recall, is at page 302.0333 of the case, page 26 of the contract, and it relates to various matters relating to the sale and purchase of the shares, the business or the assets. Now this third amendment deed does relate to what happens in relation to the sale and purchase of the shares, the business or the assets. It's the ongoing arrangements between the parties that clause 3.10 is addressing. So we say the entire agreement clause does apply to that and it supersedes and extinguishes all earlier negotiations, understandings and agreements, and that is one of those signals, we say, that the Courts have recognised as being a form of control over language that the parties are entitled to use and that goes to the *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119 case that we've cited in our submissions where Lord Sumption discusses no oral variation clauses but also discusses entire agreements, at paragraphs 14 to 16, and it's also referred to in the Singapore Court of Appeal *Zurich* decision, paragraphs 111 and 129.

So, as I say, once this agreement has been incorporated in the agreement that also applies and in our submission that constrains the kind of exercise that the Court of Appeal engaged in and requires a focus back on to the text. Back on to the text, one can't sidestep the question of doubt, one has to confront the question of doubt and the way in which the avoidance has been defined. And so in terms of language used in *MWB Business Exchange* but quoting another case, we say that what the Court of Appeal has done here in disregarding clause 16.9, he's telling the parties they don't mean what they've said, that is to say they're to disregard the negotiations and to concentrate on the text.

In any event, underpinning the Court of Appeal's approach is the idea that clause 3.10 doesn't make sense, and in the discussion so far we've covered aspects of that. But the starting point really is that Bathurst had no liability for any further consideration after settlement and nor after clause 3.10 was added. It had no obligations to pay any more money, it had no strict obligation to engage in completion of the mining operations. What L&M was entitled to

was Bathurst performing its obligations under the agreement for sale and purchase, including the royalty deed, and underpinning that again was that both had the same aspiration, which we've discussed, that what was needed was that Escarpment would be fully consented and there would be then the mine infrastructure established, an export pathway provided, so that it could operate successfully as contemplated by the DFS. In that exercise Bathurst undertook all the effort, Bathurst undertook all the costs, and if there was success then both parties would share. And recalling again that while we've look at both 2012 and 2013 as well as the original 2010 engagements between the parties, mid-2014 is the first time that Bathurst gets access to the site. And by the time that it does access, well, by the time it gets not only access but sells this 25,000 tonnes of coal, then by that time the benchmark coal prices have fallen, Bathurst has already announced it's shelving the Escarpment Mine development, and it was recording in its ASX statements that it had the ability to defer the first performance payment. And in that context Bathurst had no only secured the third amendment deed but it had also gone through the exercise of getting the 2013 clarification. And so it's our submission that if one turns to the facts Bathurst should have and indeed did only sett the coal it sold to Holcim because it relied on the existence of clause 3.10. It would have been crazy to incur a liability of $US40 million for sales of something in the order of $10 million New Zealand, and that is it engaged in…

WINKELMANN CJ:

Well, only crazy that if it hadn't at that point committed to an ongoing mining operation.

MR HODDER QC:

If one knew that one could simply mothball without selling anything to Holcim and that Holcim was only going to pay you $10 million and you wouldn't face the $40 million payment, as against going on and getting that $10 million contribution but then lumping yourself with a $US40 million payment, then you wouldn't in our submission be doing something that made very clearly no sense at all.

But the point I was seeking to establish was from the evidence of Mr Bohannan, who recognised that particular point. Firstly at 202.0287…

O'REGAN J:
This is in his cross-examination, is it?

MR HODDER QC:
This is the cross-examination, yes.

WILLIAMS J:
Can you give me the page number of the…

MR HODDER QC:
It's transcript 252, it's actually 0288 is probably the starting point. The cross-examination starts, for relevance, it's a general discussion about what's happening in January 2014, and the first part of the cross-examination establishes that life wasn't looking so good in January 2014, and towards the bottom of the page we're discussing the question about whether or not in the prevailing economic circumstances the business was unsustainable, effectively Mr Bohannan agrees with that and then the possibility they were going out of business.

GLAZEBROOK J:
Sorry, I think I'm still in the wrong page…

MR HODDER QC:
I'm at the bottom of page 202.0288 and I was referring to about line 27.

WILLIAMS J:
52 of 84 on the…

GLAZEBROOK J:
Thank you, I think I am now in the right page.

MR HODDER QC:

So do your Honours have it?

GLAZEBROOK J:

Yes.

MR HODDER QC:

It's at page 0288, the bottom of the page, Mr Bohannan's agreeing that things were unsustainable. On to the next page, starting from about line 6, there's a discussion about what the Board was doing at that time and that it was a decision to postpone development of Escarpment until the export market recovered, and there's reference to the fact that that was the only sensible option open to Bathurst, and at paragraph 20 the question was to advance construction would have cost many times more than could have been achieved in selling into a heavily depressed market, and in paragraph 25, I'm quoting, and the question from the CFO's view that to have carried on at that point would have been commercially insane and "meant near certain insolvency" and he agrees in an understated kind of a way.

And then over the page at 290 at line 10 or line 11, "if you needed anything that required capital", "It wasn't gonna happen," "you weren't going to get capital". And then likewise if we go on to page 0314, we spent a bit of time dancing around the question about whether Mr Bohannan was saying that if they stopped then the $40 million is automatically payable, and on page 0314 the questioning starts relevantly on this at about line 12…

O'REGAN J:

So the page number again?

MR HODDER QC:

0314, your Honour, 202.0314, page 278 of the transcript. And from about line 12 down to line 25, but only effectively in the last few lines of that: "So L&M is saying that at that point $40 million is payable?" that's when production stops, "Is that what you're saying?" "No, I'm not." He says: "The 25,000 tonnes was

a liability, we had 40 million to pay, but it wasn't a drop-dead event." And on the next page, 0315, about line 15, he thought the amendment said "it's still a liability but it's not a drop-dead liability" and then there's a further questioning on that and he says no "doesn't believe that was the intent" if there's only domestic production and Holcim's gone away, and then at line 24, 23: "So even though there were no royalties you pay royalties on whatever coal if any was being sold out of Escarpment. Correct?" "Correct." "And if for a period there were no royalties because no coal was being sold then the 40 million wouldn't be due. It would be a liability floating round some?" "That's what I've been trying to say."

WINKELMANN CJ:

And how is this, you say this is helpful, in what way?

MR HODDER QC:

If we go back up to the top of the page –

WINKELMANN CJ:

No, no, in terms of the – your categories of evidence that help us understand contracts.

MR HODDER QC:

Well, I was, one of the proposition about whether it was commercially crazy or not and this was evidence that this individual thought it was and it starts from page 4 on this page. The question was "it would have been insane to do this" and effectively we get to the answer where he's agreeing with it. So it's an illustration of the point, there's on the point that it would have been so it's not purely by way of submission. There's recognition there that that would be the outcome.

WINKELMANN CJ:

And what would be commercially crazy, to be precise?

MR HODDER QC:

It would be commercially – the circumstances I have been outlining earlier that if you know that you are at risk of having to pay $40 million at a time when you can't afford it and you cause that to happen by selling a limited amount of coal, then it doesn't make any sense.

GLAZEBROOK J:

Well, I suppose the wider point is that if Bathurst hadn't done that then there would have been no question of the money coming due –

MR HODDER QC:

Correct.

GLAZEBROOK J:

– unless there was, in the original contract, some requirement to undertake an operation, and again I'm having trouble formulating what that obligation would be absent the parties having agreed what that was because it would have to be an obligation that said assuming you get a permit, assuming you get this, assuming you get that, then you are obliged to undertake construction and undertake mining.

MR HODDER QC:

Yes, the –

GLAZEBROOK J:

Again, presumably you'd say, and assuming that these risks that have already been identified in the DFS have not occurred, ie, a drop in price or…

MR HODDER QC:

Yes, and the simple explanation of what goes on is it depends on the economics. So if the economics makes sense then there will be a continuation of whatever activity is contemplated, but if it isn't there won't be, and the situation we're just talking about is one that says, well, does it make sense if you're approaching the point where you can get some form of coal

out of the ground and you can sell a bit of it to Holcim does it make commercial sense to do so unless you have the protection of clause 3.10, and we say that's precisely what happened. They had the protection, or they thought they had the protection of 3.10, and so they sold that coal. But if they hadn't got that protection then that would have not made any sense, to put it mildly, to do so because they would be getting a relatively modest sum for this coal but facing an immediate liability for $US40 million if they couldn't carry on, and at that point they didn't anticipate any major domestic sales and they certainly were nowhere near export sales.

O'REGAN J:
Can I just ask you a question about clause – the Court of Appeal's interpretation effectively implies words under clause 3.10.

MR HODDER QC:
Yes.

O'REGAN J:
But clause 3.10 wasn't a standalone expression of the obligations of the parties to each other because it was just, it said, clarifying what had already been agreed in the earlier clauses in the agreement as it was originally signed.

MR HODDER QC:
Yes, I accept that.

O'REGAN J:
How does the implication made by the Court of Appeal affect the original provisions that bound the parties?

MR HODDER QC:
Well, the Court of Appeal's implications are that there must be continued mining, firstly, continued mining but must be the loyal, level that provides a certain substantive level of royalties.

O'REGAN J:
But that was effectively superimposing a requirement into what you've called the proviso to clause 3.10.

MR HODDER QC:
Well, that's the implications that we are focused on. I'm not sure if I've understood your Honour's –

O'REGAN J:
It just seems to me that if we accept that clause 3.10 was only recording what the parties had already agreed, how does the implication affect the original, the clauses to which the parties had already agreed? Does it require us to read new words into clause 4.1(a) or (d) of their –

MR HODDER QC:
I don't believe so. They're sort of two different issues, I think, at least as we perceive that particular scenario.

The first one is that there is no obligation to continue mining at any point, there's no obligation to pay royalties at a particular level, they simply don't exist. So then one comes back to clause 3.10 and the question about what it's trying to resolve. And that question is if the payment has been triggered this clause 9.7 applies so that L&M can treat Bathurst as being in default, to which we say what clause 3.10 is about is resolving the doubt by saying no, L&M can't do that with the proviso. And then in response to that the L&M argument is, well, you have to do something to read proviso differently. And the Court of Appeal effectively says yes –

O'REGAN J:
Yes, I realise all that, but it seems to me that if 3.10 wasn't actually creating any new, anything different from what was already there before, it was just clarifying it so everybody was on the same page about what it meant, isn't the Court of Appeal really changing the original agreement, which 3.10 is now clarifying and resolving doubt about?

MR HODDER QC:

Well, the gloss, if I can call it that, on their version of what the proviso requires is certainly adding new obligations, so it is changing the agreement in that way, in the way that they explain in effect through the paragraphs I've been through. But the starting point is that there are no obligations in the original agreement anywhere for continued mining once it's started more mining at a particular level, and to the contrary the whole concept behind the royalty deed, which is an integral part of the agreement itself, is you pay royalties as and when you sell coal, and if you don't sell coal because it doesn't make sense you don't pay royalties. What the Court of Appeal seeks to do is to change that dynamic very substantially.

WILLIAMS J:

Well, it took the view that 9.3, 9.7 and 4.1 were dual options.

MR HODDER QC:

Absolutely clear. Well…

WILLIAMS J:

You could utilise either and once you got to 25,000 tonnes, given you'd lost on the shipping argument, there was no doubt that you could utilise either.

MR HODDER QC:

Well, it's an option, I guess it's an option available to L&M, but what the Court of Appeal is saying is at any time L&M could treat Bathurst as being in default. I'm not sure that's best described as an option, but that's what the Court of Appeal says and that's the premise on which it then proceeds this discussion.

WILLIAMS J:

Yes, well, once 3.4 was triggered, in this case because of the Holcim sales…

MR HODDER QC:

Yes, well, on this assumption, yes.

WILLIAMS J:

Yes. Then these weren't mutually exclusive alternatively, the 9.7 path and the 4.1 path, they were options you could take either or both of at any time, in the Court of Appeal.

MR HODDER QC:

Is your Honour enquiring about Bathurst's position?

WILLIAMS J:

Sorry, no, that was effectively the Court of Appeal's point when it said: "There's no doubt. You could always have sued."

MR HODDER QC:

Well, I understood the Court of Appeal's point was that at any point L&M can say: "You're in default."

WILLIAMS J:

Well, as long as you are in default, that's right.

MR HODDER QC:

Well, if you have triggered the payment and haven't paid it then the proposition is that's absolutely clear, you can use 9.7 whenever you want to.

WILLIAMS J:

Yes. So the alternative was that 4.1(a), et cetera, and the ability to sue were alternatives and only 4.1(a) applied in the case of non-payment?

MR HODDER QC:

Well, that's the argument that would have been the one that cause doubt, 4.1(a) or, we say more likely (d).

WILLIAMS J:

That's right. But I took them to be saying that there was no doubt that 9.7 was always available, that's all they said.

MR HODDER QC:

No, I'm now reading they say not only that but that 9.7 means that Bathurst can only have recourse to the second option your Honour's describing for as long as L&M chooses not to invoke 9.7, so they're not – we may be saying the same thing, furiously.

WILLIAMS J:

Yes, well, I think that's the inevitable result of that, yes.

MR HODDER QC:

But in the sense they're not mutually exclusive in terms of L&M's ability to use them, what the Court of Appeal contemplates is that L&M can possibly tolerate the 4.1(d) scenario for a period but that at any point it chooses it can use 9.7.

WILLIAMS J:

So the doubt, if there is any, is generated by the potential overlap between 4.1(a) and 9.7?

MR HODDER QC:

Well, that's the doubt we point to as being the doubt to justify it, yes.

WILLIAMS J:

Correct, and the Court of Appeal just said, well, that's not right.

MR HODDER QC:

Yes. And that goes back to our proposition about the Court then intrudes too much as a court and doesn't put itself in the position of reasonable businesspeople on the sidelines.

WINKELMANN CJ:

So, just looking at the time, Mr Hodder, it's 3.05, and I think we've got a little way to go, have we?

MR HODDER QC:

Indeed, your Honours, as always in the absence of the six days, so yes. Perhaps I'll just…

WILLIAMS J:

Where are we on your outline?

MR HODDER QC:

We're at point 6 in the outline, I was discussing aspects of common sense. So I've really been focusing on the economic incentives, which mean that this works perfectly sensibly, there has to be enough confidence to invest in the mine's development, that requires management and investor confidence in future coal prices, and there has to be an ability to see that the performance under the agreement will make sense, that is to say that there will be sufficient coal prices that justify the payment up front of the $40 million. And, as I've indicated, I could do some mathematics, but if it gets to around the $300 per tonne it makes perfect sense to pay the $40 million, indeed the $80 million, and you're still making good money as opposed to the alternative.

So we say in relation to that it's not unfair or commercially unreasonable or absurd, particularly if you look at it ex ante. There is a point at which the incentive works really well, there are points at which it works less well, but the parties agreed to that at the outset, that's the way it's structured, and we say that's reflected in both 3.4 and in clause 4.1 and we focus on (d).

There's also the point that in relation to the performance shares the contract at clause 3.8 provides for an increased royalty if for some reason the performance shares can't be paid. So it's seeing the royalty as a mechanism which creates various kind of benefits. But again those shares depend on there being a trigger of something.

So perhaps underpinning all that, the parties, we can probably fairly infer, were optimistic in the economics incentives in 2010 and probably in 2012, but if the effective clause 3.5 doesn't expressly provide for a pessimistic state of

affairs, what happens? And we say the answer to that question is the one that was given by Lord Hoffmann in the *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988, nothing happens, the rest of the contract carries on on its own terms, that means without any obligation to mine but to pay royalties as and when due.

So part 7 in our outline takes us to the implication of terms and we say that the serious constraints on any implication of terms, if the Court's well familiar with, from *BP Refinery (Westernport) Pty Limited v Shire of Hastings* [1977] 180 CLR 266 (PC), from the *Sembcorp* decision in the Singapore Court of Appeal, from *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Limited* [2015] UKSC 72, [2k016] AC 742, and also a kind of very succinct statement in the *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2, [2017] ICR 531 decision, I think of the Privy Council, and also in the Davies article we've included in our latest, in our supplementary bundle of authorities. Also that if you have a detailed written agreement then extreme caution is required before you imply terms that aren't there, and it's also important to maintain distinction between interpretation and implication. And, as the Court appreciates from our submissions, we say the addition of these obligations about continuous mining and a certain level of royalties are effectively the implication of terms that simply aren't there in the original agreement and they aren't there in the third amendment deed. The rest of that is set out in some detail in our submissions in sections 10, and there's probably a limited amount of additional value that I'm going to provide by tacking on other cases, they're all just referred to there and the Court's well familiar with them. But the distinction between those two concepts is well understood in all the appellate authorities that have been referred to and I'm not even sure it's really in doubt, the question is whether the threshold is met here. But the basic proposition is that it requires something very special to meet those higher thresholds that are required.

In terms of what the Court might do in clarification, as the Court will appreciate, our submissions suggest that the *BP Refinery* tests have stood the test of time. They can be criticised, of course, but by the time you've gone

through them you've covered all the relevant considerations. They can be reframed in different ways but whether that's helpful or not is perhaps not so obvious. So the effect of our submissions is that the *BP Refinery* test in this case, (a) warrants affirmation, and (b) isn't satisfied by what's required here. It simply isn't necessary. The contract can work in the way that has been outlined in our submissions and it isn't necessary for these purposes.

The other point about an implied term is that it assumes that L&M has failed on the interpretation argument which means that an implied term is contradicting the essence of 3.10 in the way we've contended for it, which again is somewhat odd.

That takes me to the –

O'REGAN J:
Just before you move off it, is there anything in those authorities that says the implied term has to be able to be defined clearly and with certainty because it –

MR HODDER QC:
Yes, *BP Refinery* says just that. It must be capable of clear expression, and that's –

O'REGAN J:
So we're here with the Court of Appeal really just said: "We don't know what the implied is but it means…"

MR HODDER QC:
Something.

O'REGAN J:
Something. Something more than what the, the document without the implication.

MR HODDER QC:

Yes. Something more than sales off the stockpile, yes, and the High Court had trouble. They'd used two different formulations in the High Court as well. So we say that all those tests effectively in the *BP Refinery* list aren't satisfied. But your Honour, Justice O'Regan, is right to point out that one of the striking features of this case is that two Courts have struggled to try and define what it is that the obligation really comprises which is, we've said in our submission is a rather telling feature of the case.

On 8, the proper purposes argument, this argument has had a certain amount of airing in the Courts below. The Courts below haven't really dealt with it any great extent. It doesn't get mentioned by the Court of Appeal in any way that's sort of explicit, and the High Court gives it fairly short movement as well. So this argument has to assume that there has been a failure on the interpretation of clause 3.10 by L&M and therefore it means something else, presumably what Bathurst says it means, and as we have said in our submissions, in effect this agreement is seeking to imply a term.

It's probably sensible that I spend a moment on *Mid Essex* because that's the case I mentioned before. It also picks up the question of good faith that Justice Glazebrook raised with me at an earlier stage. So the *Mid Essex* decision – well, perhaps we'll go back one step. I wasn't proposing to take the Court to it but the Court will recall perhaps that the *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep 558 decision, which is in our supplementary bundle at tab 26, records that the republic law type purposes constraints on contractual discretions and the summary in that case is at paragraph 66 and the proposition is that there are various kinds of limits on what might otherwise look to be an absolute discretion, and that discretion, the Court says, is limited by concepts of honesty, good faith and genuineness and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. In the *Mid Essex* case there's an elaboration of where that takes one, and if the Court has our tab 25 we find the English and Welsh Court of Appeal's decision there. In brief, if one turns to page 272 of the judgment or 720 of the volume, page 720,

the right-hand column on page 272 of the report, Lord Justice Jackson sets out the relevant clause for this purpose which is clause 5.8 at the bottom right, and this is about performance of contractors providing services to hospitals, and about eight, 10 lines in, there's a sentence, where such performance criteria have not been met by the contractors the Trust, which owns the hospitals, "shall be entitled to levy payment deductions", and then in addition, "the Trust can by notice award service failure points". Those are the issues that this case is concerned with, and at paragraph 69 an implied term is formulated, or was formulated in the pleadings, and you see that at the bottom of page 278 on the right-hand side, or 726 of the volume, about six lines up, eight lines up, there was an implied term that is pleaded that in exercising this power, ie 5.8, "the Trust would not act in an arbitrary, capricious or irrational manner". That's rejected by the Court of Appeal and the discussion takes place from paragraphs 82 onwards, and after discussing a series cases between paragraphs 77 – this is on page 727 – from paragraphs 77 through to 81, at paragraph 82 Lord Justice Jackson delivering the leading judgment says: "In each of the above cases the implied term was intrinsic. The contract would not make sense without it." And then at 83: "An important feature of this line of cases is that in each case the discretion did not involve a simple decision whether to exercise an absolute contractual right," and he explains that on the next page, 729, on the left-hand column at (vi) where he says in relation to the Trust in this clause 5.8: "Once the correct figures for service failure points and deductions have been established, the Trust has a discretion. It may award the service failure points or it may choose not to do so," and likewise with the deductions. But then goes on to say, at 91, "this is a very different discretion" to those discussed in *Socimer* and similar cases which existed in the authorities above, and at the end of that paragraph, top of the next column, he says "clause 5.8 simply permits the Trust to decide whether or not to exercise an absolute contractual right" and so, in 92: "There is justification for implying into clause 5.8 a term that the Trust will not do so in an arbitrary manner," that is to say, once the pre-conditions are met the Trust has choice that either it imposes what can be broadly described as the penalty, or not. But that's not a discretion to which the kinds of proper

purposes arguments apply, you'd have a pre-condition to an absolute contractual right.

Lord Justice Lewison starts his judgment on page 733, or page 283 of the report, and at paragraph 138 says he sees no reason to department from "the language of entitlement in which clause 5.8 is expressed", it was up to the Trust "to decide whether or not to levy payment deductions", so it's a simple whether or not decision, and the same thing is effectively said by Lord Justice Beatson at paragraph 154 in relation to clause 5.8.

So in our case we say that if we're talking about clause 3.10 and we're talking about the choice whether to continue mining or not, and to continue to pay the higher royalty rate or not, if any royalties are payable, that choice – and that is as opposed to paying the $40 million performance payment which in this argument is assumed to be triggered – then it's again, like the *Mid Essex* scenario, a whether or not decision, it's not a discretion involving a series of choices or series of options. That is to say, Bathurst has an entitlement under the substantive part of 3.10 to proceed on the basis it doesn't make the performance payment, that isn't in the exercise of a discretion of the kind to which the Court attaches a particular scrutiny in terms of the proper purposes doctrines. Now we've dealt with this in our submissions and the reply in some detail and there may be some new matters that emerge, but we say that there's no cogent evidence around this and we say also that the focus on the Bathurst/Talley's joint venture is irrelevant in the circumstances and the real point being pursued here by L&M is really about when it would receive any performance payments, and we've described that in our reply evidence as well, and it depends on the circumstances, but one has to be candid and say maybe never, it all depends on whether the economics make sense, and that, we say, is the consequence of what the agreement says.

So that effectively addresses the substantive parts of what we were going to say. As I mentioned at the outset, I was conscious of the fact that the Court had arranged for the distribution of Sir Andrew Tipping's paper.

WINKELMANN CJ:
That didn't mean that you have to deal with it. It was just we knew that it was coming out and…

MR HODDER QC:
All right, well, I'm happy, as you would expect, in relation to the arguments I've been advancing, we think that Sir Andrew's view that it's time that the genie was fully let out of the bottle is probably going too far, that the genie could even go back in the bottle a bit more or otherwise be left pretty much where it is. But we do say that there is an understatement of a range of the considerations that the Court can have in mind and which are reflected in the *Firm PI1* decision. It has less focus on the contemporary evidence, less focus on third parties, less focus on the idea of certainty, less focus on the idea of a single documentary record, and perhaps less focus on the real costs of modern contract litigation and while there's a sanguine view expressed by Sir Andrew about that, we say it's open to the Court to take a slightly more sceptical view about those issues and indeed it should do so.

So with respect, an interesting paper but we would resist the idea that the genie should be given more freedom.

Now your Honours, I've rattled through the last bit because I had said to my learned friend, Mr Galbraith, I'd try and get off here by about now and I think the Court and your Honour, the Chief Justice, has the same view, I suspect. But unless there are any questions, those are the submissions for the appellant.

WINKELMANN CJ:
Thank you, Mr Hodder.

MR HODDER QC:
Your Honours.

MR GALBRAITH QC:
Interesting to hear my learned friend speak of Sir Andrew's paper in the way in which he did and criticise the Court of Appeal's judgment, given the other paper which the Court sent to us, now I understand published, from Professor McLauchlan, which the heading was "A New Conservatism in Contract Interpretation" and he beat up on the Court of Appeal on the basis that they were far too conservative. So one may see that perhaps these perspectives depend on the case that one's arguing.

I will want to go through written submissions in some detail because, in my respectful submission, they do contain matters which, with great respect, my learned friend has rather skipped lightly over, but perhaps in the time which there is tonight if I could just make some comments, not turning to the written submissions at this stage.

I was interested to hear my learned friend also suggest that the L&M submissions were made with, or the L&M approach or LMCH approach, was made with hindsight whereas in fact, of course, the Court has heard an awful lot about what happened in 2014/15 when the coal price had fallen and Bathurst were facing different circumstances. These arguments or these propositions which this Court has heard about didn't emerge until after the confrontation when Bathurst stopped mining and these arguments emerged for the first time some six to seven years after the actual contract was entered into and there's not, in my respectful submission, the slightest indication on the way through apart from what my learned friend has said about the use of the term *doubt* in the clause 3.10 agreement of anything in the way of these legal arguments or these legal issues being raised by Bathurst prior to late 2016.

WINKELMANN CJ:
So you say that applies to the shipping argument?

MR GALBRAITH QC:

Yes, absolutely. Shipping never reared its head in fact until some considerable time after the dispute arose between the parties, never referred to by Mr Tacon in his first letter when he set out Bathurst's position, shipping was accepted as having triggered the first performance payment in at least three financial statements put out, I do want to take you to those tomorrow, by Bathurst and these were considered positions taken by auditors, directors, management. They, with my respectful submission, can't simply be dismissed as the way the Court of Appeal did by saying: "Oh, well, they might be wrong." Well, they might have been wrong but if one's looking for evidence of what a reasonable and informed person would regard the words of the contract as meaning, all the evidence is that a reasonably informed person of the business nature that my learned friend referred to did, in fact, believe that these words, shipped, caught transportation of coal of whatever type it might be from the permit area.

WINKELMANN CJ:

So for the second argument that there was effectively an option, you could either pay the performance payment or defer it by making a heightened royalty payment, you could say that was put on the table by the amendment clause 3.10?

MR GALBRAITH QC:

Yes. Yes, that was put on the table and that was referred to in Bathurst's financial statements, so it was said initially that this issue of triggering was coming up and then they say: "Yes, we have triggered it, it's happened, but in the meantime we can defer by paying the royalty." They don't say: "We can defer by not paying the royalty." You won't find that anywhere in the financial statement.

WINKELMANN CJ:

Okay, so that's the third argument and you say the third argument, didn't you?

O'REGAN J:

But they wouldn't say that if at that time they were intending to pay royalties, would they?

MR GALBRAITH QC:

I'm sorry, Sir?

O'REGAN J:

Well, at that time they were intending to keep mining.

MR GALBRAITH QC:

Absolutely, and that's the answer.

O'REGAN J:

So this was a situation nobody anticipated.

MR GALBRAITH QC:

No, no, you're absolutely right, Sir, and that is in fact the answer to cross-examination of Mr Bohannan which my learned friend took you to. Yes, of course, if you say to them now, if you believe you're going broke you wouldn't do that, no, but they didn't expect at the time that that was the situation. They were still optimistic that they'd be going forward. So fine, I mean, my learned friend quite rightly got the answers he got but that's unsurprising because one's looking at it in a different time sequence as to when these things actually took place and what people were thinking at the time which – and that's really the point I…

O'REGAN J:

Well, the problem is nobody thought of this at the time, did they? I mean we have to accept that reality.

MR GALBRAITH QC:

I accept that, Sir, I absolutely accept that, and what I was just going to say very briefly, and my learned friend said this also, was at the time that the

contract was actually entered into, which is actually the time we've got to focus on except for the third amendment, at that time there was a great deal of optimism and on the Bathurst side perhaps one might say over-optimism about what might occur and I don't want to take your Honours to all the evidence but Bathurst was an ASX listed company which was suspended at the time. It had a Kentucky coal mine, Black Diamond, which had gone into I think it was receivership or liquidation. It had repurchased the assets. It was looking to redeem itself on the AX exchange and because of connections from the past between Mr Loudon who Mr Bohannan had met at an award ceremony in Australia many years before and knowing Mr Loudon's son-in-law, the prospect of the mining permits in New Zealand came to his attention and he was very enthusiastic about it and there's an interview with the *Greymouth Times* or something somewhere in these volumes which says that he really saw this as being high-class quality coking coal, a great situation in the sense that the West Coast of the South Island has been a mining area for, I was going to say centuries but that's probably going a bit far, but certainly more than a century, and so it was just a situation which he saw as offering Bathurst the chance of redemption. That's what it boils down to.

What had happened prior to this was L&M, as it then was, had done an enormous amount of research and geological exploration to identify the resource which was available there, they'd circulated that material to a number of entities, and Bathurst was the one that came along and made the offer. And I know Bathurst cases, that one shouldn't look at anything but the written document, but I think context, with great respect, and *Prenn v Simmonds* and other cases, goes a little bit beyond that.

WINKELMANN CJ:

I don't think that is the case, because Mr Hodder was very keen for us to look at the due diligence material.

MR GALBRAITH QC:

Yes, there's a certain inconsistency in the legal proposition as again what, in the case, but in any event…

O'REGAN J:
But what happened in Kentucky 10 years ago is not relevant context, is it?

MR GALBRAITH QC:
Well, it was context at the time, Sir, in the sense that –

O'REGAN J:
How does it help us?

MR GALBRAITH QC:
Oh, no, all I'm saying is that they were optimistic at the time, that's the only point I'm making, and they had a reason for being optimistic.

O'REGAN J:
Well, everyone was optimistic, I mean, the contract was written on the basis that it was going to be a great deal for everyone, that's the reality.

MR GALBRAITH QC:
It was, Sir, there's no argument about that.

But the contract was written, and my learned friend has placed considerable emphasis on the DFS, the contract was written before the DFS, even during 2010 analysis of the Escarpment project or possibilities was available, if one at least believes the words of the contract, because in the contract of course where it defines the DFS it says it's a DFS "to be done", and the June 2010 document which my learned friend quite properly took you to is not dated, the contract itself was dated 10 June, was signed then, and the DFS, in our respectful submission, can't supplant the terms of the contract itself, nor can the DFS alter the terms of the contract, which has to be interpreted in its own context at the time.

Now it's correct to say that the DFS followed shortly after the contract, that appears to be the sequence, we don't have a date which suggests anything different from that other than what the contract itself recognises –

GLAZEBROOK J:

So are you saying the June 2010 document wasn't a June 2010 document? What's the submission?

MR GALBRAITH QC:

No, no, I'm not saying that.

GLAZEBROOK J:

Well, then…

MR GALBRAITH QC:

I'm saying that the contract was signed on the 10th of June and the contract says the DFS is to be…

GLAZEBROOK J:

Well, was there a June 2010 document in existence at the time the contract was signed or don't we know?

MR GALBRAITH QC:

We don't know…

GLAZEBROOK J:

Right.

MR GALBRAITH QC:

And that's inconsistent with what the contract itself says. But there was a 2010 document, yes, your Honour.

So the evidence certainly doesn't say it was there before 10 June 2010, and that would be inconsistent with what the contract itself says.

O'REGAN J:

Were there earlier drafts on it?

MR GALBRAITH QC:

Not of the DFS. There was earlier material, yes, Sir, because of course that's what Bathurst relied upon, but not a draft – well, it hasn't been produced if there was one. And what happened was that there was the June 2010 draft, there was an October 2010 similar paper on Deep Creek, and then there was the final DFS in November which was the DFS on which the settlement was effected. And the DFS, as my learned friend quite correctly said, did have a section on risks, but it didn't dwell on risks because the purpose of the DFS of course was to show that the, well, they hoped for the purpose of the DFS was to show that the project was feasible, which was the conclusion that was reached, the DFS didn't deal with the performance payment triggers, it didn't focus on that at all, it dealt generally with the quality of the, from the drillings that had been done, the quality of the coal, the prospective marketing of that coal, and discussions about potential price and recognition of what his Honour, Justice O'Regan, quite rightly said. The professional people involved would have recognised that it goes up and down because it's effectively a commodity product.

But the DFS, the agreement for sale and purchase with the feasibility that that was given a positive recommendation, was the basis upon which Bathurst went about raising $165 million odd dollars in the next less than 12 months, and you'll find that in tab 64 which is the 2011 report, and so the market was prepared also to be optimistic, one might say, and back that without there being actually any production and of course –

WINKELMANN CJ:

How much money, Mr Galbraith?

MR GALBRAITH QC:

I'm sorry?

WINKELMANN CJ:

How much money?

MR GALBRAITH QC:

165 million. And that wasn't raised, of course, by dwelling on any liturgy of risks. That was raised by dwelling on the positive prospects of what might be achieved.

The agreement for sale and purchase signed on the 10th of June was, of course, entered into at that very early stage. The DFS, at least so far as the evidence is, hadn't been completed at that time. The DFS itself recognised that further investigations needed to be undertaken. There was further drilling after the DFS and there was new information that was obtained as time went past, and again without taking your Honours to it, you'll find at 305.1060 and 1066 that subsequently it was found that a deal of the resource didn't require washing, for example, so the washing plant wouldn't be needed in the early stages. It was also found that where they were thinking they were going to develop the pond in fact had a decent amount of coal under it and so they would have to mine that coal first before they could start on the pond for the drainage system, and so the situation come 10 June when this contract was being entered into was one where there was optimism about the feasibility, feasibility not completed, there were ideas about what they would do in terms of their mine planning and there had been a preliminary plan developed, but all of this could change as circumstances change, which they did. Subsequent to the reference I've given, your Honours, in 2012, circumstances changed more negatively, but circumstances changed in any event. So while it's correct for my learned friend to say that the focus of the proposed project was on an export coking mine, there were other possibilities that existed, certainly in the project at large, because the project at large was potentially a very – it was much more than just Escarpment. Escarpment was perhaps a five, six year deal. The project at large could have been a decades-long deal and the volume of coal which was to be found from the northern regions right down to the southern regions where Escarpment and a bit more north where Deep Creek were, was not the totality of the project at all. The totality of the project was much larger than that.

O'REGAN J:

When you say *the project* what do you mean by it?

MR GALBRAITH QC:

Well, they used the term – that was a term that was used, Sir. The project was the Buller –

O'REGAN J:

But who used it?

MR GALBRAITH QC:

I'm sorry. Initially L&M in its marketing and subsequently it was adopted by Bathurst too as a generic term that was used.

O'REGAN J:

But the agreement for sale and purchase only related to the escarpment, or did it relate –

MR GALBRAITH QC:

No.

O'REGAN J:

It related to the whole project?

MR GALBRAITH QC:

No. No. Perhaps if we look back at the agreement for sale and purchase.

WILLIAMS J:

Was it just those two permit areas?

MR GALBRAITH QC:

Yes, but the – I'll have to find you a map. There's one attached to –

O'REGAN J:

You can do it tomorrow if you like. Do it tomorrow morning.

MR GALBRAITH QC:

Oh, look, it might be easier, Sir.

WINKELMANN CJ:

So the fundraising, the prospectus when it went out and raised funds, how did it describe the project?

MR GALBRAITH QC:

The initial fundraising I don't believe was done off a prospectus, but I'm subject to – no, I'm right on that.

WINKELMANN CJ:

Well, how was the fundraising, how was the project described in the fundraising?

MR GALBRAITH QC:

I think that's a good question, your Honour, I don't know the short answer to that at the moment, but we'll have a look and see what we can find.

WINKELMANN CJ:

All right, we can come back tomorrow.

MR GALBRAITH QC:

Yes. And I'll have a plan for you of the permits by tomorrow. The initial area of the permits was, if I say huge, it was very, very large indeed. There was a reduction at around about the time of the sale and purchase agreement, but it still remained at that stage very large, and I think in Mr Tacon's affidavit in opposition to an affidavit that we filed the other day he sums the total of the existing permits and those which, the new permits which are being applied for to replace expiring permits, and it's something like 10,177 hectares, I think, but I'll check that tomorrow. Initially it was something like 22,000 hectares is my recollection, so Escarpment was a – I'd better be careful what I say about its area – but it was a relatively small part of –

O'REGAN J:

But that was the only part that was about to be developed when the deal with done?

MR GALBRAITH QC:

Not really, Sir, because again – and I can take you to the documentation – Deep Creek was expected to be up and going within 12 months of Escarpment up and going, that was the initial planning at this stage. There hadn't been as much drilling at Deep Creek but – you'll see, and perhaps tomorrow I'll take you to the documents – but Deep Creek was going to overlap, if I can put it that way, in the second year of operation of Escarpment. Escarpment at that time was thought to be, they were planning on beginning mining in the fourth quarter of 2011. Well, they didn't expect, I mean, to be fair, that was optimistic even with a fair wind behind them, but of course they ran into, as this Court would know, they ran into the problem about climate change and the fact of burning coal in India or China or wherever else it might be, and it wasn't until this Court said, well, that wasn't a relevant issue under the environmental considerations, that they finally got their consent through in late 2013, and then they had to, as my learned friend quite rightly said, they had something like some dozens of other minor consents to be obtained from DOC and from local councils, et cetera, et cetera, but they weren't resource consents, they were condition consents as to the way they operated.

WILLIAMS J:

So at that stage the project was Escarpment and Deep Creek?

MR GALBRAITH QC:

That's the initial project.

GLAZEBROOK J:

Can we say at what stage we're talking about? We are talking about entry into the original agreement in June 2010, are we?

MR GALBRAITH QC:

Well, let's…

WINKELMANN CJ:

Yes, it's useful to look at the contract and the deed of royalty, because the deed of royalty refers to permits and defines them. So it's not something vague, is it, it's actually we can…

MR GALBRAITH QC:

No. The deed of royalty…

WINKELMANN CJ:

It seems to me in terms of your arguments reasonably critical what is captured by the deed of royalty, the royalty deed.

MR GALBRAITH QC:

Yes. The deed of royalty you'll find at 303.0494, or at least, sorry, that's the page which has got the definition of "permits" on it, and it's EP 40628, which was the first permit which my learned friend referred you to.

WINKELMANN CJ:

It is the Escarpment, isn't it?

MR GALBRAITH QC:

And that includes Escarpment and Deep Creek. It's going to be easier if we find a map, I think.

WINKELMANN CJ:

Yes, and 51078.

MR GALBRAITH QC:

And then 51078, that's the one to the north.

O'REGAN J:

But what was – the feasibility that was being established was of mining Escarpment and then later Deep Creek. I mean, that was, the whole deal became unconditional when they were satisfied of the feasibility of those two areas.

MR GALBRAITH QC:

Yes, I think your Honour is correct about that. The initial feasibility information which L&M had put out because they'd had both feasibility in relation to coal and quality of coal traversed the entirety of the permits, your Honour, and those documents are in the information before the Court also and were traversed at some length below.

Mr Kalderimis has just given me a plan which probably shows it reasonably well. It's 313.2944. The complication that one has is that there are permits and there are mining licences and so you get…

WINKELMANN CJ:

Can you just give me that number?

MR GALBRAITH QC:

Sorry, 313.2944.

GLAZEBROOK J:

Can you tell me where the agreement is again? I seem to have lost mine, so the 303, where is the agreement?

MR GALBRAITH QC:

It starts at 303.0491, the royalty agreement, and the –

GLAZEBROOK J:

No, not the royalty agreement. The actual sale and purchase agreement.

MR GALBRAITH QC:

Sorry, sale and purchase agreement is 302.0304.

GLAZEBROOK J:

So 003 – okay, thank you.

MR GALBRAITH QC:

04.

GLAZEBROOK J:

So where's the feasibility study clause? Which one's it in? It probably disappeared off my screen because I'd probably closed it by mistake but…

MR GALBRAITH QC:

It's in the definitions.

GLAZEBROOK J:

But it actually seems to be on a separate page for some reason. I've no idea why.

MR GALBRAITH QC:

302.0309.

GLAZEBROOK J:

302.0309, thank you.

WINKELMANN CJ:

So if we look at this map you're referring us to, we have the Escarpment down the bottom there in blue.

WILLIAMS J:

That's the whole plateau, yes.

O'REGAN J:

The map is bigger than the screen.

WILLIAMS J:

Just reduce it to 75.

WINKELMANN CJ:

It's actually in exhibit volume 13 if you've got that because I find it easier to look at these things.

MR GALBRAITH QC:

The problem about that map is some of the areas on that map are not L&M areas.

WINKELMANN CJ:

So it would be much better if we, rather than us –

MR GALBRAITH QC:

There's got to be a better map somewhere. We just –

WINKELMANN CJ:

No, well, let's just get it very clear tomorrow morning when we start again exactly what was in contemplation at the time, what was – I'm interested to know also what Bathurst was raising money for.

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

The feasibility study was definitely just the Escarpment according to the document, the sale and purchase agreement.

MR GALBRAITH QC:

Yes, I –

GLAZEBROOK J:

And then my understanding was later extended to Deep Creek but without there being a contractual issue aspect of that.

MR GALBRAITH QC:

Well, your Honour's right. It extended, as I say, October 2010 you find the Deep Creek defeasibility study which then was amalgamated into the November 2010 which was intituled the final –

GLAZEBROOK J:

Because presumably if the Escarpment came out okay then the contract was unconditional, whether Deep Creek was terrible, wonderful or indifferent.

MR GALBRAITH QC:

Yes, possibly.

GLAZEBROOK J:

Unless there'd been a variation in some way to say that both of them were going to be important to it becoming unconditional. Who knows actually but –

MR GALBRAITH QC:

My guess is that they were sufficiently optimistic that Escarpment was going to come in positively and Deep Creek was definitely on their target at the time because it was the other reasonably contiguous mining area which had significant volumes of coking coal and thermal coal, as I think Justice –

WINKELMANN CJ:

In any case –

O'REGAN J:

Did the term that the Court of Appeal implied into the, or said was required in the agreement, that there had to be a reasonable level of mining, was that only in the Escarpment area or was it in some broader area?

MR GALBRAITH QC:

I don't know that the Court of Appeal – I mean, what we say, Sir, perhaps is the easiest answer to that, is that, what we say is if a performance payment is triggered then because of the wording "for so long as royalty payments

continue to be paid" or "made", I think the words are, that it's those, it's royalty payments relevant to the action which triggered the performance payments which have to be continued. So if –

WILLIAMS J:
The same magnitude, is that your point?

MR GALBRAITH QC:
Yes, it's similar. I mean, it doesn't have to be done –

O'REGAN J:
So does that mean just the Escarpment area?

MR GALBRAITH QC:
Well, if it had been Deep Creek that had triggered it, because there was nothing to bind Bathurst to mine Escarpment or mine Deep Creek, Bathurst could mine whichever mine it chose to. It's priority was Escarpment, so assuming that it was Escarpment that triggered it, yes, your Honour, the answer would be yes. So mining of Escarpment would need to continue and royalty payments be made, and that's fine. If they decided not to, well, then a performance payment had to be made. So it's not a question of –

O'REGAN J:
Yes, but in terms of interpreting clause 3.10…

MR GALBRAITH QC:
That's interpreting clause 3 point…

O'REGAN J:
You're saying that they had to keep mining the Escarpment only, they didn't have any obligation to start mining Deep Creek or anywhere else?

MR GALBRAITH QC:
Well, not from clause 3.10, no.

O'REGAN J:

And if they triggered it in Deep Creek, if they would have had an obligation to mine Deep Creek but not Escarpment?

MR GALBRAITH QC:

Well, they wouldn't have an obligation under clause 3.10, it's just that they wouldn't be able to defer paying the performance payment unless they –

O'REGAN J:

Correct. But we're trying to understand what the obligation is to save them from having to pay the 40 million.

MR GALBRAITH QC:

They need to keep making royalty payments of the same –

O'REGAN J:

So the Court of Appeal's "reasonable degree of mining" is a reasonable degree of mining in the Escarpment area, isn't it, that's how we should interpret it?

MR GALBRAITH QC:

Yes, that's what triggers it, yes, Sir.

O'REGAN J:

And once they've finished in the Escarpment area, no further obligation?

MR GALBRAITH QC:

Not if that's a deferment of performance payments. They would have to keep paying royalty payments to defer the – well, go back a step. If it's exporting of coal from Escarpment, exercise, then they have to –

O'REGAN J:

Well, I think on your case it's just selling coal, isn't it, not exporting it?

MR GALBRAITH QC:

No, no, that is our case. But in fact on Bathurst's argument, forget about the shipping and forget about exporting, all that, say that they had exported – accept their argument – they'd exported 25,000 tonnes of coal off to Japan or China or Timbuktu, and they'd kept paying some royalty payments, and they've got to the million tonnes and they exported that offshore too, and then they thought: "Gosh, that's $80 million we've got to pay. We need to give up on that. We'll spend the $80 million on buying into Stockton and we'll stop doing any mining. When does the $80 million get paid? It doesn't, on Bathurst's argument. Because they might sometime in the never-never or they might not in the never never-start paying royalties again.

WINKELMANN CJ:

Well, that's exactly what Mr Hodder argues.

WILLIAMS J:

Yes, that's what he said, that's exactly right.

MR GALBRAITH QC:

Exactly, yes.

WINKELMANN CJ:

He says that's the way the cookie crumbles, because your clients failed to place in the agreements minimum mining requirements.

MR GALBRAITH QC:

That's right. But –

WILLIAMS J:

Why would the same magnitude requirement, whether interpretive or implied, stop at the edge of Escarpment? Wouldn't it just keep going until "the project" had stopped mining?

MR GALBRAITH QC:

Well, the obligation to pay the 40 million or the $80 million doesn't have a boundary, I mean, it just doesn't have a boundary.

WILLIAMS J:

So the royalty trigger applies only to a particular permit area and doesn't require to start digging somewhere else?

MR GALBRAITH QC:

No, the royalty trigger applies to the clause which says that 25,000 or a million is shipped from the permit areas. It's not from Escarpment. If they wanted to limit to Escarpment they could have written *Escarpment* and I know my learned friend's argument about that, but it isn't. It's from the permit areas. So if it comes out of the permit areas which are defined then that –

O'REGAN J:

I think you're going beyond what – all I want to know is what do they have to do to satisfy clause 3.10 as interpreted by the Court of Appeal. What's your answer to that?

MR GALBRAITH QC:

That they've got to keep paying royalties, your Honour, from mining which would be mining consistent with that which triggered.

O'REGAN J:

So if they finish the Escarpment and they still haven't paid 40 million they've got to develop another mine?

MR GALBRAITH QC:

Well, if they don't want to pay the 40 million.

O'REGAN J:

Well, that's what I'm asking you.

MR GALBRAITH QC:

Sorry, that's the short answer.

O'REGAN J:

Is that the answer?

MR GALBRAITH QC:

Yes.

O'REGAN J:

So the Court of Appeal was saying that the obligation wasn't just the Escarpment. It was you had to keep developing mines into the never-never or pay the 80 million which might have, as it turns out, might be easier, but that – because the Court of Appeal didn't really – they didn't come up with a clause that was capable of being complied with, it seems to me.

MR GALBRAITH QC:

Well, I don't think the Court of Appeal actually put it quite in the way that your Honour may have put it, but I think the short answer is that this was a – well, I suppose I'd like to have explained it given the full context, but without giving that full context. The context that led to clause 3.10 in that third amendment was the request that was made that if we have to say that we've triggered one of the performance payments and at the same time say we can't pay, then that's going to make it very hard for us to raise the money. So it was that.

O'REGAN J:

No, I'm aware of it. I've read that material, yes.

MR GALBRAITH QC:

So that was quite simple, and everything surrounding that, all the evidence, internal and between the parties, was that the idea of raising the money would be a short-term hold, so they could raise the money for the purpose of developing Escarpment, if that was what it was going to be, and paying the performance payment. So everybody's contemplation was we're talking about

something, a short-term deferment, not a never-never, and so in that context, your Honour, I doubt very much that the parties, well, the parties had no contemplation of mining stopping. That's one thing which is quite clear on the evidence. And so it would be but a short term and it's repeated and repeated and repeated through all the documentation.

GLAZEBROOK J:

Well, I'm not sure it was so much short term, was it? It was effective – well, short-term in the sense that once mining was really up and running then the incentive was always going to be not to pay the higher royalty payment but to pay the 40 million.

MR GALBRAITH QC:

The incentive was –

GLAZEBROOK J:

But that was how it was set up in the first place, wasn't it?

MR GALBRAITH QC:

The incentive was always there to – well, the way it was – the incentive always was set up on that basis, yes, your Honour's quite correct, but the expectation of Bathurst certainly, which is recorded throughout, was that it would be better for us to raise the money – well, in fact from 2012 on they were negotiating with L&M to change the basis upon which the performance payments were to be made and that's what you find Mr Bohannan saying quite a few times when my learned friend was asking him questions about isn't this a problem. He was saying: "But we were trying to negotiate a restructuring," and you'll see that from early 2012 on. They recognised that this was a difficult position for Bathurst to be in. So the commerciality was to try and cut a varied deal.

WINKELMANN CJ:

It's 4 o'clock. So Mr Galbraith, you indicated you want to be able to take us to these points again in the context and Mr Hodder was able to do that and I

think it's important for your case you be able to do that. So perhaps tomorrow morning we start off with this whole point about what the project was but then we'll let you take us through the points as you wish to do so.

MR GALBRAITH QC:
In a more disciplined way, yes, your Honour.

WINKELMANN CJ:
Well, you started out by saying you wanted to take us with care through your written submissions.

MR GALBRAITH QC:
Yes, thank you.

COURT ADJOURNS: 4.00 PM

COURT RESUMES ON FRIDAY 9 OCTOBER 2020 AT 10.01 AM

MR GALBRAITH QC:
Thank you, your Honour. I apologise yesterday wasn't as coherent as I would have wanted it to be, something had afflicted me, apart from old age, but I seem to have recovered.

A couple of housekeeping matters. We have a short oral outline to hand up, and also I've asked the registrar to hand you three maps, or I think it was probably only two. There are actually exhibits to the Tacon and Manhire affidavits but I just thought you mightn't have those in front of you, so easier to do that. And the third, which you may or may not want, we have got a bundle which includes the merged pleading, the agreement for sale and purchase, the third amendment, et cetera, et cetera, which we could hand up, so it's a hard copy one.

WINKELMANN CJ:
I think that would be helpful.

MR GALBRAITH QC:
Yes, thank you. And perhaps just finally to say that various topics we have to deal with today, I'll be talking about shipping and about the third amended agreement and Mr Kalderimis will be talking about implied terms and correct, proper purpose, so that's the way we've divided it. But I'm going to go back to that list of questions which her Honour the Chief Justice raised with me last night, which I think helpfully does give you a better context for understanding what was going on around the time of the ASP. But there are a few documents to go to, I'm afraid.

WINKELMANN CJ:
That's all right, we're used to that.

MR GALBRAITH QC:

Yes. So if I could perhaps ask you first just to go to 301.0038, remembering that we're talking about two permits, that's what the ASP is talking about, and this is, you'll see a summary of what L&M had identified for the Buller coalfield…

WILLIAMS J:

Can you just hold there, please, Mr Galbraith?

MR GALBRAITH QC:

I'm sorry.

WILLIAMS J:

No, it's not your fault. My table of contents has gone blank. Can you give me number again and I'll and find it another way.

MR GALBRAITH QC:

301.0038.

WILLIAMS J:

I'll see if that works. No. I'll go to the hard copy. What's it in?

MR GALBRAITH QC:

It's in exhibits volume 1 behind tab 4. That's actually probably quite a good place to go.

O'REGAN J:

So this was the earlier, this predates the DFS?

MR GALBRAITH QC:

This predates, it's well before, Sir. It's probably got a date on it, I'm just not – September 2008, Sir.

O'REGAN J:

So that's quite a long time before, then.

MR GALBRAITH QC :

Yes. But if you're trying to identify what the permits covered it's the best description of that. So you see in that page 0038 there's a photo at the front of it which gives you an idea of some of the topography, you see the middle arrow to Escarpment Mine and then the Cascade valley and Mount Rochfort. If you go across to 301.0040 –

WINKELMANN CJ:

Is that the sea in the distance or is that cloud? I think it's cloud.

MR GALBRAITH QC:

That's – good question.

O'REGAN J:

It's the sea, I think.

WILLIAMS J:

Is it?

WINKELMANN CJ:

That's the coastline anyway.

MR GALBRAITH QC:

Yes, I think that's right, your Honour.

WINKELMANN CJ:

I think so. Or maybe it's just the horizon. Anyway, it's quite a long way from the sea, whichever.

MR GALBRAITH QC:

Quite a long way to go. 301.0040 is just the executive summary and I just want to draw your attention to a little bit of that. It describes – I'm in the group history – it talks in the second paragraph about the volumes of coal which have been mined from the general area 125 years-odd ago. Then the third paragraph talks about L&M establishment resources, 46 million tonnes of

coking and thermal coal, 24% of the resource is hard coking and 41% semi-soft coking coal, balance thermal coal, so there's, I think the Court of Appeal said roughly a third, it's not quite that, but that's pretty significant. The fourth paragraph: "Coal mining is a significant part of the NZ economy," railway lines service, current spare capacity, railway lines approximately eight ks, supplied via truck access from potential mine sites, port facilities, and talks about them being serviced by rail.

Then I don't particularly want to take you to any of the specifics in here, though if you do flick into 301.0056, for example, you'll see a table which has a summary of the resources within the permits, and the fourth column of it has "coal utilisation" and if you just skim your eyes down that you'll see some is hard coking and semi-soft and some is hard coking, sorry, and some is semi-soft and thermal and some is a blend and thermal and some is hard coking and thermal. So it's a big resource and there's a mix of what's available there for development if somebody wants to develop it.

Now just to try and help with some maps, we don't really have an ideal map, but the ones that the registrar has handed to you, perhaps if one looks first at the one which has at the top got DM-1, it's an exhibit to Mr Manhire's most recent affidavit, and that sets out the permit areas as at, it was just before the – June 2010. So at the time of the agreement, and you'll see how far the permit area extend to the north and down to the south, ignore the hatching, that was because he was trying to differentiate some new permit applications, and you see 51078 at top right.

Now Mr Tacon responded and if you look at RT-2, which are annexures to Mr Tacon's affidavit, and the top map is the map which shows effectively the same as what Mr Manhire's map shows and the bottom map 2 shows a reduction that was by agreement between the parties accepted back in, I see he's got 17/8, 17 August 2010, after the agreement and there was a reduction and you can see most of the reductions are shrinking in the northern area and that was of areas – there's a technical problem about renewal that you have to reduce the area unless you've got an extra super-special jolly good reason

and it was agreed that these areas could be returned to the Crown because they had limited, if any, resource. So you'll see how it shrinks and you'll see the, again just going to the boxes in RT-2, that the area initially was 22,000 hectares and it came down to 10,691 hectares and that's by August of 2010, and then if we go to DM-2, that's effectively RT-2, the second map 2, with a bit more detail that Mr Manhire's added to it but it's the same area, and you can see Escarpment right down the bottom, that little, slightly L-shaped at the bottom with blue, so that's where Escarpment sits in that.

O'REGAN J:
What's the blue at the top right? Is that Deep Creek?

MR GALBRAITH QC:
That's Coal Creek, as I understand it.

O'REGAN J:
Deep Creek or Coal Creek.?

MR GALBRAITH QC:
Coal Creek. Deep Creek is much closer to Escarpment.

O'REGAN J:
Okay. They're not very imaginative geographical names, are they?

MR GALBRAITH QC:
No.

WILLIAMS J:
Is Deep Creek that hatched area straight opposite Escarpment? There's that gap area there.

MR GALBRAITH QC:
I'm just trying to see if I've got a better map for you, Sir, better photo for you. Deep Creek, possibly if you look at 313.2979.

WILLIAMS J:
What document is that?

MR GALBRAITH QC:
That's in volume 13, tab 220.

GLAZEBROOK J:
312, sorry, what was it?

MR GALBRAITH QC:
313.2979, and you'll see Escarpment there is the red box at the bottom and Deep Creek, your Honour sees, an inch and a bit up on top of Denniston where that black. It's that...

WILLIAMS J:
Right, so it's still some distance away though?

MR GALBRAITH QC:
So it's still in this area. You'll see in a moment when I take you to another document that they talk about Southern Buller and Northern Buller and Deep Creek and Escarpment are in the Southern Buller area. The ones up the top are in the Northern Buller area.

So now just to explain a little about this terminology of Buller Project, which was a bit of a moving feast in fact, again if your Honours wouldn't mind going to another document, 302.0447, and if your Honour is stuck in hard copy still, that's in volume –

WILLIAMS J:
No, I'm fine, I've…

MR GALBRAITH QC:
You're okay now?

WINKELMANN CJ:

302.0447?

MR GALBRAITH QC:

302.0447.

WINKELMANN CJ:

This is: “Significant Upgrade to Buller Coal Resource”

MR GALBRAITH QC:

Yes. So this is a late July document, so it’s after the agreement, but you’ll see that it says in the first lighter-coloured sentence: “Bathurst’s exploration program for the Buller Project is focused on establishing sufficient resources,” et cetera, and then it sets out in that box down below the prospects which have been measured, indicated and inferred, Escarpment, North Buller, Blackburn, Millerton North, Deep Creek, and you can see those in that first document that we looked at. And then after that table it says: “Following completion at Escarpment the drilling program has since continued on to Deep Creek, the second area target for possible production in the Denniston sector. The 16-hole drilling program is expected to be completed this week,” the interpretation and modelling, should be some upgrades, and then across the page at 0448 Mr Bohannan is reported as saying: “As a result of this latest drilling program Bathurst can confirm that it has resources in excess of 40 million tonnes of high quality coking and thermal coals which should underpin the first 20 years of production from the Buller project.” So that terminology “Buller project”, I’m not saying that’s the first time it ever appeared but that, and then –

WINKELMANN CJ:

It also talks about thermals coals, not just quality coking.

MR GALBRAITH QC:

Yes, and I'll explain that more in a mo. And then staying with the Buller project, as I've said, it was a bit of a moving or developing feast. If one goes to 304.0771, and we're leaping forward in time doing that, so –

GLAZEBROOK J:

Can I just ask, if you just let us know if we're finished with a particular document or whether it's…

MR GALBRAITH QC:

I'm sorry.

GLAZEBROOK J:

No, just because we have a, there's a certain sort of number we can have, and if we're going to go back to it I'd rather leave it open.

MR GALBRAITH QC:

No, we can forget that one.

GLAZEBROOK J:

So we can get rid of that, so thank you very much. It just helps.

O'REGAN J:

So just give us the number again, 304…

MR GALBRAITH QC:

304.0771. This is – well, it starts at 0768. Sorry, should start at the beginning and then you see what it is. It's the 2011 annual report, so it's, as I say, we've leapt forward in time to the second half of 2011, but it's helpful in respect of a number of the matters which your Honour the Chief Justice asked about yesterday. If we go to 304.0770 you'll see there there's a timeline from July 2010 to June 2011, and so it gives you some – and you'll see the first thing in the timeline in fact is what we just looked at a moment ago, "Significant upgrade to Buller Coal project resources", so that was what we

just looked at. And then August, “Interim DFS completed confirming project viability”, and that ties in, remember we were talking yesterday about the draft that we saw was June but in fact it’s not reported until August that it’s been completed, and then finally it was completed in November, the extended one with Deep Creek in, “80% increase in Deep Creek resource”, et cetera, in November “$110 million equity raising”. I should have said yesterday, and I apologise, that those are Australian dollars we’re talking in, because it was an ASX listed company. November, “Acquisition of Buller Coal project complete”, “Announcement to acquire eastern resources”, which I’ll explain in a moment, “Listed on NZX”, and then in May you see “$55 million equity raising”, so that’s the 110 and the 55 is the 165 I talked about yesterday. But in a moment I’ll show you the – in fact there was an earlier raising 16 million 250-odd thousand to actually get the transaction off the ground, but we’ll come back to that.

So if one goes across the page to 304.0771, there’s a description of Bathurst resources and it would tell you, if one looks at the right-hand column, it says: “The Buller Coal Project was founded on the acquisition of L&M Coal Limited in 2020 which owned substantial exploration leases in the Buller coalfields. Since that time the group has made two further strategic acquisitions – Eastern Resources Group … providing Bathurst with immediate coal production, and the Brookdale assets – completing Bathurst’s consolidation of its South Buller operation.” So what happened it raised the money and it spent a reasonable chunk of it in buying these other resources which were domestic coal producing assets, and so when you go down below to that table which sets out the structure of Bathurst Group and you see on the left-hand side “Buller Coal Project” and then there’s the North Buller and the South Buller particular mines in the little boxes there, not all of those are mines acquired from L&M. For example, Cascade was one that was acquired subsequently and Cascade was the mine that ended up having the geotechnical problems and for which Escarpment had to step up to deliver to Holcim, and Whareatea West, for example, was also another mine that was acquired subsequently.

But that's what I say about the Buller Coal Project developing. It wasn't locked, at least in the way Bathurst used the terminology, into the L&M assets, and so one has to be a little bit careful when that terminology is used.

WILLIAMS J:
Presumably that means that L&M were aware that Bathurst was active elsewhere in the area and would be producing coal, not just from your permits?

MR GALBRAITH QC:
Not until after the – not until they did it. I mean it wasn't part of any, well, there's no evidence it was part of any discussion with…

WILLIAMS J:
So this doesn't come – this timeline says 10 July 2010, July 2010 to whatever it is, June 2011.

MR GALBRAITH QC:
These were all acquired after settlement of the…

WILLIAMS J:
What date is the ASP?

MR GALBRAITH QC:
ASP is 10 June 2010, settled in November 2010.

WILLIAMS J:
What date is this document?

MR GALBRAITH QC:
This document, the second half of 2011. It's the annual report for…

WILLIAMS J:
I see. It's retrospective, isn't it?

MR GALBRAITH QC:

Yes. And so you can see that if the Chairman and Managing Director's report on 0772 because he's reporting on the activities during the year 2010, 2011, and he talks about the capital raisings, for example, and then he says, fourth paragraph down: "Since balance date, we have further added to our South Buller operation with the acquisition of the Brookdale assets on the Denniston Plateau." Talks about the equity raisings in November was the first one and then in May 2011 and I think that's all I – no, sorry, if one goes across to 304.0773 he gives the detail of the acquisitions, you'll see on the left-hand side.

WILLIAMS J:

What page is it ?

MR GALBRAITH QC:

0773, and then has a discussion of the Buller Coal Project development as well. That gives you some background on that. Now again that's not a document I'm intending to go back to, your Honour.

O'REGAN J:

And the point of this is just to let us know what the project is? You're not relying on these as having contractual significance?

MR GALBRAITH QC:

Certainly not these latter matters, but the next couple of document I'm going to take you to which are actually documents relevant to the question that her Honour, the Chief Justice, asked about, what were investors told, some of these, a couple of these may well have some contractual significance because I'm going to go back to a couple of earlier documents. So if your Honours wouldn't mind going to 302.0254, so we're going back in time now, and unfortunately I'm really having to give you sort of a snapshot of, there were a lot more documents, but this is to try and give you the most useful ones.

This is a document in May, and I don't think it's got a particular date in May but I'll identify in a moment why we can say it's in May of 2010, so it precedes the ASP, and it's an investor presentation, as it says on that page, so it's something that did go to investors, and on the next page at 0255 it gives the investors important notice, and then it has the table of contents, and then if we go into…

O'REGAN J:
Unfortunately ours is this…

GLAZEBROOK J:
If you go up to View at the top and then go Rotate, clockwise, it'll fix it. You can right click as well apparently.

WINKELMANN CJ:
Right, what page are we on?

MR GALBRAITH QC:
If we go to 0257, because I think fairly I should take you through this, executive summary, Bathurst resources listed, developed Buller Coal project, objective, mid-tier coking coal producer by fourth quarter 2011, you remember that was the date that my learned friend showed you yesterday. Underneath the development plan, the second ticked box, "complete definitive feasibility study", so that's underway, and that's the third quarter, 2010.

The next page, 0258, background, the Buller region, high quality coking coal province, second bullet point "best known for coking coal product, majority is exported as blend sweetener" and I am going to make something of that in a moment. Further down, acquisition terms, second bullet point, "sale and purchase agreement to be signed prior to the end of May 2010", so that I think gives a fair clue when this was, and then the little bullet point underneath, "alignment of payments to vendor on production milestones", so that's being anticipated. Your Honours may want to look at other pages but I was going to then just quickly take you to 0260, where you'll see a plan very similar or a

map very similar, well, probably identical to that where we started today, and then you'll see the various mines identified down in those boxes…

GLAZEBROOK J:
I'm sorry, I've just no idea what 0260 is coming up as.

WINKELMANN CJ:
The number's on the right-hand side top.

GLAZEBROOK J:
Okay, thank you.

MR GALBRAITH QC:
So it's got the permit areas and then split down into the exploration targets and mining methods. And if one goes over to the next page, 0261, it gives some project history and says Escarpment, Blackburn and North Millerton is the most advanced, detailed mine schedule at Escarpment completed, and on 0262 you'll see exploration targets and four of them are defined as coking and thermal and two defined as coking. If we go across to 0263 –

WINKELMANN CJ:
What's the significance of that?

MR GALBRAITH QC:
Oh, only that, which I think's accepted, is that there's both coking coal and thermal coal in the project, that's…

WINKELMANN CJ:
So it's Denniston coking and thermal?

MR GALBRAITH QC:
Well, not just Dennison, the whole, the project. It goes back to what that other document showed, that I think it was 24 per cent hard coking, 40-odd per cent semi-soft and the rest of it was thermal. And if we go over to 0263 you'll see under "Mining plan, initial development at Escarpment" "high quality coking

coal", no argument about that. Third bullet point down, third of the diamond bullet points down, "Bring on new mines from 2014," second bullet point, "Deep Creek as main priority," and then 0264 there's a development plan which, in the appellant's submissions, you've seen either this or something similar to this but you'll see on this one at the right-hand side underneath to the right of the wash plant arrow, "Initial sales Target: Coking – 850, Thermal – 150," so that was what was being presented to investors in May 2010 before the ASP was signed, and if we –

WILLIAMS J:
I don't think Mr Hodder would disagree with any of this even if he could but that thermal was export thermal, wasn't it?

MR GALBRAITH QC:
Well, going back to what we said before right at the start of this somewhere, it says majority is exported. So no, I – yes, definitely the objective. No argument, Sir. We're not quarrelling the objective was to export as much as you jolly well could because it makes sense to get the best price, but that isn't what had happened or was happening with Stockton at the time. I mean you sell it wherever you can sell whatever you've got. So – and if one looks across at 0266 you'll see that the Project Economics, in the total at the foot, there's contract prices for current coal prices, hard coking coal $200, thermal coal $100. So it's spelt out that there's a different value that attaches to these.

Now I think, I'm not saying you shouldn't look at anything else in that, but I think I've fairly taken you through what's in there and I don't propose to go back to it.

But one other document which I will take you to which, as I said, Bathurst were pumping out a fair bit of press to drum up interest, and we haven't got time to go and look at all the documents but there's a document at 302.0288 which is dated 17 May so we know when this went out. So 302.0288, and it's talking about the initial JORC resource which, of course, that earlier document

I took you to was also talking about. You'll see in the third text paragraph in the quotes: "As a result of this drilling programme … initial resource of 7.3 million tonnes," that's at Escarpment, "of high quality coking and thermal coal," so Escarpment's got both high quality coking and it's got thermal coal. Nothing surprising about that. The last paragraph on that page, the DFS anticipated to be completed in Q3 2010. The updated JORC resource expected to demonstrate the primary product from Escarpment will be high quality coking coal. Primary product, not exclusive product. Primary product. That's the way they're thinking at this time.

And then if one goes to 302.0290 which went with this release, you will see very similar to the September 2008 document I took you to, this is a much, much shorter version of that, that on 302.0290 under "Background" the first paragraph says: "Current production is mainly coking with the majority of coal being exported." Yes, it was because that's the best market, of course, and then it says in the fourth paragraph under "Background": "Stockton," that's the existing Stockton mine, "produces approximately 2 million tonnes of coal per annum. Most of the coal … is exported." Not all of it, most of it. And then again under "Project Overview", again it confirms the study, the feasibility study, expected to be completed in Q3 2010, and across the page 0291 they talk about hard coking coal as well as the smaller, it says "quality", I think it's meant to be "quantity", quantity of semi-soft steaming coal. Steaming coal is what you have in boilers because it produces heat. So we can close that document. But can we please go to another one, 302.0413…

GLAZEBROOK J:

What do you say in terms of the "shipping to overseas markets" comment there?

You just say it wasn't necessarily all of it, is that the…

MR GALBRAITH QC:

Yes, no doubt they were hoping to ship as much as they jolly well could. So 302.0413, just the initial capital raising which I hadn't referred to yesterday, 302.0413. 20 June, this is a release to the ASX, you'll see in the, "pleased to

announce" it has signed the option and the deed of guarantee, and then says: "Following the recent capital raising of $16,250,000 from the placement of 125 million shares, Bathurst confirms the payment of the $5 million deposit." So that investor document which I took you to your presentation in May is the best that I can locate as being the document that preceded this capital raising which was used for the actual purchase, in other words paying the $5 million deposit signing up. So that's why I say that, in answer to his Honour Justice O'Regan, that in my respectful submission there is some relevance in these documents because they preceded the ASP and they did lead to the capital raising which funded the ASP. But you'll see that attached to this is another Bathurst resources overview at 0415, which has exactly the same background that I just took you to a moment ago about the majority being exported, and then it also has at 0416 a summary of what the agreement provides, and you'll it actually does refer to the performance payments, so the second bullet point on page 302.0416 is: "Bathurst is required to make two performance payments of $40 million each on the first 25,000 tonnes of coal being shipped from the Buller Coal project and the first one million tonnes being shipped from the project. The wording of course in the agreement was from the permit areas, but probably pretty much the same.

O'REGAN J:
That doesn't advance things much, does it, because it uses the word "shipped" again, which…

MR GALBRAITH QC:
No, no, I'm not saying it answers the question, Sir, but I'm just trying to give you the sequence.

Then if you wouldn't mind looking at 303.0508, because I don't want there to hopefully be any argument about when the Escarpment feasibility study was in fact available. 303.0508 is when Bathurst says that the DFS has confirmed the technical and economic feasibility of the Buller Coal coking project based solely on the Escarpment project. Now 0508 is at 18 August, ties in with all those other references to third quarter. So while that date of, well, not a date,

it's typed at the top of that Escarpment DFS of June, and my respectful submission is that if it had come out in June they would have been saying that and they never did say that, they said it was underway. And it wasn't until August that they came out and said that they'd now got the feasibility study based solely on the Escarpment project which gives them the tick. And it's headed "Interim DFS results" also, so it's only the interim study.

If one goes across the page you'll see it sets out the Buller project resources again, a little table, talks about the Buller project. Across on 0510, talks about the assets which will be required. Interestingly enough, as I think I said to you yesterday, very little expenditure and very little assets in terms of the mine infrastructure, and I only say that –

GLAZEBROOK J:
Sorry, can you just…

MR GALBRAITH QC:
I'm sorry, on 0510.

GLAZEBROOK J:
So that this is…

MR GALBRAITH QC:
There's a little box there.

GLAZEBROOK J:
That's what you're referring to?

MR GALBRAITH QC:
Yes, and the fourth one down is "Mine Infrastructure" and that relates back up to the third paragraph on that page which actually says: "Mine Infrastructure and Other comprises office facilities in Westport," so it's not even at the mine, "dams for raw and process water, light vehicles and site access roads," and there's two and a half million for that. So the actual infrastructure on the mine

site is pretty minimal. Plenty of infrastructure off the mine site, no argument about that. And then you'll see under that little box it says: "If, as planned, Bathurst were to develop a mine nearby at another of the Denniston prospects, then the additional infrastructure required would be minimal, likely comprising only haul roads to the CPP," which is how Deep Field came to get rolled into this as we'll see in a moment.

Talks about mine production on 510. 0511, operating costs, coal quality, and then 303.0512 you'll see what it says in the first sentence is: "Following washing and blending, the study has found that Escarpment is able," and I think I've got to put "to" in, "is able to produce product coal that is 100% hard coking coal. Bathurst had previously advised the market of its expectation that the coal produced was likely to be 85% hard coking coal and 15% semi-soft coking coal." So it's found something out as a result of the feasibility study after, after the ASP has been signed. So this emphasis about it's all hard coking coal is not what they were telling the market and I've taken you to the documents which show what they were telling the market and it's not what they knew themselves until they got the DFS and they didn't get the DFS until somewhere round about the time they announced it in August. So, with greatest respect, you can't write back, as has been part of the argument for Bathurst, the DFS into the terms of the 10th of June ASP because Bathurst itself was changing its understanding and therefore its ideas of what it would like to do. But the contract can't be a mobile contract based on Bathurst changing its preferences and what it might like to do.

And then staying in that same volume – so finished with that. If you wouldn't mind going to 303.0713, and again we're leaping forward in time…

WINKELMANN CJ:
This is a new document?

MR GALBRAITH QC:
New document, 303.0713, and perhaps you get the date at 0712, 303.0712. it's another investor presentation, this time February 2011. So we've leapt

forward from well past the date of the agreement and it's a presentation as 0713 shows in Sydney at the Emerging Coal Companies Forum. It actually says, when one goes through 0716, for example, it actually says pretty much, and 0717, pretty much the same as the document I was showing you back in May 2010 says and on 0717, for example, you'll see it's got the same second bullet point, "Majority is exported as blend sweetener," and has the same "Aligning payment with value creation," talking about initial production. There's actually that photo which is on…

GLAZEBROOK J:

Just remind me what the *blend sweetener* was again.

MR GALBRAITH QC:

Different sorts of – coal has different properties regarding ash, sulphur, all sorts of things, and what they can do is they can mix, as you do with a pudding, mix various things in to try and get the balance which is most optimal and, for example, some of the coals in Australia were short on some things, some of the coals in New Zealand were short, had too much of other things, and so you could export something from New Zealand to Australia, mix it together and then send it off to China. It's technically explained in the DFS but, sorry, that's a very untechnical explanation which I've given.

WINKELMANN CJ:

But what is "blend sweetener", how's it being referred to?

GLAZEBROOK J:

Really, it's still coking coal is what I was really asking.

MR GALBRAITH QC:

Yes. Well, it might not have been good enough to sell to China as itself as coking coal because its properties might be too much sulphur, too little ash or, of content, or whatever. So you might have to export it to, as I say, Australia, and do a mix.

GLAZEBROOK J:

What I'm really trying to do is the majority will be exported as that, how does that relate back to the majority will be a hundred per cent coking coal? Or is this just talking about the region generally?

MR GALBRAITH QC:

They would regard that, I think, if it's sent off to be mixed, or blended, sorry, they would regard that as coking coal, but it wouldn't be hard coking coal, it would be semi-soft coking coal.

GLAZEBROOK J:

All right, that was what – but this is talking then about the whole region and not the Escarpment because the Escarpment they said it's going to be a hundred per cent hard coking coal?

MR GALBRAITH QC:

Well, that's what they decided they would do, subsequent to getting the DFS.

GLAZEBROOK J:

No, I understand that. Because earlier they'd thought there might be some semi-soft and some hard coking coal.

MR GALBRAITH QC:

And, well, actually, something I should have shown you and I'll show you in a moment –

WINKELMANN CJ:

Well, can I just say that the map on page 303.0718 is a revelation.

WILLIAMS J:

It's pretty good, isn't it.

MR GALBRAITH QC:

Yes, I was just going to say that it actually gives you perspective. No, I think that is helpful, your Honour. And Escarpment, as you see, is a red circle, and

you can see where Deep Creek is too there. And then across the page there's that similar schematic of where everything goes to, and I don't think there's anything – oh, so if we go over to 0721, you'll see by now Deep Creek's come into the picture more definitely, and so you've got Escarpment, Deep Creek, associated together in total reserves. You'll see on page 0722 on the right-hand side, just to perhaps answer a little bit to what your Honour Justice Glazebrook just asked me, you'll see "High quality bituminous coal" it talks about and it has some ticks, "superior to best Australian coking coal", "low ash", "high swell", fifth tick down, "majority of resource has low ash and sulphur" and so "ideal for export metallurgical markets" they say.

And then across on 0723 they're talking about the mining plan and commencing at Escarpment, "100% hard coking coal", which is where they've got to now. FY2013 "commence mining Deep Creek" and perhaps just interestingly on 0724 – this is only for interest, I'm not saying it's got any relevance – but you see at the bottom of those, 0274, it says environmental consent "application lodged", "public submission received (50 for, 6 neutral, 42 against)", third bullet point "no major issues raised", that turned out to be a little bit optimistic.

0725, top of the page, "Draft DFS highlights", "Initial DFS confirms feasibility of the Escarpment project". But then on that same page if you just look at the production schedule, "Prospects", Escarpment financial year 12, 359 thousand tonnes, financial year 13, 783, Deep Creek, 317, so you've got an overlapping production at this time, that's in their projected plans, and always Deep Creek has been regarded as 80% coke and 20% thermal, so, as I say, it overlaps, or that was the plan at the time.

GLAZEBROOK J:
What was the percentage on, you said, thermal?

MR GALBRAITH QC:
Twenty per cent.

GLAZEBROOK J:

Oh, that's it, I thought you said – thank you.

MR GALBRAITH QC:

And you'll see also in 0726, by this stage they actually had had a purchaser on line for some of the Escarpment coal. It all faded off unfortunately at the end of the time. 0727 is talking about the Eastern Resources Group, what was available there, thermal coal mine, et cetera.

WINKELMANN CJ:

Is there much point in spending too much time on this though because it's all after the contract?

MR GALBRAITH QC:

No, but I was just – that was just to explain what happened. I think perhaps just one other document while we're...

WINKELMANN CJ:

So is the point there's nowhere in here where they're saying: "And if the market dips below this, we will be stopping mining"?

MR GALBRAITH QC:

No.

WINKELMANN CJ:

Is there anywhere that says…

GLAZEBROOK J:

Hardly going to say that to investors, are you?

MR GALBRAITH QC:

No.

WINKELMANN CJ:

Well, actually, I think you might be obliged to in some circumstances.

GLAZEBROOK J:

Well, you would if you were putting out a prospectus.

MR GALBRAITH QC:

Yes, I don't think that crossed anybody's horizon at the time. Can I just take you to one other document, sorry, because it's actually relevant to what I've been saying, just so you can see how this came up. It's part of the feasibility study. 303.0581 is actually just a page of that, so 303.0581.

WINKELMANN CJ:

Is this in the same document or is it another document?

MR GALBRAITH QC:

Sorry, that's another document. 303.0581, but this is part of the final feasibility study in November but just to explain how they got to where they go to with Escarpment.

WINKELMANN CJ:

Is that in a document which begins 303.0567?

WILLIAMS J:

It's the DFS.

MR GALBRAITH QC:

Yes, that sounds right. Yes. Yes, I'm sorry, you need the front page, don't you?

O'REGAN J:

This is the DFS, isn't it?

MR GALBRAITH QC:

This is the DFS. This is the final DFS. But you just see on 0581, and if you go back to the previous page you'll see also what Marston did, they did some sensitivities. What if we go for just hard coking coal and the prices are X, Y and Z, what's the return, sensitivities of prices moving around, what if we –

and you see on 0581, what if we go for, this is from Escarpment, 68% coking coal and 31% thermal coal? They could get that out of Escarpment if they wanted to, but it didn't give the same return as doing hard coking coal. So that's why you see in that other document I took you to, the August one, that Bathurst is saying: "No, we've decided, whereas we told the market previously that we were looking at coking coal and perhaps 15% thermal, we're not going to do just hard coking coal," but that's all after the agreement and it's the result of the information that they were still gathering which goes back to the point I made yesterday that at the time they were negotiating the agreement in May and signing it on 10th of June all of this was still mobile and it remained mobile after this too and, of course, mobility at the end of the day ended up being they decided they had to sell domestically because there wasn't an international market they found out in 2014.

But what one, with great respect, can't do is go back and change the terms of the contract which was signed on the 10th of June to fit in with Bathurst's aspirations as the market changes and as their knowledge changes.

O'REGAN J:
I didn't understand Mr Hodder to be suggesting it was always going to be coking coal. He accepted there was going to be thermal coal, didn't he?

MR GALBRAITH QC:
He – well, that's an interesting point. I'm just going to – their initial –

O'REGAN J:
But he said it was going to be export.

MR GALBRAITH QC:
Yes. Well, can I just show you how that came through the pleadings? The initial pleading was just what your Honour has said to me. The initial pleading was paragraph 26, the initial statement of claim. There's been two statements of claim so I know one can change one's statement of claim. So the initial pleading was, paragraph 26: "25,000 tonnes of coal has not been shipped

from the permit areas. (a) The right to mine coal from the permit areas was sold to Bathurst and Bathurst agreed to purchase same, on the underlying basis that the coal in the permit areas was predominantly to be exported from New Zealand and sold on the international market." "Predominantly" was the word that was used there. That absolutely ties in with all the documentation I've taken your Honours to pre-10 June 2010. That was –

O'REGAN J:
Is this in this document you've just handed up, or not? Is that where you're taking us to?

MR GALBRAITH QC:
No, it's the pleadings, Sir – sorry, it's got a page reference, sorry. The start of it is 101.0011, and paragraph 26 is at –

O'REGAN J:
101.0011 is the first page of the statement of defence.

MR GALBRAITH QC:
Yes.

O'REGAN J:
Is that where you're taking us to?

MR GALBRAITH QC:
Yes. And if one goes across to 101.0015 you get paragraph 26.

O'REGAN J:
So, paragraph 26 is what you're taking us to?

MR GALBRAITH QC:
Yes. And (a) talks about "the underlying basis that the coal in the permit areas was predominantly to be exported from New Zealand", and that is entirely accurate as at 10th of June, that was what all the documentation said, all the documents I took you to said, it was predominantly to be exported,

that's what happened in the whole Denniston/Stockton area and that's what had been happening for 125-odd years. But that changed, and then you'll see (f), it says: "25,000 tonnes of coal has not been shipped from the permit areas for export sale in overseas markets", so that position was being taken about the export. And then the pleading changed, the parties are perfectly entitled to change the pleadings. At 101, the document starts at 101.0031, and the equivalent pleading is at 101.0037, and (a) then becomes instead of being predominantly to be exported from New Zealand…

O'REGAN J:
At what paragraph of the pleading is it?

MR GALBRAITH QC:
Paragraph 31(a). And so predominantly it's disappeared and just is, well, is to be exported from New Zealand. Really, the only point I make out of that is that again it's this peripatetic nature of – the words of the contract didn't change, the text didn't change, but the substance of what's said to be affecting it changes, and of course is changed in the course then of oral argument. Because your Honour is quite correct that the oral argument is a little bit different from the written argument. The written argument said "hard coking coal to be exported". Now, that couldn't be sustained because in fact there was both hard coking coal and thermal coal and so, as I think his Honour Justice Williams put to my learned friend and my learned friend accepted really that the argument for Bathurst has got to be it's all got to be exported and domestic coal doesn't count, even if you sell domestic coal, doesn't count, that's got to be the Bathurst argument. Can't find that anywhere in the documentation but there it is. But that wasn't the position that was being represented –

O'REGAN J:
But domestic sales would have counted for the royalties though, wouldn't they, because that talked about mining the coal rather than shipping it?

MR GALBRAITH QC:

Yes, though in 2012 Bathurst, as you know, Sir, tried to get that to be FOB, which very interesting prospect for domestic coal, and of course was rejected by L&M unsurprisingly. But your Honour's right, yes, the definition and the royalty agreement would capture domestic. Odd that the performance payments wouldn't. So that's got to be the Bathurst position, it's all export, and our respectful submission is that's not supported on the evidence, and even if it could be said to be supported on the evidence as something more than just what Bathurst would like to achieve, there's nothing to show that that is the objective interpretation of the clause in 3.4 about "shipped from the permit areas" which has to be interpreted in relation to what both parties had agreed to in the contract. Now when one thinks about it, fine for Bathurst to change its mind, quite properly change its mind as it gets more information and decides it wants to be simply hard coking coal out of Escarpment, and that principally is one of the words used in the earlier documents, or primary product would be exported, but from LMCH's point of view it didn't, it wasn't a question of what Bathurst did. It was a question of whether it did do something. All LMCH was interested in was that if the trigger was met then it was entitled to further part of the consideration. How Bathurst did it was up to Bathurst, and if Bathurst chose to do it, for example, if Holcim had played like the aluminium smelter, and in fact it had over some years, it kept saying it was going to close, then it didn't close and didn't close and didn't close, well, if Holcim had decided not to close, Holcim could have been knocking on the door of Bathurst at any stage saying: "Look, there's more than geotechnical problems and Cascade. It's going to fall down and kill somebody if we're not careful," because it was pretty much a perpendicular mine by that stage. "We want you to supply." Now they had a contract with Holcim, 100,000 tonnes a year. Was Bathurst likely to say: "Nah, we're not going to sell to you"? It was a good price. I think it was $168 a tonne. Don't quite me precisely on that but it was something in that bracket. And that –

WILLIAMS J:

They might have said that if they thought it triggered $40 million.

MR GALBRAITH QC:

Sure. Well, but they might not have, Sir, if they'd been exporting at the time, in other words, they'd got up and going. Why would you turn down $16 million a year from Holcim? So the idea that one excludes domestic per se, just no domestic, it's not in here, difficult interpretation of the text of 3.4 and difficult for the business person that my learned friends suggest is the reasonable observer for this contract at that time. So the question is, as I say, there's Bathurst having its intentions and preferences and there's LMCH who simply wants to be paid if Bathurst has got up and got going and that, in fact, and you'll recall in some of those documents I took you to they talk about these payments being related to production, and that in fact was the oral evidence my learned friend cross-examined Mr Bohannan on and Mr Bohannan said look, 25,000 tonnes, it was more than 10,000 and less than 50,000 and want to be more than 10 because we might be sending bulk samples off, and that's part of the practice in coal that you have to send bulk samples off and Mr Tacon gave evidence on that and other witnesses gave evidence on that, so had to be more than 10,000, and he also used the term: "It would show that we weren't just scratching around," and you'll find that reference at 202.0213, "that we weren't just scratching around." In other words, by the time you've got 25,000 tonnes, you've got your resource consent, you've got all the other little bits of consents, I shouldn't say little bits but you've got your DOC consents and the local authority consents and whatever else and you've actually started producing something, not just something you're throwing on the left-hand side in a bin but you're producing something and you're, to use a neutral term if it is a neutral term, you're taking it off the permit areas and it's presumably saleable and "saleable" was a term that was used in some of the early documents. So it's not just scratching around, as Mr Bohannan said. It's something which is measurable. It was never intended, of course, that the 25,000 tonnes was going to produce $40 million, that wasn't the expectation at all. Twenty-five thousand tonnes would produce whatever it produced in dollars after whatever the costs would be and cost, but it wasn't going to fund the payment of the first performance payment. What was was simply a signal that the mining was up and going, we would say, to whatever purpose or end that Bathurst chose to mine for. So essentially –

WINKELMANN CJ:

So it was performance in the sense that there was confirmation that Bathurst had got a valuable asset?

MR GALBRAITH QC:

Yes, it had got up and got going, it got its resource consents. I know my learned friend would be horrified at the through that one goes back to the earlier offers, et cetera, but the first initial offer was to get paid simply on the basis of the resource consent, and that was LMCH, you may recall there was some evidence, LMCH said, oh, tie-ho, that's a bit too, that's too optimistic, and that's when the payments got changed to the 25,000 and the million tonnes because, as I say, that was asking too much.

So our focus, and it really isn't the focus of the Bathurst argument on this, our focus is on the text, certainly giving priority to the text of 3.4.

WINKELMANN CJ:

Are we moving off shipping now?

MR GALBRAITH QC:

We're still on shipping, I'm afraid.

O'REGAN J:

But we're an hour and a quarter into the day and we've only just got to the text, so if that's what you're focusing on…

WINKELMANN CJ:

Yes, we're just a bit worried about…

MR GALBRAITH QC:

Well, we did have some background.

WINKELMANN CJ:

I am a bit worried about timing, because…

MR GALBRAITH QC:
Sure, sure, okay.

But what I've been saying has, I think, got a lot to do with the 3.4 interpretation, Sir, if I can defend myself on that basis, because the argument between it says it's solely export, is it not solely export, or the argument, I guess, if you put it a different way, is does it exclude domestic sales as against, we would say, it includes any sale, all sales. And so my simple submission is the texts doesn't make a distinction –

O'REGAN J:
Well, I think the Court of Appeal said it just has to be taken off the site, didn't it?

MR GALBRAITH QC:
Sorry?

O'REGAN J:
The Court of Appeal's interpretation was it just had to be taken off the site, it didn't have to be sold.

MR GALBRAITH QC:
No. Well, as I said, you'll find probably when you go back to some of those documents I was looking at that Bathurst used the term, if one said "saleable" coal. Because one of the problems is, for example, just taking up that point, Sir, as Mr Bohannan said, they might want to send samples off. Well, you don't sell samples, you give them away, and so you can't talk about FOB or CIF or anything like that with a sample, it's simply you send off to – and there's evidence here that they did do that – off to Japan and China. But they counted, there was a subsequent argument whether they counted it or not, but Mr Bohannan's position was that that was why he chose 25,000 instead of 10,000 to give room for bulk samples.

O'REGAN J:

But your interpretation of shipping is it's taken off for sale, taken off the site for sale?

MR GALBRAITH QC:

Yes. It goes back to that sort of comment that Mr Bohannan made about: "We're not scratching around any more, we've got up and got going."

WINKELMANN CJ:

But isn't Mr Bohannan's evidence consistent with what the Court of Appeal had said, that it's simply taken off the site? That's why he set it at that level, so that it wasn't going to be triggered by samples.

GLAZEBROOK J:

You're accepting perhaps that it doesn't include the scrap coal that's just been put somewhere but only saleable…

MR GALBRAITH QC:

You're only going to move what, it's going to be saleable, I guess is what we'd say.

ELLEN FRANCE J:

As I –

MR GALBRAITH QC:

But going back, sorry, going back to the point that, one that the Chief Justice has made, if one used the term "saleable", well, that captures the sample stuff, because you're going to be sending, the stuff you – I shouldn't talk about *stuff* – but the sample you send off has got to be of a quality that they can feed into their furnaces and see whether it works with whatever they've got. Sorry, I'm being a bit cavalier with my language.

WINKELMANN CJ:

Justice France, did you have…

ELLEN FRANCE J:

I was just going to ask Mr Galbraith, do you accept that the Court of Appeal limits it to movement off the site? I ask because they refer back to Justice Dobson's reasoning which, as I understood it, incorporated the submission that you'd made in the High Court, ie, has to be something meaningful and if it wasn't able to be sold it would just be stockpiled, in other words incorporating that idea, but do you accept the Court of Appeal simply says "transport"?

MR GALBRAITH QC:

I think it's – I should make a submission of it, I think, I guess. The concept of saleability is, I think, relevant and, of course, here, well, we'll come to it, but the coal that we say has triggered the performance payments here was sold and was targeted to be sold, so it meets that criteria. But in interpreting the contract, of course, one has got to talk about the generality of what might happen.

Perhaps just say in passing, but not because it's insignificant, in a sense the Bathurst argument is a bit like the argument in the *Yoshimoto v Canterbury Golf International Ltd* [2002] UKPC 40, [2002] 1 NZLR 1 case that, well, wouldn't it be better or it would have been more sensible or it would have been more commercial or would have been something other else but that isn't what the parties agreed on. They were agreeing on a very simple measure volume, 25,000 tonnes, shipped off the permit areas, and there's nothing surprising about that and the boundary of the permit areas is very often the classifier in terms of not just in permits but in many instances where you're moving bulk material. It's at the weighbridge. That's where it gets measured. That's just what happens and doesn't matter what the bulk material is. It's always measurement, 99% of the time.

O'REGAN J:

So when you say it's moved off the permit area, that's not just the Escarpment area. That's off the area covered by all the permits?

MR GALBRAITH QC:

Yes, yes, accept that. So if I can just quickly see if – perhaps I just should draw your attention to, having been given the warning about time not take you to them, but if I could ask you to note our paragraph 92.4 in our submission has a footnote 184 and if I could give you some references to add to what's there. So if you could just perhaps underneath it just add, unfortunately there's a few of them, 308.1713, sorry, 184…

WINKELMANN CJ:

308.1?

MR GALBRAITH QC:

308.1713 is the first, and then in the footnotes which are already there, that goes back a bit before you'll see in the second line of the footnote there's 309.1862. Then at that one you'll want to look at page 1864, that footnote, and I'll explain what they're about in a moment, and then…

GLAZEBROOK J:

Good, I was going to ask you that.

MR GALBRAITH QC:

I'm sorry.

WILLIAMS J:

So 308.1713 and 1864?

MR GALBRAITH QC:

Yes. You'll see that second…

O'REGAN J:

1864 is part of the document at…

WILLIAMS J:

Of 309, is it?

MR GALBRAITH QC:

1862 is – so at 1864, and then 309.19 –

GLAZEBROOK J:

Sorry, I think I might have missed that…

MR GALBRAITH QC:

Sorry. Are you doing it on the screen?

WINKELMANN CJ:

We will speed up if we stop apologising to each other. It's tricky. Let's accept that.

MR GALBRAITH QC:

Just a blanket apology, your Honour.

WINKELMANN CJ:

Yes.

MR GALBRAITH QC:

So it's 309.1862 at 1864, and the next footnote, 309.1929 at 1932 and 1945, and I take out the footnote reference 211.2289, I take that one out…

WINKELMANN CJ:

So you're taking out the reference to the Bathurst operating plan?

MR GALBRAITH QC:

That one, not the earlier one.

WILLIAMS J:

15, 16.

WINKELMANN CJ:

15, 16.

MR GALBRAITH QC:

And I'd add another one, I'm sorry –

GLAZEBROOK J:

Oh, sorry, I'm just totally lost here.

MR GALBRAITH QC:

Oh, I'll forget about taking that one out then.

GLAZEBROOK J:

Maybe you could just give it to us in writing as an amendment, I think that might be easier.

MR GALBRAITH QC:

Sure, that would be easiest. But I'll just mention, in case somebody does look them up, the other two – 202.0319 at 0320. Now just in very short compass, what all that's about, including the cross-examination of Mr Tacon, is really the point I made a moment ago, is that there was a problem with Cascade, there was a contract for a hundred thousand tonnes a year with Holcim, they didn't want to lose that, in fact earlier on they'd had to take a little bit of the Escarpment permit to in fat perform their Cascade obligation, and so in those various references I've given you there's the Board paper discussions about providing the coal to Holcim from Escarpment. You won't find any discussion in the Board papers of the third amendment. What you will find in some of those references I've given you is discussion about the fact they're having discussions with L&M and, as I said to you yesterday, those discussions with L&M about re-casting the whole performance payments started back in 2012, or were identified in Bathurst documents back in 2012. But the decision to go ahead and do the Holcim supply wasn't at least, in my memory, in any of those documents tagged to the third amendment it was tagged to. And the other thing you'll see in those documents in fact is that the mine plans were for something like 93,000 in the first years and, a round figure, 113-odd thousand in the second year, and if Holcim had done a similar performance to the Invercargill then that might have gone on for period of time, and you'll also

find in those documents that they say if not Holcim then to some other industrial user. And so again it's the, you sell to who you can when you can, and the circumstances may change.

WINKELMANN CJ:
So long as it's profitable.

MR GALBRAITH QC:
Sorry? Yes, as long as it's profitable, which that was. And there's a graph there which shows there's a bit of cost and then they start making a profit.

Now there was also evidence, and I'll just briefly refer to this, paragraph 96 of our submissions and on 97, et cetera. Both Mr Bohannan and Mr Loudon, who were the parties who negotiated this deal, gave evidence that from the background that they both had in mining that the use of the term "shipped" or "shipment" was a generic terms, or used generically, it could be used obviously to actually be on a ship, but it was commonly used and they commonly used it generically, and Mr Bohannan's evidence was while he was stuck in Kentucky and they shipped everything out by train, and there's a document which is in the common bundle which, 312.2719, if anybody wants to look at it, 312.2719, which is a US document which talks about rail coal shipments, and his Honour the trial Judge in the High Court had done a case in Australia about an Australian, contractual obligation, where again the term had been used in that way for shipping bulk stuff by rail. So while my learned friend used the expression "literal" yesterday to support his interpretation of "shipped", "literal" these days can have either meaning. It's not – I know what he meant.

WINKELMANN CJ:
As anyone on the internet knows.

MR GALBRAITH QC:
Yes, exactly.

WILLIAMS J:
(inaudible 11:20:20).

MR GALBRAITH QC:
312.2719. So there's an argument, and my learned friend of course would be horrified that that evidence was admitted. His Honour said that it was credible and reliable and so one can go back either to three of –

WINKELMANN CJ:
(inaudible 11:20:43).

MR GALBRAITH QC:
Absolutely, yes.

O'REGAN J:
(inaudible 11:20:49).

MR GALBRAITH QC:
Yes, they didn't take it into account. In my respectful submission, I'm sorry, but I happen to be on Sir Andrew Tipping's side in this one, that if it's credible and probative then it should come in. If it's not, well, it shouldn't come in. Really where it comes from is insignificant, in my respectful submission, but…

WINKELMANN CJ:
Wouldn't you say its almost conventional evidence because its industry practice?

MR GALBRAITH QC:
Yes. Well, that was the context actually because Bathurst produced evidence from Mr Russell who'd been with Solid Energy for a long time saying industry practice was to always say what you were shipping the goods by, and of course that's right in terms of a specific contract because if you're buying, you want coal delivered, you want to know whether it's coming by Timbuctoo or coming some other way. So that's why his evidence, we've said, really wasn't

relevant and wasn't helpful, whereas Mr Loudon and Mr Bohannan were both donkey deep in the industry and so it certainly was their experience in the industry and when one thinks about it just in sort of lay terms, I remember Mr Loudon giving evidence about sending gold from Papua New Guinea, so what do you write on the thing? Shipment 1, shipment 2, I think that's what I would write, not –

WINKELMANN CJ:
(inaudible 11:22:25).

MR GALBRAITH QC:
Yes, yes. So his Honour in the High Court accepted that and my respectful submission is it was credible and these witnesses were credible and they were tested on it and – I'm not sure I need to say any more on "shipped", thank you, your Honour. I know I'm slow to take hints but I understand.

So if we can look at the third amendment now, perhaps sum up more quickly. Can I just start there by saying that you've heard a lot from my learned friend quite accurately about the structure of the agreement and the fact that it had these performance payments, it had a royalty arrangement and the royalty arrangement was tiered and so there was 10%, 5% and 1.75 I think per cent it was, or 1.25, can't remember which, and the reason for that was to provide an incentive for the royalty payments to be actually, sorry, for the performance payments actually to be made. But of course there's no incentive if royalty payments aren't being made. The incentive doesn't exist. So if you're not paying royalties then you've got no incentive to make a performance payment, and if you already owe a performance payment, which of course is the position as we allege here, and you're not then paying royalty payments, then you've got no incentive at all to pay that royalty payment that was due and owing but deferred, and so the incentive issue is fundamental to any business person's consideration of the likely objective interpretation of what was agreed by this third amendment.

Now I spoke about it a little yesterday so I'll try not to go back over that but the Court's obviously aware of the request that was made and the terms of that request and why it was made and it was made because otherwise the ASX would have to be told that the performance payment was due and if they were told the performance payment was due and that Bathurst were in default then it's going to be jolly hard to go out and raise some more money, so they needed some breathing space.

O'REGAN J:
(inaudible 11:24:48).

MR GALBRAITH QC:
Not at the time they were having a discussion, but it was –

WINKELMANN CJ:
(inaudible 11:24:55) future.

MR GALBRAITH QC:
In the future, yes, in the future. No, that's fair.

Now, with respect, the third agreement or the third deed of amendment, which is in that bundle at tab 4, was not a very well draft document, if I can put it as neutrally as I can. We refer to it in 107 of our submissions, it says a number of conflicting things. It's actually, if one looks at a header page, it's actually a deed of amendment, so it wasn't headed as a clarification, it was headed as a deed of amendment. It purported to put a clause 3.9 but there already was a 3.9, so it should have been 3.10, so that wasn't a particularly good start. It got the vendor and purchaser back to front in the non-waiver clause and even when you correct that I struggle to understand what that clause says and I wasn't, I'm not the only person who struggle, because when Russell McVeagh came to re-look at this in 2013 when a prospectus was going out they couldn't reconcile the non-waiver clause with the clause that we now know is 3.10 either. What they didn't pick up, neither did anybody else, until external counsel came on the scene after the dispute arose, nobody picked up that this

apparent doubt which you've heard a lot about about whether clause 4.1(d) in the royalty agreement trumps 9.7 in the agreement for sale and purchase, nobody thought of that until external counsel came up with that idea. So the doubt that my learned friend kept talking about yesterday wasn't a doubt about whether clause 4.1(d) of the royalty of agreement trumped 9.7, the doubt, as his Honour found in the High Court, was whether the good feeling and bonhomie, et cetera, which the parties had exhibited to each other, would mean that when the time came for the performance payment to fall due would LMCH be insisting upon its payment or would LMCH give breathing space to Bathurst, that was the doubt, as his Honour found, having heard all the evidence in the High Court, there was the commercial doubt. Because the problem which Bathurst had was no good triggering the performance payment and then saying on disclosure to the ASX: "Well, we don't have to tell you about the fact we're going to be in default because –

GLAZEBROOK J:
(inaudible 11:28:14)

MR GALBRAITH QC:
Well, it's the submission, comes straight from the evidence, because that's exactly what they were asking for. They needed to know that they wouldn't, that they would be given breathing space, undoubtedly, if I can put it that way, undoubtedly would be given breathing space. Because if they didn't know they were undoubtedly going to get breathing space then they did have a problem about disclosure, and that's exactly what Mr Marston was saying to Mr Hogan when he made the phone call, and both Mr Bohannan and Mr Louden gave evidence and they were cross-examined on this again and his Honour came to the conclusion that that was the issue that was in doubt at the time.

GLAZEBROOK J:
Well, it was not really in doubt in that both sides think there was breathing space, that that good relationship would continue.

MR GALBRAITH QC:

No doubt about – well, **(inaudible 11:29:40)** using the word *doubt* now.

GLAZEBROOK J:

No. So it was really saying: "Well, we've got this good relationship, this is what we think is the deal, and let's just make it clear that is the deal," and I understand that submission.

MR GALBRAITH QC:

Yes, no, that's right. And you'll find if you want –

GLAZEBROOK J:

I'm just having such trouble with this computer. If I'm making faces it's nothing to do with you, it's to do with the computer doing the oddest things.

WILLIAMS J:

This time.

MR GALBRAITH QC:

This time, I was going to say.

WINKELMANN CJ:

Fortunately it's morning teatime, so we can get somebody to fix it. So are you going to take us to some of that evidence?

MR GALBRAITH QC:

Well, I was going to take you to a document first. Shall we have the break now?

WINKELMANN CJ:

I don't mean immediately, and we will be having the break.

MR GALBRAITH QC:

Right.

WINKELMANN CJ:

I'm just seeking reassurance that you're going to take us through it.

MR GALBRAITH QC:

Yes.

WINKELMANN CJ:

And the order you choose to.

MR GALBRAITH QC:

Yes, well, are we going to have the break, your Honour? Yes, we are.

WINKELMANN CJ:

We are.

MR GALBRAITH QC:

Right, okay.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.47AM

MR GALBRAITH QC:

If I can just correct one of my misspeakings, that "scratching-around" reference I apparently said 202.0213, it should be 202.0313.

WILLIAMS J:

Can you just wait until I find my notes, please?

O'REGAN J:

Is that when you were adding to the footnote?

MR GALBRAITH QC:

Yes – no, it was somewhere…

WINKELMANN CJ:

No, it wasn't, it was earlier I think. It was when you had – Bathurst having its intentions – oh, it was about Mr Bohannan saying there had to be more than 10,000 as that could be samples, and there had to be enough to be shown whether it was just scratching around.

MR GALBRAITH QC:

Yes, that's right, not scratching around.

And the other thing which I skipped over, I've been reminded, was what I said to your Honours yesterday about – just back on shipping just for one brief moment – the financial statements and where Bathurst had acknowledged the triggering in the financial statement. It's footnote 10 are the references in our submissions, and I think I already said yesterday that in my respectful submission that it appropriate evidence and can't be so easily dismissed as the Court of Appeal did by saying, well, they might be wrong, given the process and the focus which had to be had on that because it is the basis for assessing a liability in the financial statements.

Right, back to –

WILLIAMS J:

This is footnote 10 of your subs?

MR GALBRAITH QC:

Footnote 10.

WILLIAMS J:

Right, thank you.

MR GALBRAITH QC:

So back on the third amendment. I was going to take your Honours, if you wouldn't mind, to one document which is an internal Bathurst document, but

really in a sense I think summarises the position. It's in 305, it starts at 305.1059, but it's…

WILLIAMS J:
1058?

MR GALBRAITH QC:
305.1059, but at 305.1065.

WILLIAMS J:
These are Board paper, is that…

MR GALBRAITH QC:
Yes. And what Bathurst discussing at 305.1065 is, as they say in 305.1066, "project funding solutions" because, as I already previously said to your Honours from early in 3012, Bathurst were conscious of having spent money buying these other assets, having the delay which they were having on their resource consent –

GLAZEBROOK J:
What's the date of this?

MR GALBRAITH QC:
The date of this is, it's a 2013 operating plan, it'll be the second half of 2012, be my guess. It's before the – oh, I'll show you a reference in a moment which shows it's before the third amendment was entered into.

So you'll see on that page 1065 which we started at, they're discussing their critical funding points for the Buller Coal project, and then on 1066 it's worth looking at, project funding solutions, and so their first bullet point, the coal off-take funding, with that Stemcor funding we were looking at before, but it's still up in the air. But the second bullet point is the point I've been labouring: "Revision of L&M performance payment structure – this solution has been raised previously and involves varying the original terms of the L&M

acquisition agreement deferring the timing of the first $40 million payment," so varying the terms. "This first payment is due on the first 25k shipped from the project, which under then assumption in this operating plan is August 2013," it's pushed back. "Initial discussions with Geoff Louden have proved positive, however an agreement has not yet been reached," so it's prior to the third amendment. And then if one goes across to 1067 you see again it's a table looking at the options, and the third column down is "Restructure L&M performance payments" and you'll see "US$80 million (timing only)", risk "low", indicative cost of funds moderate to high.

WINKELMANN CJ:
Sorry, where are you, Mr Galbraith?

MR GALBRAITH QC:
I'm sorry, I'm 1067, your Honour.

WINKELMANN CJ:
You don't need to apologise because it's usually one of our faults, so just take your apologies as read. 305.1067?

MR GALBRAITH QC:
Yes, third column down – across.

GLAZEBROOK J:
What are you referring to now, what comment?

MR GALBRAITH QC:
Restructure L&M performance payments, and you'll see in the second column down, "US$80 million (timing only)", and then issues, a couple of columns across: "The primary issue with this alternative is cost. At US$200 a tonne coal prices the potential funding cost for a two year deferral is 10.7%," I'll explain that in a moment. And then under "Comment": "In discussions with L&M it was always the intent to have performance payments flexible with the trade-off being a higher royalty. However this is not how the legal agreement

has been drafted. A variation deed is current being prepared." So that's really the point I was making before about the commercial relationship was expected be flexible but it wasn't what the agreement said, and so a variation deed was being drafted which of course is our –

WINKELMANN CJ:
What does "US$80 million (timing only)", what does that mean?

MR GALBRAITH QC:
It means that –

WINKELMANN CJ:
That means the only variabilities are timing?

MR GALBRAITH QC:
Yes. You've still got to pay the 80 million, and Mr Bohannan repeated that many a time under cross-examination. And you'll see on 106 –

GLAZEBROOK J:
So you accept though that at that stage everybody agreed that that was meant to be the commercial relationship, the commercial agreement?

MR GALBRAITH QC:
The commercial relationship, undoubtedly, not the legal but the commercial relationship, yes, your Honour. And they always said that Mr Loudon always said: "Look, you know, it's in our interests also."

So on 1068, just to give a little bit of explanation, you'll see the first paragraph they say, well, restructuring's a, will give us "the most leverage" if we can do it. They explain why they're in a bit of a hole at the moment and the last sentence in the first paragraph is: "This has impacted Bathurst's ability to fund the first US$40 million from its own cash flows," then sets out the royalty regime, et cetera.

In effectively the third paragraph they're discussing the deferring of the first $US40 million payment until 12 months after the second payment and simply retaining the royalty rates, but what they figure out is it equates to a pre-tax cost of funds of 10.7 and it's unlikely that cost of funds would be tax deductible. So that's not a very attractive alternative.

O'REGAN J:
Sorry, where are you referring to?

MR GALBRAITH QC:
Third paragraph in page 1068, starts: "Preliminary analysis using the parameters and assumptions of the operating plan indicates the following."

O'REGAN J:
Because further down it says it will be tax deductible but that's presumably what –

GLAZEBROOK J:
That's borrowing it immediately, paying and borrowing back.

MR GALBRAITH QC:
That's if they borrow and get a loan from L&M. So all of these things were on the table at the time and what happened was Mr Marston rang – well, as the previous page shows, the agreement was meant to be being drafted that was going to give the deferment and that's agreement that we've now got drawn by Ms McArthur. But the context of what they were looking for is blindingly clear and it was confirmed by the witnesses and that's what his Honour, Justice Dobson, found in his judgment and you'll find the discussion in his judgment, starts at paragraph 114 in his conclusions through to 129.

WILLIAMS J:
Just give me those numbers again, please.

MR GALBRAITH QC:

114. Well, actually it goes beyond 129, sorry. 147. And he –

WILLIAMS J:

114 to 147?

MR GALBRAITH QC:

Yes, and he traverses all the evidence so it's probably the shortest way for your Honours to see the evidence by reference to that.

WINKELMANN CJ:

Do you want to give us potted highlights because it's a critical part of your argument, I think.

MR GALBRAITH QC:

Well, what he accepts is really what I've just been saying to your Honours that the context was that there was a good working relationship between the parties. It obviously wasn't in L&M's interests to put Bathurst through and so the difference he says between what Bathurst's submission was and what L&M's submission was is really highlighted in paragraph 124 of his judgment where he says: "I find that prior to completion of the third amendment, the position was not that L&M *could not* cite non-payment of the first performance payment as a default … once it was due, but rather that L&M *would not* do so. I am satisfied that the effect of the dialogue between Messrs Loudon and Bohannan prior to the addition of clause 3.10 was that L&M would not rely on any breach of Bathurst's payment obligation to treat Bathurst as being in default," and you can see in those documents I took you to that they're thinking about a 12-month – a 12-month deferment is what Bathurst is thinking about. They're certainly not thinking about the 40 million and potentially the 80 million disappearing, particularly the 40 million which is something that was being anticipated to be already due which was why there was the funding problem.

WINKELMANN CJ:

I think paragraph 122 is probably the critical one in terms of the review of Bathurst's evidence.

MR GALBRAITH QC:

Yes, he accepts – yes. And you will see that paragraph 127 is referring to that document I just took your Honours to. That's that extract that I referred to, and in 128 he says that: "Bathurst's submissions characterise this statement is confirming the third amendment was only a clarification of the pre-existing position. However I interpret it as reflecting a change to the formal commitments as legally recorded so as to accord within formal assurances that were a feature of the co-operative attitude between the parties at the time, and in 129 he's satisfied that the contractual rights were altered.

WINKELMANN CJ:

And what do you say about why did they use the language of clarification in the deed?

MR GALBRAITH QC:

That's a very good – well, it –

GLAZEBROOK J:

Well, they were clarifying the commercial relationship I suppose is what you'd say, yes.

MR GALBRAITH QC:

Yes, it clarified the difference between the commercial arrangements which, and the, what were the legal arrangements, so clarified that, and that's what they wanted clarified.

GLAZEBROOK J:

So I suppose a better way of putting it is they were making the legal relationship accord with what they both understood was the commercial agreement.

MR GALBRAITH QC:

Yes, I think that's fairly put, your Honour.

ELLEN FRANCE J:

Isn't that arguably consistent with the no-waiver idea?

MR GALBRAITH QC:

Yes, I think – consistent or inconsistent, your Honour?

ELLEN FRANCE J:

Consistent.

MR GALBRAITH QC:

Consistent, yes, I think it is. Because the idea was you satisfied what my learned friend called the "proviso" or otherwise line 7 kicks in.

WINKELMANN CJ:

Sorry, can you just repeat that?

MR GALBRAITH QC:

Either you satisfy the continuing to pay royalties or, if you don't, then the entitlement which L&M has under 9.7 kicks in and they can recover the 40 million.

O'REGAN J:

What do you say to the Court of Appeal's view that there was still a, it left open the possibility of just suing for a debt?

MR GALBRAITH QC:

Well, we had that argument obvious in the Court of Appeal, it was pursued by Justice Gilbert in particular. If I can perhaps answer it this way, that wasn't the way L&M treated the position. So L&M's position was when L&M believed that the 25,000 had been triggered by the coal being sold to Holcim, L&M accepted the payments of royalties which continued while they continued to pay coal to Holcim, and it wasn't until that stopped that there was difficulty

then arose, the dispute then arose. So I think, I'd certainly say fairly L&M would have been, I don't know whether one says generous, they would have been consistent perhaps one would say with the relationship, Sir, I don't think they would have taken that point, but Justice Gilbert certainly took the point, and then we spent some time on it.

So in our submission this is where context is relevant and –

WINKELMANN CJ:
But what do you mean by that, sorry, Mr Galbraith? Are you saying that L&M concedes that they could not enforce while the royalties were being paid, as you say?

MR GALBRAITH QC:
Yes…

WINKELMANN CJ:
Or was that then, was that simply L&M's commercial position?

MR GALBRAITH QC:
No, L&M could not enforce under clause 3.10. But –

WILLIAMS J:
While some royalties were being paid?

MR GALBRAITH QC:
Yes, and we can discuss what that was.

WILLIAMS J:
That might mean.

MR GALBRAITH QC:
Yes. And they were certainly happy with the royalties that were being paid while they were being paid, that was fine, but no royalties isn't some royalties, so at least that division I think is reasonably stark. Where you get to whether

it's one or 10 is another issue. Which is why we say that some help to the Court can be obtained from clause 8.1 of the royalty agreement read with the definition of "gross royalties" which says it doesn't matter whether they're profitable or unprofitable, "uneconomic" I think is the term used.

ELLEN FRANCE J:
Where's that, sorry?

WINKELMANN CJ:
What clause, sorry?

GLAZEBROOK J:
The royalty deed.

MR GALBRAITH QC:
The royalty deed…

ELLEN FRANCE J:
Yes, no, no, I just wondered what the clause was.

MR GALBRAITH QC:
The definition section.

WINKELMANN CJ:
Clause 6.1, did you say?

MR GALBRAITH QC:
8.1.

GLAZEBROOK J:
I think we're trying to get the royalty deed up again so you probably need to give us the numbers because I had it yesterday but I'm not entirely sure that it's still up there.

MR GALBRAITH QC:

It's in that bundle we handed up, your Honour.

GLAZEBROOK J:

I'd sort of prefer to either be all electronic or all…

WINKELMANN CJ:

We're trying to make the transition, Mr Galbraith.

GLAZEBROOK J:

We're trying to…

WINKELMANN CJ:

It's an evolutionary moment of the Court.

ELLEN FRANCE J:

So did you mean the – you said the definition of "gross royalties".

GLAZEBROOK J:

Yes.

WILLIAMS J:

You don't mean gross sales revenue?

MR GALBRAITH QC:

Gross sales revenue, sorry, is it? Yes, sorry. It's gross sales revenue which is what the royalties are payable on, the definition of regardless of whether or not mining is profitable, and 8.1 is the one about (a) is complying with the mining permit requirements which actually say you are meant to mine but Bathurst persuaded the Ministry that there'd been enough of a work programme undertaken so that they weren't in breach of that and then (b) is "conduct mining operations in accordance with good mining practice", and that I agree is about how you do it, but the second part of 8.1(b) is, "and with a view to maximisation of coal sales at the best available price," and in my respectful submission that does link to or give rise to an obligation that you've

got to be conducting mining operations with a view to maximising the coal sales at the price which is the best price which is available. If there's no price available, well, that's an interesting issue. But provided there are prices available, and I cross-examined Mr Tacon on the basis that there'll always be a spot price available, and Mr Tacon and I had some disagreement over that, but if one goes back to the gross sales revenue definition it's not simply a question of whether it's profitable or not profitable, and we did submit, and I still would argue, that the conjunction of those two provisions is a possible, no, is a sensible, I should say, rather than possible, is a sensible, minimal, minimum royalty provision. The problem that there would be in drafting what would be a traditional minimal or minimum royalty provision is that this was being entered in 2010. They had a lot of hoops to jump through before they would start production. To try and be precise about you've got to pay more than X or you've got to mine more than Y this far out didn't make sense, but certainly the royalty deed does provide an obligation to conduct mining operations so that sales can be maximised and it does say that the sales revenue isn't related to whether it's profitable or not. So in that way, in my respectful submission, this was a form of minimum either mining undertaken or minimum royalty obligation.

O'REGAN J:

So are you saying they are in breach of that now, they're in breach of the royalty deed?

MR GALBRAITH QC:

Yes.

O'REGAN J:

Have you taken enforcive action?

MR GALBRAITH QC:

No. Well, two courts didn't agree with this.

GLAZEBROOK J:

Can I just take you back because let's assume there's no third amendment, so this would mean that you say there's no third amendment at all and they get to the stage where the prices have collapsed altogether. They haven't taken any out of the ground whatsoever. You're saying actually they were obliged to take coal out of the ground whatever the prices were so they couldn't decide, no matter the changes that might have occurred, it was not possible for them to decide they weren't taking anything out of the ground because if you're right this had to apply whether there was a third amendment or not.

MR GALBRAITH QC:

Yes, this would've applied whether there was a third amendment or not. But two things: one is that the prices never disappeared so they couldn't sell anything, because they sold to Holcim and they could have sold –

GLAZEBROOK J:

No, I understand that, but let's just assume that there was going to be nothing profitable about getting this out of the ground at all. You say they're just obliged to do it anyway, and how long are they obliged to do it? Are they obliged to…

MR GALBRAITH QC:

Well, it would all depend on the facts. I mean, the practical thing is that –

GLAZEBROOK J:

Well, isn't that usually why you'd have quite precise things in these agreements if that's what you mean?

MR GALBRAITH QC:

Well, yes. I mean, usually, no argument about that, usually you would. But you don't often – well, start again, I don't want to give evidence from the Bar. But how often do you get situations where you're going to a greenfields to start up umpteen years in advance. I mean, most of the time, I suspect, when you have leases of mines you have an operating mine that is being leased I

would have thought was the – and that's what I was just going to say, that my learned friend quite properly, Mr Tacon in re-examination said: “Well, have you ever seen a minimum requirement like this?” and Mr Tacon said: “No,” and he probably hasn’t. But my friend hadn’t laid the foundation of: “Have you had experience of a situation where you’ve got a green,” well, when I say a “greenfields” it’s a “brownfields”, “situation and a mine not going to be getting up and going for two or three years?” so I don’t know if he had experience of that.

GLAZEBROOK J:

But isn’t the answer to that or a possible answer to that the commercial incentives in the agreement itself were designed to ensure that you did keep on mining and the commercial incentives were designed so that you did pay the performance payments because otherwise you were stuck with a higher royalty?

MR GALBRAITH QC:

Yes, provided. But that only works if you keep on mining, if you don’t keep on –

O’REGAN J:

Yes, but what you're saying is that the royalty deed meant you had to mine…

MR GALBRAITH QC:

Well, that’s what it says, Sir.

O’REGAN J:

And if you had to mine by definition you would have had to trigger the $40 million payments. So you're saying they didn’t have any choice, Bathurst, they bought an asset but they didn’t control how it was used, they had to do what L&M wanted?

MR GALBRAITH QC:

No, no, they didn't have to do what L&M wanted, they simply had to mine, Sir. And so the argument hasn't succeeded in two Courts, so I'm not…

O'REGAN J:

I mean, it does seem a bit far-fetched to say that the royalty deed meant that no matter how uneconomic it was or how broke Bathurst was they had to develop a mine.

MR GALBRAITH QC:

Well, a couple of things, Sir. If they don't have some obligation to mine it could be profitable – let's not get carried away saying "hugely profitable" – it could be profitable, and they can simply, as they've chosen here, go and mine something else. And so you simply sit there and whistle for your royalties, forgetting about the performance payments, and…

O'REGAN J:

But if you want to ensure that you put a clause in saying you have to mine.

MR GALBRAITH QC:

Well…

WILLIAMS J:

Or you succeed.

O'REGAN J:

I mean, this is an incredibly oblique way of achieving that result, isn't it?

MR GALBRAITH QC:

I'm not disagreeing with your Honour, all I'm saying is that you can read 8.1(b) as imposing an obligation, because if there isn't an obligation then you end in the situation I was talking about.

WINKELMANN CJ:

Well, on its plain reading it is actually an obligation to mine and to maximise coal sales, mine in a way to maximise coal sales at the best available price.

MR GALBRAITH QC:

Yes.

WINKELMANN CJ:

But the resistance you are facing is the implications of that, which is it's an incredibly lengthy agreement and Bathurst is committing to mine through extremely bad times and good.

MR GALBRAITH QC:

Yes.

WINKELMANN CJ:

What about that, though, in terms of how people saw the markets back in 2010, because it very hard to remember what the world of coal was like in 2010. I mean, did it seem possible that you would be mining something which was so easy to mine on their assessment in an unprofitable way?

MR GALBRAITH QC:

No, it didn't look like that, because that's why the feasibility study said things are, it's feasible at this range of prices. But, well, I understand that the resistance to the thought that you might be mining when you're not making any money, I perfectly understand that. But the actual answer in this relationship was the answer Mr Bohannan gave several times: "We were talking, we had good faith," it's the same as the deferment on the 40 million, we wouldn't have got to that, unfortunately, when Bathurst went off to Stockton, that was the end of the good relationship. But there'd been a good relationship through the whole previous umpteen years.

O'REGAN J:

But on your case, even if they had paid all the performance payments they would under the royalty deed have had to keep mining to generate royalty revenue until they had exhausted the entire licence area.

MR GALBRAITH QC:

If that interpretation was accept which I quite clearly see your Honour's not accepting and that's fine. Look, I understand. I'm not…

WINKELMANN CJ:

So you're saying something like what Mr Hodder said really which is that this was a commercial relationship where they both had an interest. He's absolutely declined and eschewed any kind of a notion of a joint venture but it was something where they had an interest in working together to make it profitable.

MR GALBRAITH QC:

Yes, there's no doubt about that. But the circumstances in which the – and L&M weren't saying that to Bathurst to the time that they were negotiating on the third amendment. They were saying on the third amendment that if Bathurst has a problem about raising the money which it needs for further development and to pay the 40 million royalty payment then sure, Bathurst can have time provided they keep paying royalties, and so we come back to the text of the third amendment which if you're Bathurst you put your emphasis on the words "relevant –

O'REGAN J:

Royalty payments.

MR GALBRAITH QC:

– royalty payments" and if you're L&M you put your emphasis on the "continue to make" – well, let's get the precise words so…

O'REGAN J:

The word "continue" is what you rely on, isn't it?

MR GALBRAITH QC:

Well, the continuation is obviously the important word and linked with the "for so long as". "For so long as the relevant royalty payments continue to be made under the royalty deed," and as we've said in our submissions "continue" doesn't mean stop/start. Continue means the continuation, if you take my learned friend's literal meanings, I've checked the dictionaries and that's what they say. So if you're doing something you continue doing it and that doesn't mean you stop doing it. So it's for so long as these payments continue to be made under the royalty deed. Now if you interpret the Bathurst way, of course, all it means is – well, I'm not sure quite what it means, to be fair.

GLAZEBROOK J:

I think it just means you continue to make whatever you're obliged to make. That's my understanding of the argument, what you're obliged to make under the royalty deed.

MR GALBRAITH QC:

Yes, which you already were, of course, because you'd signed the royalty deed, so…

GLAZEBROOK J:

Well, you could be in breach of the royalty deed and then –

MR GALBRAITH QC:

You could be in breach of the royalty deed.

GLAZEBROOK J:

– and then of course 9.7 at that stage comes in, not just on the breach of the royalty deed but actually on the breach of the performance.

MR GALBRAITH QC:

Yes. You could be doubly in breach, put it that way.

GLAZEBROOK J:

That's right, exactly. Well, I think that's what it says, that's what the intention is, that as soon as you breach the royalty deed you – so even assuming you're continuing to pay as soon as you breach the royalty deed then you land up with 9.7 for a breach of the performance because that comes due again.

MR GALBRAITH QC:

Yes, and so I mean really our position is relatively simple is that the words say what they say and it's very hard to interpret "for so long as" and "continue to be made" as being, well, something may happen 13 years or 20 years or may never happen in the future because that is the effect, as my learned friend has fairly conceded now. It wasn't a concession that was made I don't think in the courts below but in any event it's now conceded.

WINKELMANN CJ:

What are you saying Mr Hodder has conceded, Mr Galbraith?

MR GALBRAITH QC:

I'm sorry?

WINKELMANN CJ:

What are you saying Mr Hodder has conceded?

MR GALBRAITH QC:

Well, I think my learned friend has conceded that it may mean that there may never be royalty payments made ever because Bathurst may simply choose not ever to mine again, full stop. So you have a $40 million debt, because it is a debt, it accrues under the performance payments, which Bathurst may simply choose because it chooses never to mine chooses never to pay, and as his Honour, Justice Williams, said, there's no obligation at the end date to catch up and pay the 40 million. So it just goes off into the never-never and

while the concession which is made in the reply submission says, well, that may happen because you get a Green government, it doesn't actually say Green government, but you get a government in opposed to mining and therefore they can't mine, the fact of it is on the argument Bathurst could simply choose not to mine and, as I think I said yesterday, could in fact have incurred both lots of $40 million and simply choose to stop then because there's a better deal out there. So it's a very odd consideration, or it would be a very odd consequence of a situation that was intended to clarify, if that's the right word, or confirm a friendly commercial arrangement between the parties that ends up with one party gets away with 40 million or 80 million that it otherwise owes for no ongoing, in a practical sense, no ongoing benefit other than it says it will in the future comply with what it already has to comply with.

O'REGAN J:
What do you say they had to do to comply with the "for so long as"?

MR GALBRAITH QC:
I'm sorry, your Honour?

O'REGAN J:
What did they have to do to comply with the "for so long as" proviso?

MR GALBRAITH QC:
Because this is going to come up at the time that a performance payment is due, because that's the prompt for this, then they're going to have to continue to pay royalty payments. Those royalty payments are what it boils down to.

GLAZEBROOK J:
Which ones though?

MR GALBRAITH QC:
The ones that they've been paying that trigger the –

GLAZEBROOK J:

So they've got to pay the same – how do they calculate that? Because that's going to fluctuate as well, isn't it?

MR GALBRAITH QC:

Well, nobody's going to argue that it's got to be a precise dollar, but they've got to pay royalty payments from those actions, those sales, which comply with the 25,000 tonnes of the million tonnes, it won't be hard to identify what those are.

GLAZEBROOK J:

Well, that's what I was asking, how would this be worded?

MR GALBRAITH QC:

Oh…

GLAZEBROOK J:

Because there was the 25,000 tonnes could have been one tonne, three tonnes, seven tonnes, four, over a relatively long period, couldn't it?

MR GALBRAITH QC:

Well, it could.

GLAZEBROOK J:

With relatively different prices.

MR GALBRAITH QC:

It could. But in the particular situation here we know what it was, it was domestic sales running at, projected to run at about 90-odd thousand a year, a hundred thousand a year, in fact they ran at less than that because Holcim went out of business. But it wouldn't be hard to identify the character of the payments which here have in fact triggered the performance payment obligation.

WINKELMANN CJ:

So it's a similar level of production is what you're talking about?

MR GALBRAITH QC:

Yes.

WINKELMANN CJ:

Not royalty payments but a similar level of production.

MR GALBRAITH QC:

Well, it's the production which…

WINKELMANN CJ:

So you don't say that, you do say that you have to read in some sort of bare minimum, you can't just leave it so long as they're paying any kind of royalty payment?

MR GALBRAITH QC:

Well, I mean, it could end up being argument, there's no argument about it could end up being an argument, I can understand that, but –

O'REGAN J:

Well, where we were left by the Court of Appeal it just had to be reasonable, but they specifically said they didn't know what that was.

MR GALBRAITH QC:

No.

O'REGAN J:

And it seems to me, if you're going to interpret the clause you've got to say what it means and say what did have to happen to avoid the non-compliance that you say has occurred.

MR GALBRAITH QC:

Well, I'm not, with respect, Sir, I'm not sure that one does have to for the purpose of the particular claim which is before you. Because, as I said before, what happened was L&M accepted mining continued, Holcim was supplied, there could have been an alternative of going to other industrial users, Fonterra, or whoever else it might have been, or Golden Bay Cement, which they did in fact put a tender in for. So while that mining was being undertaken and while those industrial users or Holcim was being supplied, no quarrel, L&M accepted that. What they didn't accept was no royalties, well, other than from a stockpile, and we would say that's not of the character – I'm not sure, with respect, on our debt claim that one has to identify precisely where the how many stones make a heap starts and stops, because that will depend on the facts, I would, with respect, suggest, and the facts we know at the moment is they were doing this and they stopped doing anything, and that's got to be outside the parameters of, we would say, sorry, got to be outside the parameters of what this third amendment was about. Now, as I say, quite where the line –

O'REGAN J:

Well, I mean, if they'd started selling 50,000 tonnes instead of a hundred thousand tonnes, would you say they would have been in breach of the proviso or not?

MR GALBRAITH QC:

I don't…

O'REGAN J:

Well, there is a how long is a piece of string here, isn't there?

MR GALBRAITH QC:

Well, that's what I said, I mean, I agree with you, Sir.

O'REGAN J:

I mean, what if it had been 10, what if it had been five?

MR GALBRAITH QC:

Yes, I know, but in a claim all the Court has to be satisfied with is whatever the facts around the claim is in breach or not in breach. I don't think –

O'REGAN J:

Yes, but in breach of what? That's what I'm asking.

MR GALBRAITH QC:

Well, in breach of the obligations under the clause.

O'REGAN J:

But that's just taking me round to where I started from. What I'm asking is what is the obligation.

MR GALBRAITH QC:

Well, the obligation to – they've got to continue payments. While they do that they can maintain the deferment. Once they stop making payments they can't, and they've stopped making payments. It's not that they've produced payments of 50,000, I'm sorry, subject to the stockpile, but they've stopped making payments which were required to continue to be made.

WINKELMANN CJ:

So your point is whatever the level is they've stopped making it?

MR GALBRAITH QC:

Yes, that's all I'm saying.

WINKELMANN CJ:

And Justice O'Regan's point is, isn't it, to give it that meaning makes it an obligation which is basically void for uncertainty is his point.

MR GALBRAITH QC:

Well, if it's void for uncertainty then L&M wins, of course, which I think is the point the Court of Appeal might have made, because then the third amendment doesn't come in. So…

GLAZEBROOK J:

Well, they just don't interpret it to make it void for uncertainty and that would be a principle of interpretation.

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

Implied term might be different.

MR GALBRAITH QC:

Yes, implied term would be different.

GLAZEBROOK J:

And so we're not at that stage yet.

MR GALBRAITH QC:

No. Mr Kalderimis will –

GLAZEBROOK J:

But you wouldn't interpret something to make it void for uncertainty. You'd interpret it in a different way, wouldn't you?

MR GALBRAITH QC:

I would expect so.

GLAZEBROOK J:

Yes.

MR GALBRAITH QC:

But for the purpose of the actual claim, it is a claim based on that they are not paying any royalty payments. I know there's the trickle from the stockpile and that, I would say, in answer to his Honour, Justice O'Regan, is outside what's objectively intended by this because otherwise what do you do? You'd simply

stick a, well, in fact, what they've done, stick a stockpile there and twiddle out a few barrow loads every three months.

WINKELMANN CJ:
Do you want to concede that you wouldn't interpret it in a way to make it void for uncertainty because isn't it really the essence of your argument that what they were doing, he was making commercial accommodations based on an understanding about how things were going to go, which was a pretty vague but sort of friendly kind of accommodation?

MR GALBRAITH QC:
That's an absolutely fair point that your Honour makes because that is the other context in which this has to be interpreted, that this was for the purpose of an accommodation where they were trying to achieve legally what they were otherwise achieving through, say, good faith or good relationships, and so it shouldn't be interpreted as being something that can be – the benefit of which can be obtained by what one might say is a breach of that relationship which –

WINKELMANN CJ:
So what you're saying is that that notion of give and take accommodation is critical context to how one comes to construe this?

MR GALBRAITH QC:
Yes, and that's what Mr Bohannan said all along even, that we're always give and take and he said that 40 million didn't disappear, liability didn't disappear. Of course it didn't. Well, it would be a very strange way of it disappearing.

Perhaps just note in our written submission, there was a submission made by my learned friend rather briefly that that *Rock Advertising* case in some way meant that the entire agreement clause applied to 3.10. We've set out in footnote 249 extracts from *Rock Advertising*. I must confess I'm not sure whether Sir Andrew said anything about that but I do have some sympathy for

the Australian Judge who said the reasoning in that isn't too persuasive, but in any event it's a decision of the House of Lords and –

WILLIAMS J:
Where in your submissions, sorry?

MR GALBRAITH QC:
This is paragraph 126 of our submissions and footnote 249, Sir, and what was acknowledged in *Rock Advertising* was while the "no oral variation" clause might affect the – the clauses don't "purport to bind the parties as to their future conduct, they leave the scope and procedure for subsequent variation entirely unaffected," talking about entire agreement clauses, they're not oral variation clauses. So that's why we say in 126 the Court is able to interpret the contractual words "in their proper context", and of course when you have the words about clarity and doubt used in the clause 3.10, the Court must always be able to find out what the doubt was and, as I said yesterday, there is absolutely nothing that suggests the doubt was about 9.7 versus 4.1(d), that was a latter day revelation.

The other matter which my learned friend passed over very quickly yesterday was the suggestion that the subsequent discussions in 2013 hadn't been ignored by the Court of Appeal and some weight, I took from what he was saying, should be given to those. We deal with it at paragraph 127 on. The short point is nothing really comes out of it other than takes us back to the words of 3.10, they were just more, it's just a re-casting of the words in 3.10, and in 129, for example, we set out what Mr Clarke, who was the Russell McVeagh lawyer who was most directly involved, said, simply that "BRL can delay a payment provided we keep making the royalty payments" and that was the common sense of the way that all the parties looked at what they were discussing, both in the 2012 and in 2013, that provided the royalty payments are being made then L&M aren't losing out on anything, they're getting paid effectively interest, as Mr Bohannan, said, on vendor finance, and there's no consideration by the parties of anything else in either 2012 or 2013 or, in the words of the prospectus and it was also confirmed, that nobody was

thinking at the time that Bathurst might start mining, trigger a performance payment, and then stop, and certainly nobody was thinking at the time that Bathurst might do all that and go off and effectively use the money to buy another mine and mine that rather than the L&M assets.

WINKELMANN CJ:

And you make a point in relation to how the higher royalty payment situation is used within the royalty deed as a mechanism for incentivising certain payments, certain behaviour?

MR GALBRAITH QC:

Yes. But incentivises, because it's very clear and one can quickly do the maths and see that paying 10% royalty for any period of time is undesirable from the miners' point of view and so the incentive is meant to be there for, well, the incentive that was intended by that structuring was to ensure that the performance payments were paid at the earliest possible time, and that's really what that document I took your Honours to effectively says, that it's a high cost, and so one wants to mitigate it by paying the performance payment. You get a perverse incentive, of course, on Bathurst's interpretation now because what you've got is that rather than pay royalty payments, which gives the incentive to pay the performance payments, Bathurst do much better to look around and see if they can find another prospect to spend the $40 million on where they don't have to pay such high royalty payments, which in effect is what they've done, they've gone off and bought Stockton. So they've leveraged themselves off the L&M assets and the other assets they acquired to invest in a different mine where they're not paying royalties – well, they will be paying royalties to the Crown but they're not paying royalties to a vendor – though in fact there was a contingent payment obligation in the transaction with the Stockton purchase where there could be contingent payments up to, I think, $50 million provided the coal price was above US150 million for a shortish period of time, two or three years, I think I've got that right.

WILLIAMS J:

Yes, that's right.

O'REGAN J:

Why does that help us, though?

MR GALBRAITH QC:

Oh, I'm just saying that – well, because I was saying, Sir, that you go off somewhere else and it's cheaper, I'm just being fair to say that there was a cost.

O'REGAN J:

There was a royalty if it was.

MR GALBRAITH QC:

There was a royalty in it. But perhaps just also to note, that was a contingent payment, the same as we've got contingent payments here, and nobody's suggesting that that imposed some sort of semi or quasi joint venture obligations on Bathurst's with the liquidators or receivers.

GLAZEBROOK J:

Can I, I mean, isn't the issue that the parties at the time thought that the commercial incentives would be enough for these to be paid? It didn't occur to them that what you could do to avoid them is find another asset, probably because at that stage there may not have been absolutely clear other assets that were even in contemplation, well, at least at a price that would make that actually commercially…

MR GALBRAITH QC:

Yes, no…

GLAZEBROOK J:

And so what it is is that this is something that nobody has thought of. If they had thought of it they may have said: "Well, if you do go off and buy something else you've got to mine both of them to actually have a positive mining obligation in there," but only contingently on: "Mine this first, don't go off and buy something else."

MR GALBRAITH QC:

Yes, and…

GLAZEBROOK J:

And can we, aside from a good faith-type obligation or alternatively the discretion argument you've got, actually do that via interpretation, can we fix up the commercial bargain that was made on the basis of not anticipating the situation ever arising by interpretation ramifications?

MR GALBRAITH QC:

Well, your Honour's absolutely correct, the situation wasn't anticipated, the evidence is all that, and if it had been the of course something else would have been said. But my respectful submission is that you don't have to fix it up, you can simply apply an interpretation consistent with that incentive objective that your Honour's spoken about, because the incentive only applies if in fact there is mining and royalties are being paid, then the incentive does apply, the 10%, and that's the purpose of continuing the, requiring the continuation of the royalty at the higher rate.

WILLIAMS J:

There's a certain kind of unreality about that though, isn't there? I think they were mining 55,000 tonnes a year, for Holcim?

MR GALBRAITH QC:

Well, the operational plan, Sir, has showed 90-odd for the..

WILLIAMS J:

Yes, but they didn't get there, did they? From memory it was 55, but it doesn't make…

MR GALBRAITH QC:

Well, they didn't get there because what happened was by then that there was a bright light on the horizon and –

WILLIAMS J:

Right, but if your argument is really you comply if you produce and sell at the same magnitude, then you're talking about, I think, 55,000, but the number doesn't matter so much. But if it was, that's a 263-year obligation on 14 and a half million tonnes of coal across these two permits, that's just, doesn't make a lot of sense.

MR GALBRAITH QC:

No, I don't think that's right, Sir, you've lost me on that one.

WILLIAMS J:

Well, the two mines, Deep Creek and Escarpment, had 14 and a half million tonnes of recoverable coal in them, according to the documents, and at 50,000 tonnes a year that's 263 years according to my calculator, but I could be wrong.

MR GALBRAITH QC:

That may well be right, but that's, with great respect, Sir, the situation is or was that at the time they entered into the contract the expectation was that they'd be mining an awful lot more than that.

WILLIAMS J:

Sure, but you're implying a term and the term is…

MR GALBRAITH QC:

No, I'm not implying a term.

WILLIAMS J:

Well, sorry, you're interpreting the – it probably doesn't matter in terms of the substance – you're interpreting the contract or implying a term to the effect that you've got to keep doing what you were doing, which according to –

MR GALBRAITH QC:

No, all we're simply saying, Sir, is "for so long as continues" means what it says, and so we're not implying any term, we're simply saying that if you –

WILLIAMS J:

I'm talking about the substance really, I don't…

MR GALBRAITH QC:

Yes, all right. But if you've been doing something then you've got to keep doing it. Now, but the –

WILLIAMS J:

The path doesn't matter. Right, so we're at 50,000 tonnes?

WINKELMANN CJ:

Or else pay the 40 million.

MR GALBRAITH QC:

I'm sorry?

WINKELMANN CJ:

Or else pay the 40 million.

WILLIAMS J:

Right.

MR GALBRAITH QC:

Or else pay the 40 million, that's got the choice.

WILLIAMS J:

Sure. But the alternative is –

MR GALBRAITH QC:

No, but that's not what's going to happen in…

WILLIAMS J:

– dig up 50,000 every year until you run out of coal.

MR GALBRAITH QC:

No, with great respect, your Honour, that's not practically what's going to happen.

WILLIAMS J:

No. That's my point, yes. Seems a little silly really.

MR GALBRAITH QC:

Yes, well, that's right, I agree.

WILLIAMS J:

As an implied term.

MR GALBRAITH QC:

Well, it's not silly in terms of the incentive because the incentive applies, and I mean that could happen, Sir, whether or not, I mean, after performance payments are all gone or whatever. But the belief that the parties have is that at some stage or other this was going to be a viable mining operation and the 24,000, as I was saying, was simply so that they weren't just scratching the surface. It wasn't meant to pay for anything, the 24,000. It was just a sign that they'd got up and got going.

WINKELMANN CJ:

So just to go back to the point you made just before Justice Williams' question, you're saying that when you interpret this contract, this amendment, you still interpret within the overall commercial structure of this transaction.

MR GALBRAITH QC:

Yes.

WINKELMANN CJ:

The commercial structure of this transaction was to incentivise the payment of the principal amount?

MR GALBRAITH QC:

Yes.

WINKELMANN CJ:

And there's nothing in that variation which suggests that it was a departure from that fundamental intent?

MR GALBRAITH QC:

Yes, that's it in a nutshell, your Honour, and unless the Court has any other questions on that, I think it's probably all I can usefully say.

WINKELMANN CJ:

Thank you, Mr Galbraith.

GLAZEBROOK J:

Are you not dealing with the…

WINKELMANN CJ:

No, Mr Kalderimis is.

MR GALBRAITH QC:

Unless – no, I'm not going to encourage your Honour to ask me questions on the law, so I'll –

WINKELMANN CJ:

We don't want you dealing with Mr Kalderimis' part, thanks, Mr Galbraith, not when he's done all that work to prepare.

MR KALDERIMIS:

Your Honours, I might take you to the road map that my learned friend handed up at the beginning of today just to orient where we are, and all I'm going to refer to to start with is the diagram at the top.

WINKELMANN CJ:

So this is really your road map, is it, Mr Kalderimis?

MR KALDERIMIS:

It's a joint road map so that it covers all of the issues.

WINKELMANN CJ:

It's just that Mr Galbraith did not one time refer to it. That's all right.

MR KALDERIMIS:

That is not an untrue observation. If we look at the diagram at the top, you can see the four issues that the Court has to decide and we've looked at issues 1 and 2, and there's an overlap between issues 2 and 3 which is why they appear in the diagram in the same place, and then issue 4, the proper purposes issue, arises separately.

What I wanted to say about the posture or context of issues 2 and 3 is that we've depicted them there as if suspended by a hook because that is where we will be if LMCH succeeds on issue 1. If it succeeds on issue 1 then the performance payment has been triggered, and I'll come on to briefly discuss, but that is despite the doubt issue that's been raised. Plainly a debt then that but for clause 3.10 is due and owing and enforceable under clause 9.7. But as my learned friend, Mr Galbraith, accepted, LMCH's position despite the tempting suggestion of his Honour, Justice Gilbert, is that for so long as clause 3.10 remains engaged LMCH accepts that the debt that is otherwise due and owing cannot be suitable. So we depict that as a suspension of that debt, that weight, by a hook, and so this part of the submission on the implied term is about, as the latter part of my learned friend, Mr Galbraith's submission on the interpretation of 3.10 was about, is about whether that

suspension still holds, and the reason I say that at the outset is because it's easy to lose sight of the fact that this is a limited argument about whether the suspension holds and to move more broadly into an argument over whether clause 8 of the royalty deed, for instance, imposes an ongoing mining operation, and we see some of that shift in my learned friend, Mr Hodder's, submissions where there are objections to the interpretation of clause 3.10 and the implied term on the basis that it can't be right that BRL has an ongoing mining obligation.

But what I want to say is let's leave that aside. That is not the argument. The argument on issues 2 and 3 is irrespective of whether BRL has an ongoing mining obligation under clause 8 there is something it needs to do in order to keep the suspension engaged and that has satisfied the proviso. And that's what the argument is about. Is it doing what was agreed, either by way of an express term or by implication, to satisfy that proviso?

Now I want to make two legal observations before diving in, as it were, to the detail, and as I dive into that detail I want to note up front that I'm conscious of the questions from his Honour, Justice O'Regan, and his Honour, Justice Williams, and more generally about the formulation of the implied term, what it is, how you describe it, how you describe it fairly, and I will get to that because I understand the importance of that. But I want to do that in a structured way and the two legal observations I want to make are, firstly, to remind the Court about the *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56, [2012] SLT 205 case which is an interesting entrée, as it were, to this sort of situation. I won't take your Honours to it. It's at the respondent's authorities, tab 2, and it's a well known case of the Supreme Court that was dealing with an appeal from Scotland, and Lord Hope gave the leading judgment and Lord Clarke gave a concurring judgment and everyone else agreed, and in that case the issue was whether the base figure for a deferred uplift in a purchase price in the case of the subsequent sale of land to be developed was to be calculated on an open market basis or not. The council has sold it to a developer, the developer then on-sold it to an in-group company in a related transaction and when you looked at the clause there

were three different ways that the parties had anticipated that an uplift might be triggered and in two of the ways it expressly said you have to calculate the uplift on the basis of an open market transaction but in the case of a disposal by sale it didn't have the words "open market". Now Lord Hope in his judgment said: "Well, I understand that and I understand the arguments that I cannot read 'disposal by sale' as still requiring an open market requirement because it doesn't expressly say that, but that doesn't seem real to me and so I do interpret it in this way," and Lord Clarke in his concurring judgment said: "Well, I understand what Lord Hope has to say and I do agree with that but I would prefer to explain the right outcome on the basis of an implied term," and so there are cases where, depending on how you read the gestalt, you will apprehend that you can interpret the words in a particular way and here you'd be interpreting the phrase "for so long as the relevant royalty payments continue to be made" and you would be saying by way of interpretation that means "royalty payments from ongoing mining" which is what triggered the payments in the first place.

But equally, you could see it that this is really more the case in implied term and if you look at our pleadings we have expressly said, and I won't take you to them but it's paragraph 34, that we're arguing this in the alternative. We say when you look at clause 3.10 either by way of an express interpretation or by way of an implied term the answer is clear. And, lest it be thought that Lord Hope's judgment is obviously at the extreme of what is permitted and should be doubted, I wanted to note that in *Arnold v Britton* of all case, and in Lord Neuberger's list of principles in all places, Lord Neuberger takes time and care to single out *Aberdeen*, not for criticism but as an example of proper interpretation by correction, and that is in paragraphs 22 in his list of principles and in a more extensive discussion at paragraph 150. Now we say here –

GLAZEBROOK J:
Can you just – sorry, I just didn't quite understand what he was taking time and care to single out.

MR KALDERIMIS :

He refers to the *Aberdeen* case and says it is an example of something that is a proper mode of interpretation, he calls it “interpretation by correction”.

WILLIAMS J:

Which bit? The Lord Hope bit or the Lord Clarke?

MR KALDERIMIS :

The Lord Hope bit. Because *Arnold v Britton* is of course not a case about implied terms, it’s a case about interpretation. And what is interesting, I submit to your Honours, is that Lord Neuberger in re-stating Lord Hoffmann’s ICS principles, as many people have understood *Arnold v Britton* to do, could have said, well, *Aberdeen* is just on the wrong side of the line, you're not allowed to do this. If it’s anything, it’s *only* and implied term. But he didn’t.

GLAZEBROOK J:

Well, they could have done, but it’s not very much of stretch to, say, sell it on the open market, is it?

MR KALDERIMIS :

No.

GLAZEBROOK J:

But it was on context that said it mightn’t mean that.

MR KALDERIMIS :

Exactly.

GLAZEBROOK J:

Because in fact normally if you say “sell” you’d go, “Well, no, you can’t sell it for two cents to your spouse.”

MR KALDERIMIS :

Yes, that's exactly right, your Honour. The only contextual argument against it was the context with contracts –

GLAZEBROOK J:
Exactly.

MR KALDERIMIS :
– that they'd missed that included the open market in the other limbs but not in that one. So that's my first legal observation, that in terms of what the process of interpretation involves it can comprehend the argument that my learned friend Mr Galbraith has set out.

The only other legal observation I wanted to make before getting into the detail is to very briefly address – and we've done it in our submissions at 78 to 83 – the Court's question on what is the difference between interpretation and implication, and of course the context to this question is what is the relationship between the *Belize* decision and the *Marks & Spencer* decision and where does that leave the law. Your Honours will be aware that what we have submitted in the written submissions is that there's no essential clash between *Belize* and *Marks & Spencer* because each case was emphasising a different aspect of the enterprise of –

WINKELMANN CJ:
And that was Lord Clarke's approach, wasn't it, in *Marks…*

MR KALDERIMIS :
That was Lord Clarke, and in particular Lord Carnwarth, at paragraph 69 of *Marks & Spencer*, where Lord Carnwarth quote from Baroness Hale in a previous decision and says the object of the enterprise of interpretation is to determine the presumed intention of the parties, what the parties *must* have meant, that's what you're trying to do. And if you read it, *Belize*, in that way you can see that what Lord Hoffmann was seeking to explicate was not that the test for implication needs to be lowered or made more liberal but that the object of implication should not be lost sight of, and that object is not for judges to impose terms on parties but for judges to do what they can in appropriate cases to ascertain what the presumed intent of the parties must have been, it's a voyage of discovery, not imposition. And put in that way,

Belize is utterly orthodox, because that is what *The Moorcock* (1889) 14 PD 64 (CA) case itself said, which is perhaps the most famous implied terms case, Lord Justice Bowen said there that if one was to take all the cases of implied warranties it would be found that in all of them the law is raising an implication from the presumed intention of the parties, and it's submitted that hasn't changed. If you look at *BP Refinery* itself Lord Simon says precisely that, at page 73 of our bundle rather than the case itself. The same point is made by *Chitty* when it discusses *Marks & Spencer* and the same point is made in the *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 (HL) case by Lord Steyn telling us that implication is essential to give effect to the reasonable expectations of the parties. So I don't want to over-labour that. I just wanted to say that at the outset because it's helpful to frame the enterprise that we'll be getting into and perhaps just to note that perhaps Lord Hoffmann hasn't received the most generous of receptions by all academic commentators on this point. He himself noted in the *Lawyers and Language* article that we have footnoted that he thought the Court in *Marks & Spencer* had made rather heavy weather of his judgment in *Belize* and perhaps there is some fairness in that view because, after all, the word "implied" in "implied term" perhaps does suggest that what you're doing is trying to engage in a process of construction, different of course from interpretation, but a form of construction anyway.

But we have no quarrel with the way my learned friend, Mr Hodder, has put the point, in the sense that no one on either side of the Bar in this case is saying that the effect of *Belize*, or the effect of a proper approach to interpretation, is that it's just merely a test of reasonableness, precisely because the term that you're seeking to imply isn't spelt out, it's important to be sure that that's what the parties must have met, and there is lurking in this jurisprudence then a sense of necessity, which is what Lord Clarke did say in his very short but cogent judgment in *Marks & Spencer*. And when all of that is borne in mind the *BP Refinery* tests then stack up in a more, it's submitted respectfully, coherent way because, as Lord Neuberger said in *Marks & Spencer*, the first test, reasonable and equitable, often doesn't tell you anything new, the last two tests, capable of clear expression and not

contradicting an express term, or they're important and relate to necessity, but most of what implications of terms are about is *The Moorcock* business efficacy test which Lord Neuberger reformulated as without the term the contract would lack commercial or practical coherence and the "so obvious it goes without saying" or "oh, of course" test, and so that's what I will be talking about in the more grunty part of these submissions.

So perhaps before the lunch break what I will say is, very simply, and the relevant part of our submissions is 137 onwards, we say that this case meets the test for implication because the implied term is necessary to preserve the parties' bargain, and we say more than this. We say that in many ways this is a paradigmatic example of necessity.

Now in terms of how to formulate the implied term, we accepted in the High Court and in the Court of Appeal that the way it's pleaded is perhaps slightly more prolix than is necessary because we talk about the need for ongoing mining and then add further words saying producing sufficient revenues that amount to something that would explain why the right has been given away. Those additional words aren't needed. They're not a part of the implied term that we are really contending for. We are really saying, and you can just strip the other words out, you don't have to add anything in to what's pleaded, the implied term is the key point is that the relevant royalty payments must reflect the proceeds of ongoing mining. We say that's the key to this case.

O'REGAN J:
Sorry, must reflect the proceeds of?

MR KALDERIMIS:
Of ongoing mining, and I will come back to your Honour, Justice O'Regan's, question and your Honour, Justice Williams', question about what that means, whether that's, as Justice Williams put it, just a bit silly as an implied term and I'll do that after the lunch break, and perhaps that's a convenient point to stop because otherwise I'll just be launching it.

WINKELMANN CJ:

Yes. Now how are we going for time? Do we need to come back at 2 o'clock because Mr Hodder will wish to reply?

MR KALDERIMIS:

I would prefer to do that, if the Court would not mind.

WINKELMANN CJ:

Perhaps you could discuss with Mr Hodder over the lunch break how you split that time up.

MR KALDERIMIS:

Yes. As the Court pleases.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.01 PM

MR KALDERIMIS :

Your Honours, I confirm that my learned friend Mr Hodder and I have conferred and reached an accommodation as to time. So I will stick to that.

We were just getting to the guts of the implied term argument and the submission is that the necessity of an implied term arises from the commercial unreality of an agreement that would allow BRL indefinitely to defer part of the due consideration on the basis of a temporary indulgence granted by LMCH to help get BRL into mining. Now BRL doesn't have to use that indulgence, it doesn't have to get into mining on this argument, it just can't rely on the indulgence as a device against LMCH in order to justify paying no monies at all. So we say an implied term is necessary to avoid BRL or prevent BRL from entirely subverting the parties' bargain. Now I acknowledge at the outset –

GLAZEBROOK J:

Can I just check your test? So it's necessary to give efficacy to the parties' bargain, is that the test you're suggesting or – that's what I wrote down before that but I wasn't entirely sure that I'd got it quite right just before lunch.

MR KALDERIMIS :

Necessary to avoid "entirely subverting" the parties' bargain is what I said.

GLAZEBROOK J:

All right. So it's necessary not to give efficacy to as to avoid…

MR KALDERIMIS :

Entirely subverting the parties' bargain. So we've described this in our submissions as being an anti-avoidance term and in a minute I'm going to take your Honours to the small number of cases that we say exemplify this important branch of the law.

GLAZEBROOK J:

Can I just – I'm sorry to be – can I just check whether you're saying that's the general issue of implying terms or just the particular branch of it that's being applied here?

MR KALDERIMIS :

I understand that question. So to give a very straight answer, that is just the particular species of implied term with which we are involved here, but the actual test is the *BP Refinery, Marks & Spencer* test and each limb of that is satisfied, is our submission.

GLAZEBROOK J:

All right, thank you. So you're on the *BP Refinery…*

MR KALDERIMIS :

We're on the *BP Refinery* test, we're not trying to avoid that.

WILLIAMS J:

So I just need that pithy sentence of yours, “necessity of an implied term arises from the unreality of…

MR KALDERIMIS :

An agreement that allows BRL indefinitely to defer part of the due consideration on the basis of a temporary indulgence granted by LMCH to help get BRL into mining. Then I said that BRL doesn’t have to use that indulgence, on this argument it doesn’t have to mine, it just can’t rely on the indulgence as a device against LMCH to justify paying nothing at all, that’s the suspension point. So it’s therefore necessary to avoid –

WINKELMANN CJ:

Could you just repeat that last sentence, sorry?

MR KALDERIMIS :

Yes. BRL just cannot rely on the indulgence as a device against LMCH in order to justify paying no monies at all, and then the sentence that I repeated to her Honour Justice Glazebrook: and implied terms necessary to avoid BRL entirely subverting the parties’ bargain, just as a species, as we’ll see, of the type of implied term.

O’REGAN J:

It wouldn't have had to pay this payment if it hadn't got into mining at all, would it?

MR KALDERIMIS :

Correct.

O’REGAN J:

So it must have been accepted by L&M that there was a real possibility that that second payment would never be made?

MR KALDERIMIS :

That is correct, Sir, leaving aside of course the debate on clause 8. So clause 8 would be an additional reason why this might be owing and why the further 40 million might in due course be owing, and we don't resile from that, you'll see in paragraph 51 or our pleadings that's one of our three reasons why we say relevant royalties haven't been paid, but that's not what I'm concentrating on here, because we don't need to win on that to win in this respect. Clause 3.10 does not require an ongoing mining obligation already to have been existing in the royalty deed, it just requires the conditions for the suspension are no longer met and therefore the suspension falls away.

WINKELMANN CJ:

So is this way you are framing it relevant to the required certainty for the clause, because Mr Hodder's case is, well, it can't, that clause, how can it stipulate the amount of mining that's required, et cetera, it's too uncertain. So the way you're framing it, which is it it's implication is necessary simply so that the device is not available to Bathurst to defer the obligation to pay when it was a temporary indulgence?

MR KALDERIMIS :

Yes, that is exactly right, your Honour, this is our answer to that broader uncertainty idea. What I'm trying to do with this part of the submissions, and also what I said before lunch, is divorce cleanly and clearly any debate over what clause 8.1 might mean and whether Bathurst has to get on and mine generally, from the specific debate over what are the conditions under which clause 3.10 continues to operate to suspend the debt, and we say on that simpler, narrower, more modest basis everything becomes much clearer.

GLAZEBROOK J:

So can you give me in terms of *BP Refinery* the term that you're implying?

MR KALDERIMIS :

Yes. It is simply, and it's in the pleading, and I mentioned just before that I think we don't need all the words of the pleading, but within the pleading are the words "must reflect the proceeds of ongoing mining", that is the term.

GLAZEBROOK J:

Well, I mean at the moment that's true, isn't it, because they're selling from the stockpile?

MR KALDERIMIS :

It doesn't reflect the proceeds of ongoing mining, that reflects the proceeds only of historic mining.

GLAZEBROOK J:

I still don't know how much ongoing mining is, is the same issue as…

MR KALDERIMIS :

I've said I will come to that and that's important and I will do, but I want to come to it in a particular way.

GLAZEBROOK J:

Oh, no, that's fine, if you're coming to it.

MR KALDERIMIS :

Now of course this submission is only one we can make if there indeed was a debt that is due and owing, and at least part of my friend Mr Hodder's submissions were designed to put doubt in the Court's mind as to whether under the pre-third amendment situation a debt actually was ever due and owing, that was the idea of talking about clauses 4.1(a) and (d), to suggest that perhaps the true construction of this bargain is that when 25,000 tonnes of coal was shipped from the permit areas perhaps no debt that was enforceable ever arose.

I just want to submit very briefly before I get further into this that that plainly is not the meaning of clauses 4.1(a) and 4.1(d). All they say is that until you've paid the first performance payment you have to keep paying the higher royalty, which makes sense, because you haven't done the thing that you would need to do in order for the royalty to step down to the next level. It doesn't say in anywhere, in the royalty deed or in any other document, that once you've triggered the payment it somehow doesn't have to be paid. In fact, all of the contextual clues go the other way. That's what 9.7 clearly says. That's what 9.3 to which 9.7 refers clearly says, remedies are cancelling the agreement, well, not cancelling the agreement, seeking damages or seeking specific performance. And your Honours should also have a reference to, and I'll just take you to it…

O'REGAN J:
But what would you sue for specific performance of?

MR KALDERIMIS:
The payment itself, the specific performance that they pay the 40 million that is due and owing. It's really a debt claim. But debt is –

O'REGAN J:
Well, it sounds like a debt claim to me but okay.

MR KALDERIMIS:
But debt is different from damages so you can see why it wouldn't fall in the damages limb.

Now I just wanted to give your Honour the reference to the deed of guarantee and security which is appended to the sale and purchase agreement, and if your Honours are using the hard copy binder it's behind tab 2 but if you're not it's document 302.0355. So what this did is right at the –

WINKELMANN CJ:
Can you just repeat that number? I was distracted.

MR KALDERIMIS:

302.0355.

WILLIAMS J:

And this document is?

MR KALDERIMIS:

The deed of guarantee and security.

O'REGAN J:

So it's part of the main agreement?

MR KALDERIMIS:

Part of the main agreement and…

GLAZEBROOK J:

I seem to have lost my index now which is really helpful, but 302?

MR KALDERIMIS:

0355, and if you've got tab 2 you just sort of move past the royalty deed that's appended to the ASP and you get to it, the deed of guarantee and security, and all your Honours need to know about that document is that at page 302.0359 you can see the parties. First one's L&M Coal Limited. It would be an easy mistake to make to think that that's L&M but it's not. That is the entity now known as Buller Coal. That's the company whose shares were sold. That's the mining entity, as it were, and then Bathurst Resources, the parent company. And the company whose shares were sold is called the guarantor because what it is doing through this it is guaranteeing Bathurst's obligations to pay the performance payments under clause 3.4 once they are due and owing, and you can see that from the definition of *guaranteed money* further down that page under 1.1: "Means all amounts owing by Bathurst to the secured creditor," which is LMCH, "in accordance with clause 3.4 of the ASP." So that's not all of the aggregate consideration that's secured. It's the performance payments that are secured.

WILLIAMS J:

Sorry, where are you reading? What clause are you reading this from?

O'REGAN J:

Guaranteed Money, the definition in clause 1.

MR KALDERIMIS:

Guaranteed Money, on page 359. And that fits in operatively with clause 2.1 on page 302.0363 which tells you that the guarantor, being Buller Coal, absolutely, unconditionally and irrevocably guarantees to LMCH the due and punctual payment by Bathurst of the guaranteed money, being the performance payments, and then under 2.2 the guarantor undertakes that if Bathurst doesn't pay to the secured creditor any of the guaranteed money when due, well, then Buller Coal will pay that guaranteed money to the secured creditor immediately on demand, and then if it doesn't then there are security rights that are then granted and are enforceable by LMCH over the assets of Buller Coal.

Now on a view that said no debt really arose, well, none of that would have any meaning and that just wasn't the position. So –

WILLIAMS J:

Well, it would depend on what 3.4 meant though. There's a certain circularity in that reasoning because 3.4 covers a whole lot of items of payment.

MR KALDERIMIS:

No, it doesn't. 3.4 is just the performance payments. That's my point.

WILLIAMS J:

I see, sorry. I thought it was –

MR KALDERIMIS:

That's my point, your Honour.

WILLIAMS J:
Right.

MR KALDERIMIS:
So if we look at 3.4 which you can see at page 302.0313, it's only the performance payments. So it's a specific security deed to ensure that the performance payments are paid when due and owing. So I'm not going to say anything more about this point.

GLAZEBROOK J:
Sorry, can I – because I was having trouble finding anything, can you just tell me what the point of that was again?

MR KALDERIMIS:
Yes. The point is that not only do clauses within the ASP, 9.7 and 9.3, plainly say that the money has to be paid and LMCH can take steps to make sure it's paid once the performance payment is triggered, and not only does the royalty deed in clause 4.1 not say anything contrary to that, but there's also a security and guarantee deed that gives LMCH secondary security rights against the assets of Buller Coal in the event that the performance payments specifically aren't paid when due.

O'REGAN J:
This doesn't really take us anywhere, does it, because the guarantee would only be triggered if in fact clause 3.10 doesn't apply and they do in fact have to pay?

MR KALDERIMIS :
Oh, certainly, but it takes us only to the point – and your Honour may have passed this point, which is why it doesn't seem pertinent – that there was a debt that was due and owing, it would have been due and owing once the trigger had been met, but for clause 3.10. The only point I'm trying to make, your Honour, is that clause 3.10 did amend something, it did change

something, you can't use the words "clarify" and "for the avoidance of doubt" to avoid that something really was changed –

O'REGAN J:
Why does it say it then?

WINKELMANN CJ:
That's because Mr Hodder's argument, isn't it, is my recollection, and how it was argued in the lower Courts, is that there was no change through this deed, it was simply a clarification of that which was already…

MR KALDERIMIS :
Yes, exactly. So this is the response to that, and then the response to your Honour's question of why say that, well, we've put our footnote in our submissions to a deed of legal drafting that says: "For the avoidance of doubt language is a filler and word 'clarifies" usually doesn't add anything and it's not good drafting," so I think that's perhaps the first point. But the doubt was explained by my learned friend, Mr Galbraith, which was that wider commercial doubt that, in the context of parties working together, the expectation Bathurst had is that even when they triggered it and LCMH could have done this it would, of its own volition, have been commercial about how it exercised its rights.

O'REGAN J:
So is your point that once they'd sold the 25,000 tonnes and they didn't pay it, that they would be paying a higher royalty but any moment the balloon could go up and they could be sued for it?

MR KALDERIMIS :
Exactly. And therefore my next point is clause 3.10 did change something, and it changed something by taking power that LMCH had to exercise commercially, *its* decision, as Mr Loudon said in evidence, and it would be giving that decision to Bathurst in the sense that Bathurst could by complying with the proviso keep LMCH out of its rights. But then that takes me to the

next proposition, which is that we say therefore it's important to make sure that that temporary indulgence that was given to Bathurst to have more room and flexibility to raise finance doesn't unravel the entire contract by pulling a threat that wasn't expressly registered against because neither party had the relevant contingency in mind at that time. So our case –

GLAZEBROOK J:

How can you, if you're looking at – well, how does that fit then if neither party had that in mind with your test?'

MR KALDERIMIS :

Well, most implied terms – the presumed intention test, yes, I understand. Most implied terms in reality arise because of a gap in the contract because neither party did expressly turn their mind to this situation, and my learned friend Mr Galbraith said, and it's entirely right, that no one turned their mind to a situation where Bathurst would get everything together to be able to get into production, would choose to get into production knowing that on doing it it would trigger the first performance payment, would announce in its accounts year-on-year that it had triggered the first performance payment, and then somehow would just suddenly stop mining and say that its justification for not paying anything further was the very indulgence granted to get it into mining, no one thought about that.

WINKELMANN CJ:

Are you perhaps misstating the law of implication in this way? It's not that no one has it in mind. Isn't it usually that it is so fundamental to the entire commercial stratum of what is going on that they don't express it in their contract?

MR KALDERIMIS :

That is a fairer – I stand corrected and I accept that unreservedly, your Honour, that is a much fairer way of putting it. So why don't I get immediately to that point, that idea that there can be things so fundamental

that they don't get expressed, so in a Lord Hoffmann *Belize* sense you can discern them from the contract in a typical traditional implied terms way.

So the place I just wanted to start to give you a reference – I won't go to it – is we've put in our tab 19 an article by Professor Richard Austen-Baker which is very good – well, it's not an article, it's an extract from his textbook on implied terms, and we've given you the chapter where he talks about where implied terms came from and he writes all about *The Moorcock* case, which of course Lord Hoffmann said was the genesis of implied terms as well, in *Belize*, and he writes the very interesting essay about what that case was, why Lord Justice Bowen's judgment was the one that stood the test of time, says *The Moorcock's* been cited many, many times since, so over 400 citations in Lexis, and then at paragraph 719 he –

GLAZEBROOK J:
Is this in your bundle, is it?

MR KALDERIMIS :
Yes, it's in our bundle, but I'm not going to take you to it because I'm going to go to the case itself, this is by way of introduction to the case. He says: "Perhaps the clearest 19th century antecedent to the approach taken in *The Moorcock* is the case of *M'Intyre v Belcher* (1863) 14 CBNS 654, (1863) 143 ER 602," and he says that case was decided by a strong Court and that those judgments that I'm about to take you to find particular resonance in that of Lord Justice Bowen just a quarter of century later, even though *M'Intyre* isn't cited in *The Moorcock,* it's clear at least that the Court in *The Moorcock* was not in any sense revolutionary in its approach. And here I'm picking up on the point that the Chief Justice just corrected me on about what we're talking about here, and what we're talking about here is something that neither party even considered could be done because to do it would undermine the entire bargain you have. So this is tab 10 of our authorities, and it is an important case to look at. It's at page 121 of the respondent's authorities bundle, the text is lamentably small, but I will direct attention to the relevant bits and I'll refer to it by the page numbers of the reports.

GLAZEBROOK J:

Can you give me the tab number, please?

MR KALDERIMIS :

Tab number 10. So, looking at the page numbers of the report, we're at page 602 in the head note, we're in 1863, and we've got a medical practice that is being sold by Mr M'Intyre, or Dr M'Intyre, to Dr Belcher, and it's stipulated that the purchaser will have delivered up to him possession of Dr M'Intyre's house, have sold to him the house, drugs, bottles and surgical instruments and furniture, and the vendor has agreed that the purchaser will pay rent and taxes and that they won't 10 years later do any competing business, and the purchaser has agreed that he would on the condition of the premises pay the vendor for and in respect of the cash of the successive years going through to 1863, if he should be living at the end of each respective year, one fourth part of the earnings and receipts provided the earnings and receipts should amount to a certain sum. So basically what you have here is a deferred sale agreement. Dr M'Intyre sells his practice, Dr Belcher doesn't have enough money to pay for it up front, Dr Belcher says: "Tell you what, I'll pay for it out of the proceeds of my medical practice," and Dr M'Intyre says: "Okay."

Now if you look at page 603 you can see Mr Harrison arguing in support of a strike out application, and what he says is there's no express promise on the part of Dr Belcher that he has to carry on the business at all, it's well settled that you've got to find that somewhere. Was the defendant bound to carry on the business for the whole of four years even though he could make no profit of it? Something we've seen some reflections on here. And then at page 604, three-quarters of the way down, it says: "It is highly probably that the parties contemplated that the business would continue to be carried on, but what is there to compel the defendant to carry it on to his ruin?" that was the argument, you just can't imply a term here. And the Chief Justice and the remaining Judges say the judgment must be for the plaintiffs and that they do this on a conventional approach of just trying to understand the language of the instrument and the nature of the transaction – that's at 605,

Chief Justice Erle's judgment. And if we go on to the next page there's the bit that's stood the test in time, it's 606, second sentence, the substance of it is that the purchaser's wilfully chosen to destroy the goodwill. "Is that a breach of the agreement? I think it is necessarily implied from the stipulations in the agreement that the defendant would take a common and ordinary care so as to carry on the business so as to realise receipts. And a wilful omission to do so renders him liable to an action."

And Justice Williams says that he's of the same opinion. "In cases of this sort, the Court should be cautious not to infringe the golden rule, that contracts are to be construed, not by what one feels would be right, but by what is expressed in or is necessarily to be implied from the language of the parties," and then says this can fairly be implied.

And Justice Willes comes up with an image that is often cited: "By wilfully incapacitating himself from doing so, the defendant clearly broke his contract. As, if I grant a man all the apples growing upon a certain tree, and I cut down the tree, I am guilty of a breach."

So that's what I call in these submissions an anti-avoidance implied term and her Honour, the Chief Justice, put it better than I did in describing what the nature of that term is.

GLAZEBROOK J:
So why does this or do you accept this implied term only applies in relation to clause 3.10?

MR KALDERIMIS:
Correct.

GLAZEBROOK J:
Well, why doesn't it apply more generally in terms of avoiding paying the extra consideration altogether?

MR KALDERIMIS:

Because if we think about that suspension image, once the payment is triggered and only once it's triggered is it due and owing. Until then there wasn't a debt due and owing. But once there was a debt due and owing the parties agreed that for so long as BRL did something they could forestall paying the debt and what they've done is made decisions that effectively preclude them either having to pay the debt or anything in lieu of paying the debt, and so it's because they've triggered the payment that everything changes, we say.

Now the most famous example of this –

GLAZEBROOK J:

Well, if they get to 24,999 and don't trigger the payment, this – there's no implied term.

MR KALDERIMIS:

Exactly. If they hadn't triggered the payment we wouldn't be making this submission, but they did.

And the most famous example of this is usually cited as the *Stirling* case, *Stirling v Maitland* (1864) 5 B&S 841. I won't take you to that, your Honours. That's at tab 14. But I will take you to my learned friend's supplementary authorities.

WILLIAMS J:

Just before you do, do you know how he wholly disabled and incapacitated himself?

MR KALDERIMIS:

I believe he just shut up shop. He just decided he wasn't going to carry on his practice.

WILLIAMS J:
Is there no more background to it than that?

MR KALDERIMIS:
I'm afraid not. You can…

WILLIAMS J:
Because this may well blur into the wrongful purpose and that's up for debate here.

MR KALDERIMIS:
Yes. Indeed, I think these cases do blur along. If you're interested in an example of that blurring, I won't go to it now but I mentioned the *Equitable Life* case. That was a case where two very eminent Judges both saw different things in what they had before them. Lord Steyn saw a traditional implied term and he did imply term. Lord Cooke thought that the whole case could be seen as an example simply of the rule that you can't exercise powers for the wrong purpose, and these sorts of cases can be seen in both lights in some ways, and so the thing I will come to with that proper purpose argument is to explain clearly why it is not just a re-run of the implied term argument, it isn't, and the High Court Judge, with respect, incorrectly conceived of it as being a facsimile and so I'll have to explain that. But even though the two arguments are logically and importantly distinct, there is a common animation to them which is these sorts of cases.

So I won't go to *Stirling* but I will take you, if you don't mind, to the supplementary bundle for the appellants and there you can see the first case at tab 22 is the *Ali Petroleum* case. Now that's a classic *Stirling v Maitland* sort of cases. It's the same sort of thing. A plaintiff employee of a company received a scholarship from his employer, who was the defendant, and the scholarship loaned him a certain sum and said that if he stayed employed for a period of five years he wouldn't have to repay the loan, and then he accepted a voluntary redundancy and he arguing that that was in effect a *M'Intyre v Belcher, Stirling v Maitland* sort of situation. And it was argued in

that case that one couldn't imply a term, and all member of the Privy Council said: “No, of course you can imply a term,” that the employer has to provide a reasonable basis for the plaintiff employee to actually work for five years, they found that they hadn't made him redundant, he’d chosen it, so he didn’t engage it. But you can see *Stirling v Maitland* being quoted, just in the middle of page 535 at 44 of the bundle, and this is the quote that is cited by everyone from Chief Justice Cockburn: “I look on the law to be that if a party enters into an arrangement which can only effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he will be doing nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative,” so that’s pretty classic law. The other –

GLAZEBROOK J:
Where are you now?

MR KALDERIMIS :
And this is at E to F on 535, it’s the indented quote.

There are two other cases I just want to note for your Honours, you don’t need to open them if it’s inconvenient, but just coming back to our bundle, tab 12 is the *Ogdens Limited v Nelson* [1904] 2KB 410 case, it’s a very classic example of *Stirling v Maitland*, which incidentally was decided one year after *M’Intyre v Belcher*, but we’re now in 1904, in tab 12, no need to go to it, but here you can see it’s the same thing. There was a tobacconist that had agreed to be a customer of a wholesaler and therefore to not purchase tobacco products from anyone else. And the price of that is that the plaintiffs, the wholesaler, would distribute an annual bonus to the retail purchasers for a period of four years, but then of course the wholesaler just shut up shop and stopped operating, and they said the same thing, they said: “How can you require us to keep being in business, it’s up to us whether we wish to be in business,” and the Court said: “Well, that’s true, it is up to you whether you wish to keep being in business, but it’s plain that if you choose not to, well, then you can’t rely on not paying this debt,” and the way it’s phrased at page 418 is that

questions of this kind have frequently arisen, there is already, by 1904, a “long line of authorities on the point”, there’s a broad line of demarcation running through the decisions, the broad principle to be extracted is that “where the consideration which one of the parties is to receive depends on the other party continuing in the same condition, there is an implied obligation on the part of the latter to keep in existence the conditions out of which his ability to make a return for the benefit received by him arises”, and a typical case is where there’s a sale of a business where part of the consideration is “some part of the future profits of the business”. So so far so orthodox.

In terms of New Zealand law, the classic authorise, as your Honours will know, is the *Vickery v Waitaki International Limited* [1992] 2 NZLR 58 (CA) case, that’s at tab 16, I will take you to that. That also involved a strong court, that’s President Cooke and Justices Richardson and Gault, and you can see the facts from the beginning of President Cooke’s judgment from the judgment pages at 59 where President Cooke outlines that the appellant, Mr Vickery, was employed by Borthwick’s, the freezing works, in their Longburn freezing works as a bone. And the freezing works then needed someone to run the café and, with the persuasion or initiative of management, the plaintiff entered into a contract for the catering service and also a cleaning service. And then the company, Borthwick’s, was taken over by Waitaki International Limited – that’s at line 39 – and as a result of various disputes the killing season ended and the works were never reopened. Now the plaintiff closed the cafeteria and he never reopened it, and the custom of the meat workers, who numbered 850 plus, was no longer available, and that’s at line 49. And so all of these arguments that we see from *M’Intyre v Belcher*, *Stirling v Maitland*, can be seen there at page 63 where President Cooke says in the second amended statement of claim the plaintiff alleged that certain terms were to be implied, and at line 16 with some resonance for this case: “In one sense it is obvious enough that the company could not be obliged to the plaintiff to provide a workforce.” In any ordinary circumstances it is unthinkable that you get specific performance or an injunction to make them keep going. “It would be fallacious, however, to see that as determinative of the present issue. An employer may enter into a contract in terms having the effect that a cessation

of the business, although it may be necessary or expedient for sound commercial reasons and although the Courts will not restrain it, will nevertheless be a breach of the contract, entitling the other party to compensation by way of damages." And then *Stirling v Maitland* and this dictum is cited at line 35 to 45, and the rest of the discussion continues over the next two pages to page 65 at line 5: "Considering cumulatively the features … of the agreement … I come without much difficulty to the conclusion that to close the works was a breach of the company's contract with the plaintiff. It was implicit in the contract that the company would provide a workforce. Of course the company remained free to close the works, for whatever commercial or other reason seemed good for it, but as is not uncommonly the case a closure could be and in this instance was in breach of contractual obligations, giving rise to liability in damages," and Justice Richardson says exactly the same thing, citing *Stirling v Maitland* at page 66, and he says at line 24: "It makes no difference that the company's failure to re-open the works resulted from a commercial decision on its part not to do so unless it could satisfactorily reduce its wage costs," and Justice Gault agrees as well, also citing *Stirling v Maitland* at line 21 and talking about this as just being an example of the proper construction of the contract and saying the appellant was entitled to expect the level of business he contracted for and in the absence of that he should be compensated by the respondent.

Now there are many other examples. I won't take you to it but at tab 8, a very leading Australian case is the High Court of Australia decision in *Hart v MacDonald* [1910] HCA 13, (1910) 10 CLR 417. In *Hart* it was exactly the same circumstance where there was a farm that was sold and the payment was to be made out of the working profits of the farm but there was a drought and there was a question as to how all of that worked, and that case, without going to it, is famously cited in his Honour, former Justice Dyson's contract law book for the latter proposition I'll come to but one is –

WINKELMANN CJ:

Dyson or Heydon?

MR KALDERIMIS:

Heydon, thank you. So sorry, yes, Justice Heydon, Dyson Heydon. The first proposition is the *Stirling v Maitland* view applies in Australia and has since 1910 and the second is that in that case there was a spirited argument that the entire agreement clause in the agreement meant that you couldn't imply this sort of term and all of the Judges rejected that and it's most clearly rejected in Justice Isaacs' decision at page 430.

So I don't need to say anything more on that aside from to note that in our submissions we have also referred at 140 to two more recent New Zealand cases, one in which the now Chief Justice presided and one of the New Zealand Court of Appeal also involving Justice Gault but subsequent to *Vickery* in which the same principle was applied.

WINKELMANN CJ:

Can you remind us of those cases?

MR KALDERIMIS:

It was *Hunan Holdings v Virionyx Corporation Ltd* (2005) 2 NZCCLR 1079. It involved a company called Virionyx that had a capital raise that was meant to be of – there was a debt and the debt was to be repaid only once the company successfully raises $5 million in a capital raise and the question was whether the company had to undertake reasonable endeavours to actually do the capital raise and the answer was yes, and *Compcorp Ltd v Force Entertainment Ltd* (2003) 7 NZBLC 103,996 (CA) was a similar issue of where the triggering event for the repayment actually for the building of the Sky City Convention Centre, just the way the contracts worked out, is that the construction company was meant to be repaid by moneys flowing from the acquisition of the developer and that acquisition never happened and it was argued that that somehow meant that the repayment didn't have to be made and that didn't work.

So coming from the general authorities to the specifics here, we say that there is a gap here if we are not successful on persuading your Honours that so

long as “the relevant royalty payments continue to be made” means, on its ordinary construction, “from ongoing mining”. If that's not what it means the we say that must follow by way of an implied term, and the reason is that, as we’ve heard from lots of the recent questions, it’s all about the incentives. Because if it’s not true that ongoing mining providing royalties has to happen, then the incentive system breaks down, and I can’t emphasise this enough, this is at the heart of our argument. The incentive system is, all the evidence explained, was that the amount of a 10% royalty on every tonne you mined would commercially and logically encourage the miner to then get around to paying the performance payment, that's what everyone knew, that was the context at the time, that’s why Mr Loudon had no difficulty agreeing to this, because of course once BRL got into production it would be a matter of timing only until it paid the performance payment and, indeed, the longer it managed to withstand the mounting 10% royalties the more money LMCH would get in the end. But it would pay in the end, because if you multiple any number of tonnes of coal by the coal price and 10% you rapidly get into exponential numbers.

So, we say that if ongoing mining isn’t required, that incentive structure breaks down completely, because at that point the temporary suspension becomes indefinite and a system with motion built into it becomes flat and lifeless. Instead of BRL being compelled by 3.10 commercially to get into mining and keep going, BRL is actually given a get out of jail free card where it can use 3.10 as an excuse not to do anything and it actually becomes preferable commercially for BRL not to do anything. So to now come to the final part of this, which is just putting this argument into a *Marks & Spencer* shape, we say, well, the term is reasonable and equitable because, in the words of the *Hunan Holdings* case, you would render nugatory the consideration here and a reasonable person wouldn't think that clause 3.10 was designed to give BRL the decisive commercial advantage it now claims. And we’ve mentioned in our –

GLAZEBROOK J:

What’s the consideration that you're referring to?

MR KALDERIMIS :

The consideration is the performance payment itself, so clause 3.10 –

GLAZEBROOK J:

So not the suspension, the…

MR KALDERIMIS :

No. Possibly I made that more confusing than I needed to.

WINKELMANN CJ:

Perhaps you should start again on it.

MR KALDERIMIS :

Yes, I will. So, a reasonable person would not think clause 3.10 was designed to neutralise clause 3.4 and give BRL a decisive commercial advantage over LMCH.

GLAZEBROOK J:

You'd better slow down a bit, sorry. So it would not designed to neutralise clause 3.4…

MR KALDERIMIS :

And grant BRL a decisive commercial advantage over LMCH. And we've cited in our submissions – but it's important that your Honours take the time to read them – the various other anti-avoidance clauses, the explicit ones, in the royalty deed. They're at clauses 8.1(b), 8.2, 8.3 and 4.6. Everything about how this agreement was structured was designed not to give BRL a way out, certainly once it had triggered a performance payment, but this mode of interpretation would give it that. And we remember the evidence that Mr Loudon and Mr Bohannan both agreed, that this wasn't designed to let BRL off the hook.

We say it's necessary for business efficacy or, in Lord Neuberger's words, "without it the contract would lack commercial or practical coherence". It's

more than a gap, without it the debt becomes an option, the incentive mechanism to pay it falls away, all on the basis of a clause inserted for BRL's own benefit and for which BRL paid LMCH no consideration, and even Professor –

O'REGAN J:
But that's just saying we did a bad deal, isn't it?

MR KALDERIMIS:
No, it is more –

O'REGAN J:
"Woe is us. Please help us."

MR KALDERIMIS:
No, that is not the submission, your Honour. All of those anti-avoidance cases I went to are ones where that same argument could have been made. It could have been said by the doctor purchasing Dr M'Intyre's practice: "You just made a bad deal. You said that I would pay you or we agreed I'd pay you out of my profits but you didn't say I had to make any profits."

O'REGAN J:
Yes, but in this case there was a choice. You could either pay it or you could pay royalties. I mean that was the way it was done with no specification of when or how or why they had to be paid.

MR KALDERIMIS:
But nor did –

WINKELMANN CJ:
Can I just ask you to repeat the submission because I'm not as quick as Justice O'Regan and I didn't actually get it.

GLAZEBROOK J:

Yes, I actually missed it as well. I tried but I missed it too, I'm sorry. I missed part of it, I think.

WINKELMANN CJ:

So you say so it's necessary and without it lacks, the transaction lacks, the contract lacks commercial coherence?

MR KALDERIMIS:

Because the debt becomes an option and the incentive mechanism –

GLAZEBROOK J:

Sorry, when you say *an option* you mean it's optional to pay it? I'm sorry, is that…

MR KALDERIMIS:

Yes, it becomes simply a choice for BRL as to whether to pay it.

GLAZEBROOK J:

Okay, yes. I had "becomes an option" and I didn't quite understand what "option" meant but you mean it becomes optional?

MR KALDERIMIS:

Yes. And the incentive mechanism that has always underlain this agreement that would ensure the debt is paid falls away all on the basis of a clause inserted for BRL's own benefit and without consideration. So BRL gets to keep the assets without paying the agreed price even though the payment has been triggered. So we say the implied term simply makes explicit the anti-avoidance requirement necessary to preserve the efficacy of the agreement, and I hear –

GLAZEBROOK J:

Can I – sorry. It was something I did want to bring up before. It was by way of deed so I can't – I do have slight difficulty saying it was without

consideration because effectively the parties must have accepted it was without consideration because –

MR KALDERIMIS:

Yes, I'm not making that as a formal point. It's a valid instrument. We're not challenging it because there was no consideration.

GLAZEBROOK J:

No, no, I understand that. It's just that I then can't understand where the "no consideration" comes in on the sense that the parties, whatever their feeling about just putting it into a form that was doing the commercial one or because they had a doubt about the contract, they dealt with that by just doing it formally as a deed and saying, well, we accept, either we accept there's a doubt as to whether their consideration just, and we're making sure or we know there's not consideration and we're making sure.

MR KALDERIMIS:

Yes, that's a fair question. The simple answer to that is the lack of consider – imagine a world where this was backed up by a significant payment by BRL to LMCH, as if BRL's buying its way out of having to pay the debt. So it's saying: "We will pay you $10 million now but that's it. Beyond now it all becomes optional for us to pay the consideration." At that point, this will all become a much harder argument. But where there's absolutely no value flowing from BRL to LMCH, what the Court is faced with is the very unattractive prospect of valuable commercial rights disappearing by way of a side wind and the question becomes was that really what the parties must have intended? Is that really what this was about?

WINKELMANN CJ:

Well, your point would be it's unlikely to be what they intended. Well, it was an indulgence for LM – it was an indulgence for Bathurst.

MR KALDERIMIS:

Precisely. It was an indulgence for Bathurst about timing only, not because it was saying: "I don't want to pay this amount of money." It was confident it could raise the capital in due course, but it would be easier to raise the capital if it didn't have to announce a default at the same time.

So we say that it is also so obvious it goes without saying, and, for what it's worth, both Mr Loudon and Mr Bohannan actually said this in their evidence, that it was so obvious it went without saying. They each say this at paragraph 47 of their briefs of evidence and Mr Bohannan repeated it for good order in his live evidence at page 202.0329.

So then we get to the issue that I said I would come to, which is, all right, is this term capable of clear expression? Well, we say it means that continued royalty payments must reflect the proceeds of ongoing mining, and I've explained that that's not an actual obligation to mine but if BRL wants to suspend the payment then they would need to keep mining and produce the value from the royalties as the price of that suspension. I state and I want to volunteer that the implied term doesn't require BRL to mine in any particular way an it doesn't of itself require BRL to ignore other commercial opportunities. It just says that if BRL chooses not to do any mining and therefore not to generate royalties from mining, well, then the implied term falls away because LMCH isn't any longer receiving the pro for the quid.

WILLIAMS J:

But that depends on, you know, if they're putting out a tonne a year, on your analysis that's unravelled the agreement too, but you say that's good enough?

MR KALDERIMIS :

And this gets into the questions that both your Honours have been asking, so let's get right into that: what does ongoing mining mean? Well, there is some fortification in that in the royalty deed in clause 8. Clause 8 tells us what counts as mining for the purposes of the parties' arrangement, relationship, it's got to be mining in accordance with good mining practice. So it's

submitted that if we were in a case that was on the borderline, where BRL have reduced the amount of diggers it was using but it didn't seem like very much mining, one could get experts along to say: "Well, does this count as mining in accordance with good mining practice?" and you could try and work that out.

WILLIAMS J:

"Good mining practice" is about the technical aspects of mining, not the volume.

O'REGAN J:

It just means you're doing it competently, not how much you're doing.

WILLIAMS J:

Not putting your workers at risk and the environmental –

GLAZEBROOK J:

Which Mr Galbraith accepted.

MR KALDERIMIS :

Well, there was more expansive evidence than that in the Court below, Mr Graeme Duncan for LMCH said that the phrase "the concept of good mining practice" comprehended more than that. But that's a view that one might have and certainly our LMCH took a more narrow view of it. But either way, experts could come along and say: "Well, look, that is you are in fact mining," or, "you're in fact not mining." But the real point here is that although these issues do arise, that was the same as in the *Hart* case, it's the same as in the *M'Intyre v Belcher* case, it's the same as in the *Ogdens* case. What does it mean, in fact, to be continuing to perform this obligation? And in some cases you'll have clearer contractual structures then in others, but it's submitted that simply saying "ongoing mining" in our submission not so vague as to be incoherent, and –

O'REGAN J:

But it's –

WINKELMANN CJ:

So is your point, Mr Kalderimis, that when you're going to do something like operate a doctor's practice or operate a mine, if you actually are compelled to do that you're probably going to do it in a way which is profitable for you, you're not going to do it in a way which isn't?

MR KALDERIMIS :

Yes, and here the facts are that the mining did stop. We are not at a borderline here, this is not a case where the Court needs to decide about whether you need four diggers or three diggers to constitute ongoing mining. If it was, we would receive these questions and be more troubled by them.

O'REGAN J:

But that's really saying you're not going to define it, and that's what the Court of Appeal did. They said "reasonable", you're saying "ongoing", I mean, there's not really any difference, is there? And then they said: "We're not going to try and define it because whatever happened her it wasn't reasonable," and you're saying: "Well, whatever happened here it wasn't ongoing," so.

MR KALDERIMIS :

I accept that with good grace, your Honour, but I say in response to it that we are doing something slightly different from the way the Court of Appeal put it, because we are not saying that there has to be some theoretical abstract level that no one knows that is reasonable, we're not trying to define a certain amount of buckets of coal that amounts to a reasonable operation in the mine and anything else isn't reasonable. We're saying "ongoing" is more like "on or off", it's more like whether you're doing something or not, are you still running a race or have you stopped running a race?

WINKELMANN CJ:

Can I just ask you…

WILLIAMS J:

Well, you've probably stopped running the race at a tonne. There's no race in a tonne, there's no race at 10 tonnes, probably no race at a thousand tonnes.

MR KALDERIMIS :

Or you could still say you're mining at a thousand tonnes if you were actually doing it, and if BRL had decided –

WILLIAMS J:

Yes, but you're obviously doing that to avoid the effect of 3.10, not because you're actually mining to make a profit.

MR KALDERIMIS:

I would agree with that and we would be more chagrined with that situation and we would have a smaller mining platform ourselves to make the argument on from but that isn't what has happened.

O'REGAN J:

Well, you'd be contending for a different implied term, I would imagine.

WINKELMANN CJ:

So anyway, can I just clarify? You're saying all the implied term requires is that there be mining?

MR KALDERIMIS:

Yes. That's all it requires. That is all we are saying. We are not asking the Court to imply a minimum amount of it or a manner of it or a character of it, just that it exists, a state of affairs that ties in with *Stirling v Maitland*, the continuation of a state of affairs, and I ask your Honours to bear in mind what my learned friend, Mr Galbraith, said about of course the logic of clause 3.10. It only became engaged if and when BRL actually mined 25,000 tonnes of

coal. If BRL didn't mine 25,000 tonnes of coal it's not engaged and we're not arguing about it, and if they have mined 25,000 tonnes of coal, well, they've done it by doing something and it's that something in an on or off way that we say has to continue.

ELLEN FRANCE J:

In the pleading it referred to substantive coal sales and thereby providing commercial value, but you're no longer pursuing that?

MR KALDERIMIS:

No, we have come to understand that while those words are meaningful, they're more meaningful as an explanation of why the implied term should be there rather than what the implied term is.

GLAZEBROOK J:

Can I just, I still have some difficulty. If you're looking at these cases they would say that subject obviously to an impossibility issue, ie, Bathurst didn't get the permits, which one assumes, although on some of those cases they'd say too bad on that as well, you have agreed to pay 120 million and you have an obligation to mine anyway. So how I – I'm not sure as how you're relying on those cases for your more narrow proposition that it only applies to 3.10. I mean I know you don't have to have a wider proposition but I still don't quite understand if we're applying those cases why it doesn't say, well, it doesn't matter. You have to do it anyway, right up to – because it's a deferred purchase price and…

MR KALDERIMIS:

The reason is, and that's also a very fair question, is that in some of those cases you could see the consideration arrangement as having no element of contingency to it. It's just a price that absolutely has to be paid and this is just how it's going to be paid.

GLAZEBROOK J:

I think that's true of the doctors.

MR KALDERIMIS:

Yes.

GLAZEBROOK J:

Absolutely, yes, the – yes.

WILLIAMS J:

And *Hart* too, isn't it?

MR KALDERIMIS:

Say it again?

WILLIAMS J:

And *Hart* too.

MR KALDERIMIS:

And *Hart* too, precisely.

GLAZEBROOK J:

And *Hart*.

MR KALDERIMIS:

Whereas in this case we don't resist my learned friend, Mr Hodder's, proposition that there was an element of contingency to this agreement. We just say that the contingency, the mining of the 25,000 tonnes, BRL's choice, no one made it mine them, was met and once it's met this case then matches the shape of *Hart* and *Stirling* and *M'Intyre* because there is now a debt that's due and owing.

Now your Honours, my time is becoming short so with your leave I will turn to the proper purposes argument which can only be responsively dealt with quickly with difficulty in any event and so I'll need the time to go to it.

Now the paragraph numbers are 143 to 155 of the submissions but I won't be going through the submissions. We know from reading BRL's reply submissions that BRL scoffs at this argument as being both responsible for the volume of documents before the Court but somehow also advanced in the factual vacuum BRL says that it's a conspiracy theory and also that it's a disguised allegation of bad faith. None of that is true. His Honour, Justice Dobson, noted, and the two paragraphs are 214 and 216, that "credible arguments were raised that a change in strategy towards the contract was decided upon" by Bathurst and that "L&M's evidence laid a credible foundation for criticisms of Bathurst". The problem below is that his Honour could not see how a proper purposes argument could succeed if putatively LMCH had failed on its interpretation and implied term argument. So we're now on issue 4 and what his Honour just couldn't see is how if that suspension doesn't automatically get cut as soon as ongoing mining ceases, how there could ever be a restraint.

Now what his Honour decided, in what were really tentative comments because it wasn't an issue that was determinative given the earlier findings, is that BRL enjoyed something called an "absolute contractual entitlement" and you were taken by my learned friend, Mr Hodder, yesterday to the *Mid Essex* case, the Court of Appeal decision in England and Wales, which is the fons et origo of the, I'll call it, the ACE language, absolute contractual entitlement language, which is really a sort of rear guard action against *Braganza v BP Shipping Limited* [2015] UKSC 17, [2015] 1 WLR 1661, *Socimer* and the other sorts of cases that have laid the foundation for the contractual discretion doctrine.

We say, with respect, that his Honour's logic below was incorrect and his Honour was led into error by excessive reliance below, as here, on the *Mid Essex* case. We say that the *Mid Essex* ACE methodology wasn't cited by Lady Hale in *Braganza* which is the leading English case and that *Mid Essex* is an unusual case. The result is right, certainly, because as we saw yesterday it was simply the calculation of service points that could determine one way or another whether the contract could be terminated but

that the reasoning of Lord Justice Jackson is less reliable, and I'm going to explain that and also why the arguments are different in the next four propositions.

Firstly, we say that the proper purposes argument putatively accepts that LMCH loses on issues 2 and 3. If we don't, we don't need to get to it. Thus not paying royalties from ongoing mining, contrary to our submissions, does not automatically disentitle BRL to rely on clause 3.10. It's not an automatic cutting of the cord if ongoing mining stops. But we say, and this is where his Honour made an error below, that doesn't of itself, just because there's no automatic termination, mean that BRL can do whatever it wishes. It means instead that unlike our submission BRL has choices. Now our primary submissions is that they don't, they just have a debt, but if BRL does have choice then we say it must exercise them for proper purposes and we say if it doesn't so exercise them the debt is for this purpose payable, and I just note this is precisely how we've pleaded the case, and we say this is because even on BRL's approach clause 3.10 at least requires BRL to properly exercise its obligations under clause 3.10. this is her Honour, Justice Glazebrook's, point about the royalties at least needing to be accurate and under the royalty deed. So we say its choices are constrained although in a more meaningful way than just that and that if BRL acts outside those constraints then for that reason also it's not paying the relevant royalties.

WINKELMANN CJ:

So how are they constrained? Are they constrained by the commercial substratum or how are they constrained?

MR KALDERIMIS:

They are constrained by the – "yes" is a partial answer but more broadly by the proper purposes, by the purpose for which clause 3.10 was granted, that clause 3.10 comprehended certain purposes and that discretion choices could be made in this view by BRL for those purposes but not for other purposes.

Now BRL says, and this is the third proposition, that it doesn't have a discretion here. But we say that there are choices and we've pleaded them in paragraph 51.1.

Now I'm going to get to the substance of the argument but I want to take you to only one legal authority before I do that, and there's no need even to look at it but the reference is important. It's the *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718 case at tab 6. It's the judgment of Lord Justice Males.

WINKELMANN CJ:
Tab 6 of yours?

MR KALDERIMIS:
Of the respondent's authorities, sorry, and the paragraph at page 67 of the bundle is at 113 where –

O'REGAN J:
Just as a hint for the future, it's better to have one page per page rather than two because it's incredibly hard to read.

MR KALDERIMIS:
Thank you. It was a misguided effort to make the bundle feel smaller but it is testing so that tip is taken.

WILLIAMS J:
Yes, makes us feel blinder.

MR KALDERIMIS:
If your Honours squint you can see, and there's no need to look, but if you wish to squint and see, at paragraph 113 you can see that what his Honour is talking about there is the judge-arbitrator below regarding the *Mid Essex* case as drawing the sharp distinction between so-called "absolute contractual rights" or ACEs and cases where there is a proper purposes sort of duty, and

he says: “In my judgment … the position is more nuanced. Although the *Mid Essex* case uses the expression ‘absolute contractual right’ that is the result of a process of construction which takes account of the characteristics of the parties, the terms of the contract as a whole and the contractual context, not a starting point intrinsic to the term itself.” In other words: “It is only possible to say whether a term conferring a contractual choice on one party represents an absolute contractual right after that process of construction has been undertaken.” To say a term provides for this and therefore no term can be implied puts the matter the wrong way round. In other words, it’s just a label. It’s a label that results from the proper process of construction. It’s not an answer. It’s not a separate category as such. Obviously, some contractual powers aren’t fettered but the only way you know that is by going through a proper process, and you can see it’s an easy mistake to make.

In BRL’s reply, it’s not a big point, but in their footnote they cite five cases. One of them is a case called *Property Alliance Group Limited v Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch). They cite the High Court decision. That was reversed by the Court of Appeal on exactly this point, that the Judge below had thought there was an ACE but hadn’t gone through the proper process, and it’s easy enough to do.

And I note that my learned friend, Mr Hodder, has spoken of the difference between having a binary choice which somehow in *Mid Essex* language leans more towards being an ACE rather than having a spectrum of choices which leans more towards being more of a discretion.

WINKELMANN CJ:
Can I just ask you to clarify? You’re saying Mr Hodder refers to a High Court decision but that was reversed by the Court of Appeal?

MR KALDERIMIS:
Yes.

WINKELMANN CJ:

So we're just to be careful. Obviously that was overlooked by the appellants but…

MR KALDERIMIS:

Yes. No, just simply overlooked. I'm not making the point – I'm not saying anything more than that.

WINKELMANN CJ:

No. Just necessary for us to be careful?

MR KALDERIMIS:

Yes. So if you're interested, the case is footnote 13.5 and the citation of the subsequent court [2018] 1 WLR 3529.

GLAZEBROOK J:

Sorry, I think I missed the first…

MR KALDERIMIS:

2018.

GLAZEBROOK J:

No, I actually missed what case you're talking about and what footnote or…

MR KALDERIMIS:

It's *Property Alliance Group*.

GLAZEBROOK J:

And the updated – the appellate citation?

MR KALDERIMIS:

[2018] 1 WLR 3529.

GLAZEBROOK J:

And that's in relation to binary choice or –

MR KALDERIMIS:

That's in relation to this ACE question or not, the *Equitas* point. The binary choice bit comes from *Mid Essex*.

GLAZEBROOK J:

I'm not sure what you mean by *ACE question*, sorry.

MR KALDERIMIS:

Sorry. Absolute contractual entitlement. I'm just using that as a shorthand. Perhaps it's not helpful.

WINKELMANN CJ:

No, it's not.

GLAZEBROOK J:

No, it wasn't at all.

MR KALDERIMIS:

Thank you, I will refrain.

WINKELMANN CJ:

I thought you meant it was an ace card to play.

MR KALDERIMIS:

So the simple point there is that there can be absolute contractual entitlements. They often arise in termination clauses, but the way you know is by going through a careful process of looking at the power in the context in order to see what it really provides for.

GLAZEBROOK J:

In order to see what, sorry?

MR KALDERIMIS:

In order to see what it really provides for and what reasonable parties would have apprehended this power allowed to happen, and I don't have time to go

into the cases so let me just say this, that Lord Sales in the article that we've included at respondent bundle 24 has written what we respectfully commend to the Court as a classic article on the law of proper purposes and what he has done, we address it in our submissions, is he has pulled together strands in the law in what we submit is a coherent and meaningful way.

Firstly, he picks up the doctrine that Lord Sumption has written about for years in various judgments. Now Lord Sumption was counsel in the *Equitable Life* case, probably partly responsible for Lord Cooke's very meaningful comment in his judgment at page 52 of the binder in that case but then Lord Sumption went on to give two very important judgments in *British Telecommunications plc v Telefónica O2 UK Ltd* [2014] UKSC 42, [2014] All ER 907 at tab 15 and in the *Eclairs Group Ltd v JKX Oil & Gas Plc* [2015] UKSC 71, [2016] 3 All ER 641 case.

WINKELMANN CJ:
What case?

MR KALDERIMIS:
Eclairs at tab 4, a company law case. And each case what Lord Sumption is doing is explaining that it's not a matter of an implied term, this proper powers construct. It comes from equity. You can see it in judicial review. That's where *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 and *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74 come from. It comes from the fact that intrinsic, it's more like a term implied by law than a term implied by fact, intrinsic to the nature of powers is that they're ordinarily unfettered and what Lord Sales does in his very important article is he says all of that is right but I think that still the way you know whether the power's unfettered or not is by doing the sort of analysis of the power in the context of the contract as a whole. So he says that's an important part of the overall requirement here.

Now I'm setting this up in order to make this submission. To do this justice one would have to go through these cases much more carefully, but the point

– well, I'll say two more things and then I'll make the submission. The two more things are, one, one should note that Lord Sumption's judgment in *BT v Telefónica* where he says that the proper purposes doctrine applies to doing acts which are within the scope of a power but for an improper reason was cited by Lady Hale with, or Baroness Hale, with approval in the *Braganza* case. It became a part of that case in 27 and 30, and, secondly, Lord Leggatt has written a very important article which we have at tab 22 of the respondent's authorities.

But the submission we make here is simply that for clause 3.10 one can very readily apprehend the purpose for which it was granted. Clause 3.10 was an indulgence granted by BRL to help, by LMCH to help BRL get into mining. That's what it was granted for, and what BRL has –

GLAZEBROOK J:
Or just to –

WINKELMANN CJ:
On that site?

MR KALDERIMIS:
On that site. On that site, thank you, within the permit areas. That's what it was granted for.

GLAZEBROOK J:
Mr Galbraith accepted that it was to do what the parties commercially had thought was the answer anyway.

MR KALDERIMIS:
Yes, what Mr Galbraith, as I heard it, said was that the parties had been proceeding in a good faith way to each other so that BRL was expecting that LMCH would not simply enforce a debt due and owing if there was a more commercial way that they could work together.

GLAZEBROOK J:

I'm not sure that's quite right, is it, because if they'd assumed that was the deal anyway then they were just putting down what the deal was. You had a choice to pay a higher royalty or to pay the money.

MR KALDERIMIS:

Yes, and we say that was not what anyone thought the deal was, but what I'm trying to explain and I'm probably –

GLAZEBROOK J:

Well, they did think it was to deal commercially is what Mr Galbraith said.

MR KALDERIMIS:

Yes, I thought I was agreeing with that. I was certainly meaning to agree with that, your Honour. I'm probably not –

WINKELMANN CJ:

He said he – they thought it was a deal commercially but that wasn't what was recorded in the – that wasn't what the agreement provided and so the clarification was that they would enforce the agreement like the commercial transaction had been operating.

MR KALDERIMIS:

Yes.

WILLIAMS J:

So it seems to me your submissions is simple, that the clause 3.10 was designed to allow BRL to get going on the Escarpment, not to stop –

MR KALDERIMIS:

That is the submission.

WILLIAMS J:

– and therefore it can't be used to do the opposite of its purpose.

MR KALDERIMIS:

That is the submission, and you have put it much more elegantly and I'm very grateful, your Honour, for putting it much more shortly.

WILLIAMS J:

Yes, I never trust lawyers when they say those nice things to judges. They are the sorts of things I used to say.

MR KALDERIMIS:

Given where my timing is at, brevity is my friend, so can I then – and you can see that I anticipated that this might happen. If you turn to the final page of the road map you can see the references to the evidence. Much of it is in the chronology but this is just a clearer way of explaining it as to why it is clear beyond peradventure that BRL has used its choice, if it has one, to pay the non-royalties instead of the actual performance payments in order to mine elsewhere, and we say there are five reasons. Now the way this is set up as it is is that one way to understand this evidence is simply to read from the first page to the last page the cross-examination of BRL's chairman, Mr Kapea, because all of these things were put to him in roughly this order and you can follow the logic along but it's helpful to have the references, the updated references, to where the documents can be found in the bundle.

WILLIAMS J:

All these references are to the cross-examination of Mr Kapea?

MR KALDERIMIS:

On the right-hand side, on the final column.

WILLIAMS J:

Right, I see, sorry, not the red items.

MR KALDERIMIS:

And then the things in the middle, virtually every document was put in one way or another to Mr Kapea but some of them were put to Mr Fergusson, the

BRL mining expert. But one doesn't need to descend too far into the detail to understand the point. I note one abbreviation. If you look at the third bullet point in the third row beginning "Even BRL's expert" and read along, you can see "WW". That's West Whareatea. That's one of the mines. And the reason why we write that is that Mr Duncan, who was LMCH's expert, explained in evidence, unanswerably and unanswered by anyone, that BRL's 2017 plan to mine Sullivan first and then West Whareatea, WW, and then Escarpment would mean that Escarpment would not be mined until 2030 at the earliest, and that's assuming that Sullivan and West Whareatea get their various consents by which time the hard-fought consents for Escarpment will themselves have started to expire and Mr Duncan said that mining unconsented areas prior to consented areas was illogical, and we say that's hard to disagree.

So in the last few minutes I'll just explain these propositions so we have them, and I'll just go through from the first to the fifth and I've really touched on the fifth already.

The first one is that you can trace through these documents that are in the middle and Mr Kapea's cross-examination on the right-hand side. BRL's changing attitude to the performance payments. First, they're listed in their accounts, first as a current liability then as a non-current liability and then it becomes something that's described as "shackles" in that email on the 13th of June 2013, and then there are frequent references, as my learned friend, Mr Galbraith, said, to the renegotiation that BRL wanted to have and then began to have for many years with LMCH and then to something as suggested by Forsyth Barr, that's the document at 309.1900, that can simply be avoided if you just didn't mine Escarpment but you focused instead on West Whareatea, and then we have in the penultimate bullet point in that first row BRL's infamous February 26 presentation where it says: "The debt will never be paid. We'll just mine elsewhere," and the equally infamous email where one of BRL's directors describes Escarpment as a dog and says: "We just will mine somewhere else," and you can see that conceptual mining plan showing the order in which the mining is to happen and then paragraphs 49 to

56 of Mr Duncan's reply statement in particular explain the illogicality of doing that and the fact that you'll just take on that sort of permit risk that BRL battled with for so many years in order to get Escarpment going.

The second point is that BRL in the end of 2014 went through quite a dramatic impairment of its assets. You can see on the left-hand side the assets reduced from 425 million to 16 million and as an accounting consequence the deferred consideration was reduced in the accounts from 180 million to two million and that was all done on the basis of a single work paper that Mr Duncan managed to show at trial was based on entirely faulty assumptions. CAPEX that was too high but OPEX of $US170 per tonne that BRL had never assumed in any of its presentations, and there was no Board minute and the impairment wasn't revisited even as the coal prices returned which Mr Fairhall, the accounting expert for LMCH, was critical of.

The third point is that there was a log of evidence at trial about BRL's subsequent, not prior, prior it was very optimistic, but subsequent pessimism that Escarpment could be mined economically even as BRL has kept Escarpment in its reserves which is confirmation that it can be so mined. Now the point there is the first point in the third row. The so-called JORC reserves, the joint or reserves commission accounting methodology for reserves, and the point is if you list something in your accounts as reserves it by definition means you've done the science, it's been independently certified, and not only are they there, which makes them resources, but they're economically mineable, which makes them reserves. So there's an incoherence in BRL's 2014 annual report in which it says: "Well, this is all worth nothing," but it lists some 4.1 million tonnes of reserves in Escarpment and 8.5 million tonnes of reserves in Deep Creek.

The rest of the third row is just going through the various bits of objections. The sulphur's too –

WINKELMANN CJ:

What do you make of that though? What's your point about that?

MR KALDERIMIS:

The point is that the intention you can see, if you're trying to discern the purpose, is not to mine the Escarpment even though it does in fact have valuable assets, that the assets are valuable and the pessimism isn't justified, that's the point. If the pessimism –

WILLIAMS J:

Well, not to mine them until 2030?

MR KALDERIMIS:

Yes. Not to mine them until 2030 but to take them out of the – they're just not assets in the accounts, and so that's an unjustified pessimism, and the rest of the table is just the various different bits of evidence where BRL said: "Oh, look, the reason we can't mine it is the sulphur's too high," or, "The reason we can't mine it is the access isn't in place," and we say the whole point of this is the last point. BRL could have economically mined Escarpment. It simply has different priorities. That's the inescapable conclusion of where the evidence led to.

The fourth point is really just a variant of this. BRL failed to show at trial that the resource it purchased wasn't valuable and possessed attractive and saleable qualities, and Mr Kapea accepted many times throughout his cross-examination that the assets were in fact valuable and there were many preferable features to them as Mr Fergusson accepted, last bullet point, over, say, Stockton or West Whareatea, and the last point I've mentioned, the illogicality of prioritising unconsented mines you can't go into yet over Escarpment when, in the second bullet point, Escarpment, sorry, third bullet point, last one, has a mining permit that expires in mid-2022. So chances are that by the time BRL, even on its current conceptual plan, because that's all it is, gets round to mining Escarpment, it might not be possible to do so.

WINKELMANN CJ:

What year?

MR KALDERIMIS:

2022. That's the last bullet point in the last row. So the point of all of that is simply to say that what BRL can't do is take advantage of LMCH's continued provision of vendor finance to buy and develop other assets. That's the proper purpose argument and I've got nothing further to add to that. And I said I would stop now and unless your Honours have any further questions I will do so.

WINKELMANN CJ:

You've probably been peppered with enough questions, Mr Kalderimis. Thank you very much.

MR KALDERIMIS:

Thank you.

MR HODDER QC:

If your Honours please, my learned friend is in breach of an express term of our agreement. He was to stop sharp at 3.20 and he has not. No damages are sought.

WINKELMANN CJ:

Yes, five minutes, liquidated damages.

MR HODDER QC:

A lot of ground which I obviously can't cover all of but can I perhaps come back to a phrase that your Honour, the Chief Justice, used that perhaps captures one of the themes that underpins much of that which is good times and bad times. Now the argument for Bathurst is that this contract was meant to operate in good times and bad times and when the good times operated then the parties would be sharing the fruits of that. There would be good mining, profitable mining to be undertaken and both parties would be sharing in that. In the bad times, nobody gave much thought to the bad times but the contract encompasses the possibility of bad times, then you wouldn't mind when it was uneconomic. You'd just pause. And the issues before the Court

come down to how that general concept is manifested in the contractual documents. That's the general response, we say, to our friends' submissions because they are neglecting that and the end result of that is that at the very moment that bad times arise, that is to say personified by what happens when the mine is put into care and maintenance, then that's the point at which they say, well, that's when you have to front up with US40 million. That, we say, doesn't capture the idea about getting this whole exercise into a successful state of mining, and if one accepts that general theme then we say that puts into substantial context and undermines the various arguments that our friends have been advancing to you.

Now can I go back and be a bit more specific?

WINKELMANN CJ:
Well, I was just going to ask you about that. Is there not a problem with that kind of interpretation too which is really the whole point that's being said against you which is that on your analysis there is no – all the loss, the bad times, tends to be falling on LMCH because there's no fetter and real discretion to defer?

MR HODDER QC:
Well, there's two phases to that. If we put clause 3.10 to one side for the moment and just look at the general proposition. Good times and bad times mean that there are profits being made and money being paid out. That's when the royalties arise. In terms of clause 3.10, I think your Honour, the Chief Justice, used that phrase in relation to how that's supposed to work, and we say the same thing applies to that, that you can interpret the proviso in a way that accommodates that whereas the interpretation of the proviso provided by our friends doesn't enable that to happen which is why they're saying at the worst possible time you need to – you lose the protection that clause 3.10 is meant to provide, and that's why I'm making the submission in the way I have, your Honour.

WILLIAMS J:

That would work, I mean on this basis you've dug $40 million into that hole and –

MR HODDER QC:

We have.

WILLIAMS J:

– your counterparty may well have done the same, that would work –

MR HODDER QC:

Five.

WILLIAMS J:

Sorry?

MR HODDER QC:

They put five million into it.

WILLIAMS J:

Well, the 40 million that they would have got.

MR HODDER QC:

Yes.

WILLIAMS J:

But you have this problem, don't you? You're not in bad times any more. You were when you put it into care and maintenance. Now you're in good times.

MR HODDER QC:

Well, that's not established.

WILLIAMS J:

Well, looking at your annual reports it seems you're doing rather better than being a failing miner on the escarpment.

MR HODDER QC:

What I'm – my learned friend has invited you to read the cross-examination of Mr Kapea. That's a very long part of the case but what I'm going to invite you to do is to read Mr Tacon's evidence. He's the one who probably should have been cross-examined on those matters. He is the one who has the mining expertise that Mr Kapea did not have. If you read Mr Tacon's evidence you will see he says on a frequent basis they do want to get back in there and mine. They can get back there and mine. They require a degree of comfort in relation to the future prices. Those prices have never stabilised at the levels of the time that they entered into this agreement and they now have a situation where they can avoid some of the costs of building infrastructure, not just on the mine site itself but generally, because they've picked that up through Stockton and they can probably access it through the joint venture with Talley's, and so again to the extent your Honour's have seen it the key part of the Escarpment block is something called the "ham bone" and there were complications because they had in the early stages to approach it effectively from the eastern side. That was a tricky thing. Coming up from the other side, they get to the meaty part of the ham bone first. It's a whole lot simpler.

WINKELMANN CJ:

We probably don't need you to go through that. So it's just Mr Tacon's evidence, if we read that.

MR HODDER QC:

Mr Tacon's evidence explains why it's not dead and buried as a concept, it's suspended, and that really is a concept that is lacking in the analysis you're hearing from our friends. They say it's on/off. It isn't on/off. It's in care and maintenance and being suspended. And the other detail, if I may, your Honour, is that it's cost 850,000 a year to keep it on care and maintenance. It's not as if we've given up like the doctor in M'Intyre or somebody else.

WINKELMANN CJ:

No, I imagine it's a risk, a large mine is a risk. You have to do things to keep it safe.

MR HODDER QC:

Yes, there are obligations in all sorts of ways.

WINKELMANN CJ:

But can I say this to you? Of course, when this was all done, the variation of clause 3.10, the concern was not to look forward to bad times. The concern was to enable the mine to keep going without wiping out the ability for the mine to keep going. So you…

MR HODDER QC:

Well, that depends how much you can read into what aren't very detailed evidence about negotiations, and so we on that front, as the Court knows, say, actually, clause 16.9 says it's part of the contract. Well, it's part of the contract and clause 16.9 says that extinguishes the previous negotiations, and, secondly, when you look at the text of the contract it doesn't say that, it's only about good times. It covers the general concept of the contract, and the general concept of the contract is in good times, ie, when it makes economic sense, then there will be benefits to both parties. But nowhere, we say, unless the Court is against us on clause 8.1(b) containing an express obligation, can you find an obligation to mine when it doesn't make any sense to do so. That's a decision left for Bathurst. Clause 13.1 of the royalty deed makes it clear that decisions about running the mining operations, and that includes the concept of whether you mine or not, are those for Bathurst alone.

WILLIAMS J:

So it seems reasonably clear that the decision, the commercial sense point that you're making, is from Bathurst's point of view a consideration of its wider interests and its joint venture and not just considerations relating particularly to this site. You say those – even if you make more money elsewhere, it's not

a wrongful purpose to walk away from this one, even temporarily, albeit for a long time?

MR HODDER QC:
I do say that but I do say also that you don't have evidence that says that it does make more sense to mine and build up Escarpment now in the way that was contemplated as opposed to be more economic to do it the other way.

WILLIAMS J:
Sorry, it doesn't?

MR HODDER QC:
There is no evidence that says that Escarpment can be profitably mined now on a sustained basis.

WILLIAMS J:
Okay.

MR HODDER QC:
The evidence from Mr Tacon says they haven't got to that point. They've got studies that show the most efficient way to do it. The efficient way to do it is to come in from the other way. That requires mining other sides first. Nowhere does it say specifically that the most sensible thing to do is to mine Escarpment in the orthodox way.

WILLIAMS J:
No, not if you've got a whole lot of infrastructure at Stockton.

MR HODDER QC:
Correct.

WILLIAMS J:
But that's because you've got a whole lot of infrastructure at Stockton that you bought after this deal.

MR HODDER QC:

The costs of – well, I don't want to go into the detail of it. The proposition is that unless it can be shown that there's an irrational decision by Bathurst not to mine because it is blatantly economic to mine and make profit on a sustained basis, and we say there is no such evidence of that, then that's a decision that Bathurst is entitled to make.

WILLIAMS J:

Right.

MR HODDER QC:

And it has. And that's, we say, the point that answers a series of propositions advanced by our friends.

GLAZEBROOK J:

And is that on the improper purpose or is that more generally that proposition?

MR HODDER QC:

It covers improper purpose particularly but it also – the underpinning of our friends' submissions on a series of places is that they've been hard done by because there's been an election on Bathurst's part not to do something it was blatantly obvious it should have been doing from an economic perspective. That's one argument. The second argument is it doesn't matter if it's economically irrational. They should be doing it anyway. We say neither of those fit into the concepts of interpretation or implication or improper purposes. That's the broad high level response to those submissions.

I come back to the detail. I appreciate that much of the time has been spent other than in the nice concept of performance but can I just – and the DFS, but the reason that I emphasised the DFS in my submissions yesterday is that it is, we say, absolutely plain that at the time the parties entered into this contract, let alone the time they committed to it finally with the settlement, that Escarpment was the obvious and clear first runner, and if I can give your Honours a reference to the –

WINKELMANN CJ:

Well, the DFS was after the contract was entered into though.

MR HODDER QC:

I'm about to explain that that's not quite the case. So if one goes to a pre-2008 information memorandum put out by Bathurst, and I'll just give the reference which is 301.0183…

WILLIAMS J:

Sorry, can you give me that again?

MR HODDER QC:

301.0183. This is the investor, or part of the investor presentation.

WILLIAMS J:

This is for the 16 million, is it?

MR HODDER QC:

This is 2008 when L&M was trying to offload this stuff.

WINKELMANN CJ:

So this is L&M's memorandum?

WILLIAMS J:

Yes.

MR HODDER QC:

L&M's – I'm sorry?

UNIDENTIFIED SPEAKER:

You said *Bathurst*.

MR HODDER QC:

In that case there was a slip. L&M is trying to sell these assets. It makes it clear that the first choice place to develop, because it will produce coking coal,

is Escarpment. That point is made clear enough in the DFS itself when it singles out Escarpment as being the subject, sorry, it's made clear in the agreement itself when it, then Escarpment is singled out as being the candidate for the DFS, but what we know is that the appointment of Marston to undertake this exercise takes place in April 2010, and your Honours will see that…

GLAZEBROOK J:
Well, I suppose you'd say the fact that it's spelled out in the agreement itself means that if it wasn't the front runner or the first off it was certainly the thing that was seen as being make or break on the deal, Escarpment.

MR HODDER QC:
Yes.

GLAZEBROOK J:
Because otherwise you wouldn't have got a DFS or the ability to get out of the deal if it didn't work, if Escarpment didn't work.

MR HODDER QC:
Correct. So can I just give some references again? So at 302.0276 there's an ASX statement from Bathurst explaining that they have appointed Marston following a recent due diligence review on the Buller project and the DFS is expected to be completed in Q3 2010, as my learned friend, Mr Galbraith, said. So it commences in April.

If we go on to 302.0288, which my friend took you to, he took you to the third paragraph, but the first two paragraphs explain that as part of the DFS, this is on the 17th of May 2010, there's a first stage of an exploration programme has been completed focused on Escarpment and it's from that that Bathurst can confirm that it has an initial resource of 7.3 million tonnes of high quality coking and thermal coal to underpin the first seven years.

In the agreement for sale and purchase itself clause 6.6 refers to the completion of the DFS, and so while there's no direct evidence about the exact sequence of timing then we say the inference that one can take from those documents I've just referred to from clause 6 of the agreement for sale and purchase and from the use of the June 2010 header across some thousands, or it prefaces that part of the report which is in fact a couple of thousands of pages in the seven volumes of the DFS, indicates that by June 2010 all that was well known.

WINKELMANN CJ:

That by the time the agreement was entered into?

MR HODDER QC:

There or thereabouts. I can't – I have no evidence that it occurred on the 9th of June or whether it occurred on the 11th of June, being the 10th of June date, but this was a matter in which both parties were contributing information to Marston. We say it's implausible that Marston wasn't giving information back. Certainly, the full thing is reported to the market in August but the detail about the key issues that, A, it's Escarpment which is the key prize and, B, that Escarpment is all about coking coal are the key points, and in relation to –

WINKELMANN CJ:

Well, that's taking us nowhere further than you were at the beginning which is you can't really say, as at the date of the agreement, that that information was there.

MR HODDER QC:

I'm saying that on the basis of the investor statement beforehand, and indeed the other statements in the market beforehand, that's already really established, that it's about coking coal and it's about Escarpment.

WINKELMANN CJ:

So by the time of the agreement it was that, you say?

MR HODDER QC:

Yes, I say, and the DFS gives you the full detail on that including the logistics about how it was going to be done, but there's no suggestion anywhere that it wasn't going to be Escarpment first off the rank and it was going to be about anything other than coking coal.

WINKELMANN CJ:

And high quality steaming coal, steam coal?

MR HODDER QC:

Well, in terms of Escarpment it was pitched as being coking coal, if anything else it was to be blended into an export exercise. And the latter point of that is that while the general focus and contract interpretation is going to be on the date the parties negotiate the agreement, then the date at which they commit themselves to the agreement is also relevant as well and as we know that comes late in 2010.

WILLIAMS J:

So this is in response to?

MR HODDER QC:

In response to the proposition that my learned friend is saying, in a very nice polite way, disregard the DFS. We say you don't disregard the DFS. It explains most aspects of the context for this case.

So, and I should say that in terms of Deep Creek, which you've heard something about, Deep Creek was the subject of a PMS, and if your Honours were to look at Mr Fergusson's evidence he explains the difference between a PMS, which is a preliminary mining study which is kind of a much higher level view, and a DFS which as it says is a definitive feasibility study, then Deep Creek only has the second and when the final DFS comes out in late 2010 it's made clear that the DFS for Deep Creek justifies a fast-track approach whereas the PMS for – sorry, the other way round, the DFS for Escarpment justifies a fast-track approach at Escarpment and for Deep Creek

it's not a fast-track approach, and if you look at the numbers you will see that –

GLAZEBROOK J:
Can you give me the – Deep Creek was the subject of a what? What were those initial again, sorry?

MR HODDER QC:
I'm sorry?

GLAZEBROOK J:
What were the initials again?

MR HODDER QC:
So DFS is the definitive feasibility study and then PMS is the preliminary mining study.

GLAZEBROOK J:
Yes, that's fine.

MR HODDER QC:
Mr Fergusson discusses the difference between those around paragraphs 18 and 19. And so in relation to those there's also data in the executive summary to the DFS when it comes out in its full form that explains that in the way that the sequence of mining is contemplated in practical terms it's pretty obvious a million tonnes is going to be reached before you get into Deep Creek. So the key is always about Escarpment in terms of both those payments. That's what it relates to.

So that's, as it were, background, and we say you can't dismiss the DFS in the way that –

WINKELMANN CJ:

You say that in terms of construing the contract it's also relevant what was known at the time it was made unconditional, but that can't be right, can it, because it can't change the nature of the agreement that was reached in June?

MR HODDER QC:

We say both parties are contributing the information that then satisfies Bathurst to the point it can list the agreement and so that –

WINKELMANN CJ:

Yes, but it's not retrospectively altering the nature of the agreement that was reached though, is it?

MR HODDER QC:

No, I'm not suggesting it is, no. I'm suggesting that it's, depending on the approach the Court takes to the admissibility in evidence then it's admissible in relevant evidence and nothing of substance changes during that period, we say.

So in terms of 3.4 itself, there's not much I can add. I still don't understand entirely what our friends say performance relates to but if the proposition is it's enough to have achieved the permits and to have got the first 25,000 tonnes out of the ground and onto a truck then we say that's not much of a performance in relation to what the DFS was contemplating which was a million tonnes a year export operation. That's as far as I take the point and you've heard me before on that.

O'REGAN J:

But neither was putting 25,000 tonnes on a ship. Either way, the $40 million payment was going to have to be made miles before $40 million was earned out of the mine.

MR HODDER QC:

But again that depends entirely on how far the Court's prepared to go with me on the concept that the idea of export was fundamental. So if the idea of export is fundamental then use of the word *shipped* we say makes most sense.

GLAZEBROOK J:

Well, I suppose you'd also say that as soon as you did have it on a ship that was your export business that was started –

MR HODDER QC:

Yes, that's the pathway.

GLAZEBROOK J:

– whereas putting it on a truck to sell to a company that was clearly, well, that clearly said it was going to stop business doesn't fit within the original concept of the agreement. Is that…

MR HODDER QC:

Correct, that's the point.

WILLIAMS J:

Did anyone give evidence from Marston?

MR HODDER QC:

No, your Honour.

WILLIAMS J:

So…

MR HODDER QC:

Otherwise we wouldn't be guessing about whether it was the 9th or 11th of June.

WILLIAMS J:

Quite. That was going to be my next question. Okay, good.

MR HODDER QC:

Just one other thing about that, I suppose. In terms of the terminology, my learned friend, Mr Galbraith, came back to the point that was made elsewhere about Mr Bohannan and Mr Loudon both having referred in evidence to their experience in different parts of the world to the idea "shipped" was a generic concept and covered "transported". The key thing about that, or a key thing about that, was that they never communicated that view to each other, that was clear. So that was both internalised views that were never communicated as part of the background as we understood it. So we say you finish up with two subjective views of the parties but that doesn't assist us when we are confronting the idea of what was represented by the contract which Mr Loudon said, as I mentioned yesterday, he hadn't actually read. He relied on Ms McArthur to write the contract and sign it.

In terms of the third amendment in clause 3.10, we would probably start somewhere differently than our friends have, obviously enough, but if I can just pick up. There's brief mention in clause 16.9 in our reliance on the *Rock Advertising* case, but the point about 16.9 is – well, go to two points. The point about *Rock Advertising*, and in distinction to rather older cases such as *Hart*, is that, as we understand it, the modern jurisprudence around most of the Commonwealth gives weight to the parties' idea of deciding that they control some aspects of the interpretation exercise. So if they have a "no oral variation" clause, it's respected. If they have an "entire agreement" clause, that's respected. Here we have one that says you'd extinguish it, the clause we've got extinguishes all previous negotiations. Our friends' propositions are very largely based on either negotiations or assumptions about what negotiations might have been if they had taken place and we say that is not was what, it's available to be used.

Putting that, if I may, to one side, perhaps the central point about this is our submission to the Court is that the key aspect of the proviso is it requires

compliance with a royalty deed and the royalty deed requires payment of royalties as and when they are due by reference to sales of coal.

In the 2013 clarification, and you will find this in our written submissions at paragraph 9.7 in the appropriate references, the point that was agreed after the discussions between Russell McVeagh and Ms McArthur and their respective clients was that, and this was to go into the prospectus, was that payments would be made as and when due. That's the actual language you find and we quote it in our paragraph 9.7, and we say nothing different was meant in 2012 than was meant in 2013, and that's the clear and obvious meaning of the proviso. It's simply a part of compliance with the royalty deed. You don't have to go looking for some other kind of obligation from somewhere else. That is the obligation, the parties will accept it, and which is incorporated by reference, pay royalties as and when due, and that's consistent with the good times and bad times. If you get to a point looking forward from 2010 or 2012 and you are successfully mining then there'll be royalties due because you're mining and selling coal. If you're not, they won't be due, and that point, we respectfully say, isn't taken into account in our friends' arguments on behalf of L&M.

So implicit in that is that there is no separate obligation under clause 8.1(b) to mine. If the Court's against us on that then that has a fairly substantial impact on the outcome of where you get to but we say it doesn't and I won't I think repeat myself except to say that our response in a nutshell to our friends' submissions is that the entire subparagraph is about how. My learned friend, Mr Galbraith, said the first part might be about how but the second part tells you that you have an obligation, or may have an obligation, to mine.

I'm not sure how firmly either of our friends were putting that but to the extent they are we resist it and say it doesn't occur. But it is very significant because if there is no external obligation like that then you're having to read something quite dramatic into the proviso to clause 3.10. It's not an existing obligation and the reason that the argument is being made, of course, is it isn't consistent with the royalty deed. So again we say that we're entitled to have

regard to the whole of the proviso which would be read as a continuous and coherent whole but the end point of it is that what must be done is to act in accordance with the royalty deed, and that in turn, as I have said, allows you to reflect good times and bad times.

The question of doubt, I acknowledge that the question of doubt wasn't raised in the correspondence. We don't have evidence from Ms McArthur as to what was in her mind when she drafted this. There's no doubt that there were concerns but the real issue is that, well, the real point is that this is happening in place in anticipation of whatever issues might arise and if the doubt happens to be the commercial doubt that Justice Glazebrook put to my friends and which I think they've largely accepted, it's still a doubt that has to be resolved. How is it resolved? It's resolved by providing the protective measure of clause 3.10 with it's proviso, and that simply takes you back to what does the proviso mean in the context of the whole arrangement and as we say the whole arrangement is meant to operate in good times and bad.

On the implied term arguments, there's a couple of things there to start off with. The first is that as we apprehend the way that the approaches have been settled, not least by *Marks & Spencer*, there is a sequence. First you identify the agreement in terms of the express terms and then you see whether an implication is required or permissible. But it is relevant, although my learned friend, Mr Kalderimis, I think was sidling away from it, that if Bathurst is successful on the interpretation arguments then it becomes a very hard task to imply a term for L&M.

WINKELMANN CJ:
Although I think it's discussed in *Marks & Spencer* that it is an essentially iterative process.

MR HODDER QC:
Yes, although I think that again there are various parts in *Marks & Spencer* always I'm – my understanding is that the essence of it is you are actually working on the starting point as being what you have expressly.

WINKELMANN CJ:

Which I think is a part what Lord Neuberger, how Lord Neuberger explains what was meant in *Belize*.

MR HODDER QC:

Well, again, my understanding is that he is confirming the traditional approach which is that before one can imply a term one has to establish what the existing provisions provide because until you do that, among other things you don't know whether you're contradicting something express that's already there and what we say is that if we are right on clause 3.10 and the way I've been arguing it then what's being sought here to imply is a way to contradict it which is problematic from the outset.

In terms of the *Aberdeen* case, the concern there was about commercial nonsense and so far as referred to in the *Arnold* case the question is whether I was clear what the parties intended, that just simply takes us back in a circle to whether we're interpreting or implying but nobody has pointed to some external authoritative source on what the parties intended, and in terms of whether *Belize* is really just a – doesn't deserve the shots being fired at it by, among others, Lord Neuberger, then we say actually it does attract that kind of fire and we think the *Sembcorp Marine* fire from the Singapore Court of Appeal is particularly well directed and comprehensive.

WINKELMANN CJ:

Well, the language Lord Hoffmann used was unfortunate, wasn't it, as Lord Neuberger says?

MR HODDER QC:

Yes. I don't think Lord Hoffmann's ever come back as he did after *Investors Compensation* saying: "What I really meant was," but perhaps one day it may happen.

In any event, our friends make a great deal out of the fact that this was a temporary indulgence. Well, where did the word "temporary" come from? Where is the temporal aspect in clause 3.10 that says it's only short-term?

WINKELMANN CJ:

Well, it must be a temporary indulgence because you're not suggesting that the obligation to pay the performance payment is discharged, so the obligation remains.

MR HODDER QC:

Well, it depends what "temporary" means, I suppose. As always, we get back to that. But at least I'd taken the impression I thought from one of Justice Williams' questions here the same, that this is a short-term exercise, get you onto Escarpment, that's the end of the story. Whether that's temporary in terms of a short period of time or it's temporary in terms of a particular phase in the overall development of the permit areas perhaps doesn't matter but if the proposition is that unless it got used up quite quickly it didn't last, then we resist that if that's not what we –

WINKELMANN CJ:

So you don't resist. It was a suspension though?

MR HODDER QC:

It's a suspension. Well, in the way it's been cast by our friends it's a suspension because **(inaudible 15:55:25)** assuming that debt has arisen and it is due. So they say it's a temporary indulgence and it effectively subverts the parties' bargain. Well, that begs the question of what the parties' bargain is. If the parties' bargain is, as I suggest, good times and bad times then it doesn't subvert that. It's consistent with it because then the economic incentives continue to application. If it makes sense to mine Escarpment, then Escarpment will be mined and everybody wins. If it doesn't, it doesn't.

WINKELMANN CJ:

Did you say everybody wins?

MR HODDER QC:

Everybody wins at the point when it's economic to mine, yes, and the idea that you wouldn't mine when it's economic doesn't hold water, we respectfully suggest.

Ongoing, with respect, this probably is echoing Justice O'Regan, doesn't take us very far because we don't know where we are but the real point is that if ex ante you're trying to predict what this means you do have to know what it requires. It's no good, we respectfully say, as the Court of Appeal does and as our friends do, it doesn't matter what the term was. There's some obligation in there somewhere and you've done no actual mining.

There's a related point that also comes back to what you're trying to define. They say "ongoing mining" by which I think they mean ongoing activities, digging coal out of the ground, all those sorts of things we see with large trucks moving around at a rate of knots. If in fact you were to interpret something like this and said: "Well, it's ongoing mining operations," then even the Crown Minerals Act accepts that mining operations has a wider concept. It would include care and maintenance where you're spending $850,000 a year to keep the site intact, and I would accept, for example, the proposition that you would assume in ongoing mining operations of that kind that's consistent with clause 8.1 as opposed to walking away and locking the gate.

WINKELMANN CJ:

Well, they don't mean that, do they, because they're talking about something that generates royalties?

MR HODDER QC:

That's the – well, that's coal sales which gets you back into coal sales. Coal sales. They're not accepting stock piles. So that's – they have to find something beyond stock piles. They need to go into something that requires active activities. But that's the distinction, your Honour's right, that they're seeking.

O'REGAN J:

Yes, I think they mean mining and selling what you pull out of the mine. So I think you generate royalties and pay 10% royalty.

MR HODDER QC:

Yes, and then they're having to draw a rather interesting distinction between stock pile mine and mine that comes out but –

WINKELMANN CJ:

But you don't normally just mine to stock pile, do you, not in any kind of lengthy sense? You mine to sell.

MR HODDER QC:

If you have a continuing mining operation clearly not, your Honour. If you have a mining operation which is dependent on some economic considerations and you stop then yes, you'll sell from stock piles and royalties will be generated and they have been, admittedly on a level that no doubt L&M is utterly dissatisfied with but they have been.

And so in terms of that general approach, the question is what does "due" mean. Well, we come back to "as and when due" in terms of royalties. Now my learned friend, Mr Kalderimis, took you to the *M'Intyre* line of cases and so on and so forth. What he didn't do was take you to clause 16 of the agreement which, if I can find it among my papers, this really goes to Justice Glazebrook's questions of him.

O'REGAN J:

This is of the agreement for sale and purchase?

MR HODDER QC:

Yes, it is. So at page 302.0332 you will find clause 16.4 which is the standard further assurances clause. Further assurances clause, in my understanding, are designed in effect to contractually capture the concept that's found in

M'Intyre, but there's no pleading or suggestion there's a breach of clause 16.4 anywhere here.

WINKELMANN CJ:

No, that's not really what that 16.4 is to do with. That wouldn't have…

MR HODDER QC:

"To obtain the full benefit of this agreement according to its true intent."

WINKELMANN CJ:

This is "Further Assurances".

MR HODDER QC:

Yes.

WINKELMANN CJ:

It's to get documents executed, et cetera.

MR HODDER QC:

Not just that. And "all things as may reasonably be required by the other party". The contract goes – and it is, as I say, my understanding of these clauses is they're designed to capture exactly that anti-avoidance point and to capture the scenarios such as *M'Intyre* and such cases, so there's an express term that deals with that. So what's being put to you is that's not good enough, we didn't plead that, we're not relying on that, we want a new term that is designed to cover some similar territory but suits the case that we're advancing to you. And the cases that you're being referred to are cases where there is no come-back, so they are really those binary situations where you either have a medical practice that can generate revenue to pay the purchase price or you don't and, as I said earlier, what we have here is a situation which is between those. We have a period of suspension in the nature of care and maintenance in which there are ongoing obligations on Bathurst which it has been fulfilling. And so standing back from it, to the extent that we're talking about a gap in that nobody was contemplating this in

2010 or 2012, that is you get to the point where some coal comes out of Escarpment but it doesn't sustain a major enterprise, then the proposition is simply that that gap is dealt with by these existing provisions, the contract does work, particularly if the good times/bad times analysis is accepted.

WINKELMANN CJ:

So are you saying – I'm not sure what you're saying about further assurances. Are you saying that if, that's it's a sufficient basis to require Bathurst to mine?

MR HODDER QC:

No. I'm simply saying that the gap that is meant to filled is one that is, doesn't –

WINKELMANN CJ:

Not filled by this? So how does it answer the point? Because it doesn't fill it, so it still leaves a gap.

MR HODDER QC:

What our friends say is in the implied term argument and, indeed, the proper purpose, they're really talking about some sort of gap in the express terms of the contract, and we say those terms are sufficiently covered by the protective provision of clause 3.10, the gap doesn't have to be covered by a protection that falls away when it's most needed because there is a suspension of operations on economic grounds. And remembering there's still the incentive on Bathurst to try and get a return on its original $40 million US as well as sharing in the profits, and taking the profits from active and successful profitable mining.

WILLIAMS J:

If its true intent is, as Mr Galbraith and Mr Kalderimis suggested, rather than as you suggest, not a good times/bad times but to get BRL up and running, not to stop, then maybe you could read 16.4 as provide what they want?

MR HODDER QC:

Maybe you could, but they didn't plead it.

WILLIAMS J:

No. But I'm not sure this helps you because…

MR HODDER QC:

Well, we say they didn't plead it because it doesn't cover the ground. What they're trying to do is come at exactly the same point from a different direction by way of an implied term.

WINKELMANN CJ:

So it doesn't really meet their implication argument then, does it, because it doesn't cover the ground, so there is either a gap or there isn't, but it doesn't really help…

MR HODDER QC:

Well, we would say that –

WINKELMANN CJ:

You maintain point that there's no gap.

MR HODDER QC:

Well, covering the ground goes to a different point. If the parties have addressed the topic in a particular way then that covers the ground. It may not cover every aspect another party wants.

WINKELMANN CJ:

You might infer from that fact that they've turned their minds to it and decided not to cover it?

MR HODDER QC:

Yes, that's the general proposition.

GLAZEBROOK J:

Well, I suppose you say –

MR HODDER QC:

And you can't come back and say: "I want a different clause implied because that one doesn't go far enough," we say.

GLAZEBROOK J:

Sorry, I was just going to say you say that the *M'Intyre* clauses don't apply in this situation and that that is designed to cover off whatever might be under both clauses – under those cases?

MR HODDER QC:

Yes.

GLAZEBROOK J:

Which, as I think your friends accepted, that in many of those cases there's no contingency aspect to it.

MR HODDER QC:

Correct. They've only got two scenarios: either you're running the medical practice or you're not. Nobody's talking about suspending it and going on sabbatical.

GLAZEBROOK J:

We'll, either you paid something for the medical practice that you'd agree to buy or you paid nothing.

MR HODDER QC:

Yes, correct.

GLAZEBROOK J:

Which is slightly different from you agreed to pay 40 million and then two more payments of 40 million, one of which was suspended by agreement.

MR HODDER QC:

Yes, and which was not defined as part of the original consideration, it only becomes, this is the question of when the contingency ceases.

Now, my learned friend, Mr Kalderimis referred to, in response to a question from Justice Williams about clause 8 being about technical matters, talked about Mr Duncan's evidence. That evidence was contested, I don't know if there was any findings from the courts below in relation to that.

Well, I think that's probably as much as I can usefully say for present purposes.

On proper purposes, with respect again this gets even harder, because by this time you haven't got the interpretation of clause 3.10 that you want and you haven't got the implied term that you want if you're L&M but you're saying nevertheless there's a discretion here and whether or not there's a subtlety between the *Braganza* approach or the *Mid Essex* approach, we say that the *Mid Essex* case is closer to this than any other and the point it's making is that if you're talking about whether you do or don't exercise a right in a way that doesn't, you know, there's a black and white scenario to get to exercising the right. It doesn't matter what you call it or what acronym you give it but in those circumstances you wouldn't expect either to come up with a discretion that somehow qualifies that on public law grounds, and this is the point I didn't quite fully, I think, complete the circle on my discussion with Justice Glazebrook yesterday nor do you expect any good faith overlay on that scenario either. And so the general proposition that we have there is that it is sufficient for us to point to the fact that this is a protection. To decide whether you're going to use a protection or not isn't the kind of discretion you then subject to some kind of public law ruler. It doesn't really matter what the authorities say. We say the general logic from *Mid Essex* which nobody has suggested is wrongly decided applies and to the extent that one needs to look at the contract in *Mid Essex* we say it's not dissimilar to that either. It is similar to that in any event.

GLAZEBROOK J:
And as I understood you earlier, you're saying in terms of this there was nothing in the evidence to show that it was an irrational decision to put it in care and maintenance. In fact, you say it was probably the most logical decision made for business purposes. Is that –

MR HODDER QC:
Yes, we rely on Mr Tacon's evidence. Again there's no finding in the Courts below on that. My learned friend, Mr Kalderimis, said you should read the cross-examination of Mr Kapea which was, I think, designed to go into that in some detail, but the real point was that Mr Tacon was the expert. Mr Tacon makes it clear in his evidence and his cross-examination to the extent it goes into that area that what they're doing is acting in a rational fashion and they have not given up on mining. They have aspirations to mine Escarpment but there's just a better way to do it.

And that means that I don't have any immediate response to the details on the last page of our friends' road map but that really is simply an attempt to summarise, for the most part, the cross-examination of Mr Kapea with a selection of documents from the discovery, but in our submission it doesn't address the issues about whether this is a kind of – firstly, it doesn't address the issue of whether this is the kind of decision that amounts to a discretion and the kind of discretion that gets subjected to the kind of constraints that are contended for by L&M and, secondly, it doesn't show that L&M has acted irrationally in any way or indeed that it's acting in a way just to spite L&M which is sort of the underpinning of all this but then the bad faith aspect of this was abandoned by our friends explicitly or it was said that that wasn't what was being argued in some disputes about pleadings at an earlier stage of the case.

And just finally in relation to the indulgence point which sort of is the phrase that perhaps captures the irritation that L&M has here, then what we don't find is any language in clause 3.10 in the proviso that says this is for a narrow purpose and we're only letting you do this so that you can do the next stage or

something. It's an ongoing part of the agreement for sale and purchase. It's incorporated as a particular clause of the sale and purchase and it will survive and be relevant until the second performance payment is paid. That's the limit of it. There's no other limit prescribed in clause 3.10 and our respectful submission is that you can't read any other limits into it consistently with the approach that the Courts take to both interpretation and implication and proper purposes.

None of that will surprise your Honours, and at the end of that process you get to the general thrust of the jurisprudence in this area which is nicely summarised in fact in paragraph 18 of the *Ali* decision in our second bundle, which my learned friend, Mr Kalderimis, took us to, which is really about you don't get to rewrite the contract, and we respectfully submit that all the arguments being put forward by L&M add up to just that.

So that's taken me to 4.09, according to this clock, so I apologise for going past that. But, as you'll understand, I will join Mr Kalderimis as a party if I'm in real trouble on that.

Subject to any questions, those are the reply submissions.

WINKELMANN CJ:
Thank you, Mr Hodder.

MR HODDER QC:
Your Honours please.

WINKELMANN CJ:
I'd like to thank counsel for the excellent submissions we've received and six days – was it six days in *Prenn v Simmonds* or was it…

MR HODDER QC:
Actually it was five days in *Prenn v Simmonds* and six in *Reardon Smith*, your Honour.

WINKELMANN CJ:

Right, well, we did it more quickly, and I don't think the quality of your submissions have suffered. So thank you very much.

We'll take some time to consider our decision and we will now retire.

COURT ADJOURNS: 4.11 PM