

IN THE SUPREME COURT OF NEW ZEALAND

SC 59/2007

BETWEEN

Glenharrow Holdings Limited

Appellant

AND

Commissioner of Inland Revenue

Respondent

Court: Chief Justice, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: CR Carruthers QC, G J Harley and S L O'Neill for Appellant
D J White QC, R J Ellis and J H Coleman for Respondents

Hearing: 8 - 10 July 2008

CIVIL APPEAL

10.02 AM

Elias CJ Thank you.

Carruthers May it please Your Honours, I appear with Mr Harley and Mr O'Neill for the appellant.

Elias CJ Thank you Mr Carruthers, Mr Harley and Mr O'Neill.

White If Your Honours please, I appear with my learned friends Miss Ellis and Mr Coleman for the respondent.

Elias CJ Thank you Mr White, Miss Ellis and Mr Coleman. Yes Mr Carruthers.

Carruthers Yes may it please Your Honours. Your Honours I've handed in a note of the oral argument that I proposed to make and with it I have handed in a green bundle, which is a collection of the provisions of the GST Act, and I'll just explain what I propose to do.

Elias CJ These as in force at the time?

Carruthers That's right

Elias CJ Yes.

Carruthers And as Your Honour has dealt with it, and if I can show you where I'm headed on the argument, just go to page 6 of my note and from there for the few succeeding pages, I go through the scheme of the Act and the relevant provisions

Elias CJ Sorry, not page of your submissions?

Carruthers No, no, page 6 of the note of oral argument.

Elias CJ Oh, the new note, which is bigger, yes.

Carruthers Well Your Honours yes that's right, but it is very much in a narrative form and when it comes to deal with the value section then it's really a matter of recording the references as much as anything else. But if I can just explain the section on the GST Act, I go through the provisions and I'll come to that, but the green bundle has arranged the sections and the definitions in precisely the same sequence as I deal with them in the note. So at some point when you come to consider it, you can follow the note and follow the actual sections.

Elias CJ Thank you.

Carruthers I won't need to go through the green bundle but it is there so that you have the sections in front of you. What I propose to do is to deal with the argument which relates to the first question – that is s.76 in the defeating arrangement, and my learned junior Mr Harley will deal with the issue of value which affects both the first question and also the second question that's before the Court. So If I can begin by outlining the argument, and I've submitted that the case for Glenharrow has two broad contentions, and that is that s.76 doesn't apply even if the price of \$45 million dollars was grossly inflated. This contention has the following two points based on Justice Chisholm's two paragraphs, and I have reversed the order and it's deliberate, and I should take you to those straight away. What His Honour has said in para.214 is this 'I should add that had the defendant's argument as to the

interpretation of s.76 been upheld, I would have concluded that the section had no application. I would have also decided that s.76 did not apply if I had been confined to an objective assessment of the purpose of the transaction which in my view was not to obtain a GST refund, but was to obtain the licence so that it could be mined. And then by contrast if one goes back to para.213, it follows that the consideration of \$45 million dollars is grossly inflated. It also follows that the arrangement between Mr Meates and Glenharrow had the effect of grossly inflating the input tax, thereby defeating the intent and application of the statutory regime relating to input tax. In the overall context, this was plainly a dominant effect giving rise to a tax advantage for Glenharrow. In short, s.76 applies. Now that's really the key to our case and the propositions that emerge from that are these in our submission. As it then read s.76 did not contemplate the effect approach adopted by the Judge and the Court of Appeal majority. The theory which was adopted, which can be discerned from the analysis of those judgments, is that although Glenharrow's principal purpose and objective in purchasing the mining licence was outcome X, Glenharrow actually achieved outcome Y. Then because of that effect, outcome Y, Glenharrow's actual purpose is to be disregarded. Section 76 applies to that outcome Y, because that was the effect achieved. Now our submission is that both Courts' reasoning is fallacious. The correct position is that the purpose comes first, determined from the transaction itself, and on what are now uncontested facts there is no need to consider any effect to provide any possible inferential evidence of what that purpose may have been.

Tipping J Do we find s.76 in this green bundle Mr Carruthers?

Carruthers No you don't, it's in the statutory materials bundle and you'll see there's a tab, GST Act, and s.76 comes in it's numerical order towards the back of that first section.

Tipping J Sorry, tab 6 did you say?

Carruthers No, no, in this bundle of statutory materials there's a tab GST Act

Tipping J Yes, I've got that. Right thank you.

Carruthers And the easiest way into it Your Honour is to go to the tab cases, the next tab down, and just come back to the pink divider.

Tipping J Got it thank you. It's all over the place, I just wanted to have it convenient, and I thought it might be in the green.

Carruthers Well Your Honour you'll see the reason that I put the green one in is that not all of the provisions are in the casebook under the GST Act section, and I wanted to arrange them in the order in which I want to explain the scheme

Tipping J Yes I understand Mr Carruthers, I just thought that it might be in the green. It obviously isn't, but it's here.

Carruthers It is there Your Honour, yes, and Your Honour will see the point which I come to where the provision is that an arrangement has been entered to between persons to defeat the intent and application of the Act. So I'm at small Roman 2 on page 1. 'On the facts as found by Justice Chisholm, the principal purpose of Glenharrow buying the mining licence was to conduct mining as its taxable activity in a genuine agreement intended to be performed. It had no other purpose whatsoever. Even if the price of \$45 million dollars was grossly inflated, that was still the relevant price paid for that supply, and the vendor finance which has pre-occupied the Courts below, is completely irrelevant to that because the vendor finance is an exempt supply of financial services.

Tipping J Mr Carruthers I'm awfully sorry, but I'm going to have to ask for some help.

Carruthers Yes.

Tipping J I've been working when I've been looking at this case in advance, on the text of the section set out in the Commissioner's submissions under his headings 'statutory matrix', para.40, and the X there doesn't seem to be the same X in s.76 as I find in reference to which you've just drawn attention.

Elias CJ No, you're looking at the green one which is the current one.

Tipping J Oh, well it was the one immediately behind cases. I think you inadvertently referred me to the current one just a moment ago.

Blanchard J No he didn't actually, but it is very confusingly laid out. I think Mr Carruthers' to be fair did say go back to the pink divider.

Tipping J Oh the pink divider. Well I'm sorry, you see there's no reference expressly for purpose or effect in the section enforced at the time is there, as there is now?

Carruthers No, no.

Tipping J So that's what's caused all the trouble, because it would have to read something in or read something out or do something with it.

Carruthers Well you've got to interpret the section.

Tipping J Well I just want to make sure that I'm looking at the right section Mr Carruthers.

Carruthers Well I think that the Commissioner's provision at para.40 is exactly the same provision as the one that I referred Your Honour to.

Tipping J Yes, well that's alright, well I'm sorry. But if I go off the Commissioner's one, the one that I was doing earlier, I'll be happy, thank you.

Carruthers Alright.

Tipping J It just simply says 'an arrangement has been entered into to defeat the intent and application of this Act'. Those are the crucial words aren't they?

Carruthers That's right, yes, yes.

Tipping J Well is that a subjective thing or an objective thing, or what is it?

Carruthers Your Honour I don't need to get to that debate because the Judge has squarely found that the purpose was not to defeat GST at all. Now I'll answer Your Honour's question

Tipping J Subjectively?

Carruthers Now I'll answer Your Honour's question

Tipping J Subjectively?

Carruthers No, objectively.

Elias CJ That can't of course deter us

Carruthers Oh no, I'm not suggesting it does Your Honour. My submission proceeds on the basis that it is an objective test as to purpose. Now let me just move, and Your Honour Justice Tipping, I'm sorry I'm going to take you back to my green, my, I'll finish up colour blind, my blue volume in the same place, because immediately behind that statutory provision is the GST review, and it's the tax policy discussion document that was produced by the Minister of Finance and Minister

of Revenue and the Treasurer, and this is what led to the amendment of s.76, and

Tipping J This is the one Rt Hon Bill Birch, Hon Bill English one?

Carruthers That's right, and if you go para.6.7 of the extract you'll see that what the Ministers say is that 'several problems with s.76 preclude its application in all but the most obvious cases of avoidance. These problems result from both the wording of the section and from the nature of GST and transaction taxes in general. Section 76 uses a subjective test of the person's intention in entering into an arrangement, stating that avoidance occurs if the arrangement is entered into to defeat the intent and application of the Act'.

Tipping J Well you don't agree with that?

Carruthers I express a reservation as to whether that's actually right, but if it is a subjective test, then my arrangement is plainly not caught by s.76 on the Judge's findings of fact.

Tipping J Well I want to know what your submission is. Is it is subjective test or isn't it?

Carruthers I have argued it on the basis that it is an objective test.

Elias CJ But of subjective intention?

Tipping J No.

Carruthers No, no, oh I see Your Honour

Elias CJ Of intention of the parties, i.e., subjective intention.

Carruthers Yes.

Tipping J You can only derive subjective intention objectively.

Carruthers Absolutely, yes.

Elias CJ But frankly you might as well collapse it and say it's a subjective test for our purposes. It's the subjective intention of the parties that you're contending for?

Carruthers Yes, yes, that's right and

Tipping J If they didn't even think about GST as the Judge found

Carruthers No not at all, that's right.

Tipping J Then that must be the end of the case on one view of it.

Carruthers Well that's right, and that is our argument, that that is the end of the case.

Tipping J Is your case as simple as that Mr Carruthers?

Carruthers Yes, I'm content to sit down now.

Anderson J Well it's not in the Court as an authority though is it?

Tipping J No.

Anderson J Whatever the Ministers thought, the judicial authority is that the test must be looked at objectively.

Carruthers Yes, yes, and

Anderson J You might be better to carry on than sit down.

Carruthers Well Your Honour I'm content to carry on, on that basis. That's the way I've structured the argument and that's the way that the Judge analysed

Tipping J Do we have to deal formally with a submission that it is a subjective test, or are you

Carruthers No, my case proceeds on the basis that it is an objective test.

Tipping J Contrary to what's said here?

Carruthers Yes.

Tipping J Right.

Carruthers Yes. So that's the analysis that I've made under subparagraph A. The second contention is that on the evidence, the \$45 million dollar price was in fact entirely rational and was not inflated at all, and if that contention is not accepted, there is ample evidence to support a principled reconstruction – that is a reconstruction to that value. I just want to take a moment to introduce the case so that Your Honours can appreciate the

- Elias CJ Would there be a difference then? I mean if the reconstruction would support the \$45 million dollar price, isn't it the same thing you're saying?
- Carruthers Yes it is, yes.
- Elias CJ Yes. Well I'm just querying when you say if that contention is not accepted, it seems to me to be the same point effectively.
- Carruthers Yes, it's subtly different because if one looks at the s.76 argument, and then goes to a value analysis, then we argue that if you look at the value, the \$45 million dollar price was entirely rational, and this is why I said there was something of a cross-over between the two questions, and that's an important step. Then if you reach the view that somehow it wasn't a rational basis or it was inflated, then one has to get to reconstruction and that's where the argument comes back in. Your Honour's probably right that really we get to the same sort of analysis
- Blanchard J Well otherwise you'd be making an irrational reconstruction.
- Carruthers Yes, yes. Now just introducing this. Our submission is that Justice Chisholm in his judgment made a masterful job of assembling correctly the key facts as to the entry into the sale and purchase transaction, and I'm not going to the relevant documents. We've no criticism of his discussion of the evidence and factual findings pertaining to the sham allegation, and the judgment is in our submission an excellent distillation of the relevant history concerning the Mount Griffin mine and the mining licence. Now I'll deal with the background in a little detail if I may. In New Zealand's mining history, probably the next best thing to a goldmine or an oil field is a mountain of Greenstone, and I've just referred to the High Court judgment. Mt Griffin is that mountain in Westland as has long been understood. Indeed a public company had been floated in the early 1900s on the basis of the prospectus, and can I just take you to that to identify it? It's in volume 8, under tab 101, and I don't need to pause, other than to just draw attention to it and invite you to look at that for the history of the operation. And the other feature that I just want to draw attention to in this history is the way in which that prospectus came to the parties. And in volume 4, at page 680, between lines 15 and 20 in the cross-examination of Michael Meates, there's just an interesting historical background, where he was asked about the prospectus in this way and
- Elias CJ 680?

- Carruthers 680, yes. 'How it started is that I bought the licence. A friend of mine whose mother worked for Hannan & Seddon, a lawyers firm in town, were cleaning out old documents and he gave me this original. He had the original New Zealand Greenstone Limited prospectus. He photocopied this for me' and then he continues. So that's how the issue started. And that licence had 63 years tenure, and the existence of Mt Griffin jewellery grade Serpentine, now known as Bowenites, was well-known since the early 1900s, and I take that expression and it's quoted from the prospectus. Bell and Fraser documented it in 1906 what they called the Pounamu formation in New Zealand geological survey. The 1912 prospectus refers to nephrites as the true New Zealand jewellery Greenstone, and refers to very large boulders, and there's a description on them. The existence of this high quality very valuable stone was well-known before World War 1. It was to be used in the Reichstag and Davidson, supported by Dr Boyd, and Brooks, peer reviews documents the research work of Coleman, summarised by Dr Rabone and Coombs. Just so that you can
- Elias CJ Well while this is all very interesting, and I'm easily distracted by such material, what's the submission that this is directed at? That simply that this is a valuable
- Carruthers Yes it goes to value because we have to look behind the compliance with the actual GST provisions – if we have to look behind that then the integrity of what these people were doing and why is important because it goes to what their purpose was in the way in which they went about this transaction, and ultimately on the argument it will go to value.
- Tipping J Is the point this that if the parties honestly thought this was a fair price, the Commissioner's bound by it?
- Carruthers Yes that's right, it goes back to *Cecil Brothers* and *Europa No. 2*.
- Tipping J It's nothing more than that proposition?
- Carruthers No.
- Tipping J That the parties honestly thought this was okay, the price was right, then the Commissioner is stuck with it?
- Carruthers That's right, it's no part of the Commissioner's role to tell parties what they should pay.
- Tipping J And this is all to show how they could honestly have thought this was a reasonable price is it?

Carruthers Yes that's right, yes. Your Honour I

Tipping J But didn't the Judge find that?

Carruthers Pardon?

Tipping J The Judge found that as a fact that subjectively there was no shall we say intent subjectively to screw up the price.

Carruthers No, there was none of that at all, and when we come to analyse the evidence on that, it's very clear. I mean the negotiation is actually quite interesting. Mr Fahey, after really a very significant background of investigation, and before he ever got to negotiating with Michael Meates, had got to the point where he was prepared to offer \$60 million dollars for the licence. When he went and met with Michael Meates and asked about the price, Michael Meates said \$45 million dollars and Mr Fahey thought he had done an extremely good deal. If you analyse the evidence, and particularly if you get to Mr Frankham's cross-examination, you'll find that Mr Meates made an even worse deal

Tipping J But there's no finding against you. As I understand it the two people deliberately inflated the price in order to get the GST advantage of doing so.

Carruthers There's no finding of that - the finding is entirely the other way.

Tipping J So subjectively they had no intent if you like to wrought the system.

Carruthers That's right.

Tipping J But we have to look at it objectively don't we?

Carruthers Yes, that's right, which is why this exercise is important.

Tipping J Yes.

Carruthers Yes. Because when I come to do the GST Act analysis, the supply was of the licence and that will turn on the money.

Tipping J But if you're claiming the benefit of the Judge's not finding there was a deliberate intent to jack-up the price, but didn't the Judge also find in effect that the price was as a matter of fact grossly excessive?

Carruthers Grossly inflated was the expression used, yes, that's so, but we can demonstrate from the evidence that the Judge accepted, that he has made an error on the value issue. It's really quite clear from an analysis of the material that the Judge had.

Tipping J Your purpose is to say that objectively the price was not grossly inflated?

Carruthers That's right, yes.

Elias CJ Don't you also though submit that it doesn't matter if it was?

Carruthers Yes I do. There are two parts to it and when I do the analysis of the transaction itself against the provisions of the GST Act - that is the specific provisions - the value does not matter. What determines it is the price. The money is the word that's used in the legislation, but if

Tipping J But even if it was, you'd go off price, not value.

Carruthers That's right, you do.

Tipping J Is that the essence of the submission?

Carruthers That's the essence of the submission, yes, but, I'm sorry Your Honour.

Elias CJ Are you saying that price is money?

Carruthers Yes I am, but the supply that we're looking at for GST purposes is the transfer of the licence.

Elias CJ Yes.

Carruthers That's what determines, and then the payment was made by the cheque swap, and that's an exempt supply in the same way as the vendor finance is an exempt supply, so the key to it is the transfer of the licence.

Tipping J But it is essential for your argument as I understand it Mr Carruthers that one makes their distinction, and a clear distinction, between value and price.

Carruthers Yes it is, but if one is then going to say well you may well have complied with the specific provisions, but as a matter of objective purpose, we the Court, are entitled to look at value and because as the Judge's reason was grossly inflated, that defeats the intent and application of the Act.

Tipping J So for black letter purposes you look at price?

Carruthers Yes.

Tipping J But for avoidance purposes you look at value?

Carruthers No, my argument is that you don't get to s.76.

Tipping J But if you do, is it legitimate to look at value as opposed to price?

Carruthers Well you will have got to the point of saying that the price cannot determine the application of s.76, and so if you're starting to look at objective purpose, then you're going to go into an inquiry about value.

Elias CJ I'm just a little apprehensive that you're going to re-run the argument in the High Court over value. How does that fit in to the questions on which leave was given?

Carruthers It fits in in this way that under question 1 it is whether the Commissioner was entitled to treat the transaction as void and to adjust the amount of tax refundable. So what I must deal with is whether one can get to s.76. You see if the specific provisions are complied with, but the Court says well objectively the purpose was to inflate the price so as to get the GST refund, then the issue is whether the price was inflated, so that becomes a value inquiry, and it falls squarely within question 1, and it falls squarely within question 2, because if s.76 does apply, the issue then becomes what is left, and what has to be left is value, and the value is relevant to how the Commissioner will have to reconstruct the transaction.

Elias CJ Sorry, when you say what is left, you mean if you get through to s.76

Carruthers Yes.

Elias CJ And if it is an objective determination

Carruthers Yes.

Elias CJ Rather than your first argument that it's just the subject of intentions of the parties that govern, so if it's an objective assessment, you say the only thing left is the question of value, is that what you're saying?

Carruthers Yes, because for the Commissioner to reconstruct, all the Commissioner can look at is value, because he said well I'm not bound by the price; the transaction is void, so what else can the

Commissioner look at. He can only look at what was the proper value and then reconstruct on the basis of the proper value. So it is an essential part of the questions to analyse whether the High Court Judge was correct in the way he reasoned value.

Tipping J And indeed there's a cross-point against you isn't there, which tries to bring it down further from what the Judge was prepared to accept as the proper reconstruction?

Carruthers Yes, that's right and going back to the adjudication report which the Commissioner now

Tipping J Sums actually paid rather than true value, that's what they want isn't it? They want the input credits to be simply on what was actually paid rather than on true value.

Carruthers Well the Commissioner now gets to the point that it's only the \$80,000. The Court of Appeal quite wrongly, and contrary to the submissions of both parties, said that there was an entitlement to an input credit on the amounts that had been paid under the vendor finance.

Elias CJ That's an argument though based on statutory interpretation at further point whether you can come down to the money paid. It doesn't require assessment of value.

Carruthers No, that's right.

Elias CJ Yes.

Tipping J With respect, I don't see how you can disentangle value against price from the avoidance question in the end. I mean if the true value was the same as the price, then surely any question of avoidance disappears.

Carruthers That's right, yes.

Blanchard J What did the Court of Appeal say about value? Did they agree with the Judge's

Carruthers That it was grossly inflated. Let me just give you the passage from the majority.

Tipping J But the Court of Appeal also said didn't they that the Judge's approach to reconstruction was flawed.

- Blanchard J Well that's a different issue. What I'm interested in is whether we have a finding of fact from the trial Judge about value, and what the Court of Appeal said about that finding of fact.
- Tipping J They agreed with it.
- Carruthers Yes. It's para.77 of the majority where the Court said 'Justice Chisholm was not wrong to find tax avoidance on the basis of a grossly inflated valuation'. Yes, and my learned friend draws attention to para.80 as well. 'As to the effect of this approach on the present transaction, Glenharrow challenged the Judge's approach to valuation. However, the Judge was plainly entitled to conclude that although Mark Meates was not involved in any sham, his valuation was grossly inflated. As the Judge said, Mark Meates' methodology was unorthodox. It was also open to the Judge to treat matters such as the volume of the stone as being of less importance given other limiting factors on the licence, particularly its restrictive conditions'. Now what the Court of Appeal doesn't recognise is that there is a wealth of other evidence that the Judge traversed that when you analyse it supports the valuation figure. In fact the Commissioner's own evidence from Mr Frankham supports a valuation of \$118 million,
- Blanchard J But you're asking us to look again at the factual question of valuation.
- Carruthers Yes, because it's a necessary part of dealing with the questions on which leave was granted.
- Blanchard J But we have a finding of fact confirmed by the Court of Appeal that the price was grossly inflated.
- Tipping J And I thought your argument was that even if that is so, but it doesn't matter because of this price value dichotomy that you
- Carruthers But what Justice Blanchard is putting to me is that there is a finding against me on value, so that there is a differential on his analysis between price and value.
- Tipping J Yes, but I like my brother, are you seeking to say that both Courts below were wrong on the question of value?
- Carruthers Yes I am, I am, squarely, and that's
- Blanchard J So you're having us look again at the facts despite concurrent findings?
- Elias CJ Concurrent conclusions perhaps.

Carruthers Yes.

Elias CJ Would that be your argument on that.

Carruthers Yes that's right, and really it's an inherent part of this Court's jurisdiction in a civil case now to look at the issue of miscarriage of justice, and if the Judge has got the facts wrong, and the Court of Appeal does not look at what facts have actually been found in the Court below, and just accept the Judge's conclusion that the price was grossly inflated, then you finish up with a significant error, and it's not

Blanchard J Well are we to look then at all aspects of the facts?

Carruthers Are you looking at all aspects?

Blanchard J Yes.

Carruthers No, no, because we

Blanchard J Just selected aspects?

Carruthers No, there's no selectivity involved at all. You will find that we have looked carefully at what the Judge has found, but when you analyse the findings of fact made by the Judge, they do not support the conclusions that the Judge has made, so I'm prepared to accept the Judge's analysis, as I said right at the start, but the reasoning and the conclusions are wrong on the question of value.

Elias CJ But that's your fallback position

Carruthers Yes it is.

Elias CJ And we should stop interrupting you perhaps and let you develop your argument, but what we are exploring with you is what the parameters of the appellants' is. We only get to value if we don't accept your principal submission that the finding of fact in terms of subjective intent determines the question of avoidance.

Carruthers Yes that's right.

Elias CJ Yes.

Carruthers Your Honours at the bottom of page 2 in para.6, I've gathered material there that I was going to take you to, but I can

Elias CJ I can't see how the maps really help us.

Carruthers Except to this being a vast resource, that's really the only point

Elias CJ Well I think that can probably be accepted.

Carruthers Yes. I'm content that I have identified the maps and the issue of the Rabone evidence clearly in that and I can leave Your Honours to

Anderson J It was a different resource from the 1913 prospectus wasn't it because that encompassed nephrite, where this excluded nephrite?

Carruthers Yes it did but that's only a relative consideration on value. Now perhaps just so that you can appreciate the scope of what was involved, at para.7 I've referred to Wellington Airport, and attached to the back of the submissions is the area of Wellington Airport at 90 hectares, and this licence involved an area of 80 hectares.

Anderson J Is it a true offence that the Wellington area has become a proxy for every part of New Zealand that has tax implications.

Carruthers There's nothing like a homely analogy to just explain what's involved.

Elias CJ It depends whether your home is right.

Tipping J But they didn't have to just confine themselves to hand tools when they were doing the Wellington Airport I presume Mr Carruthers?

Carruthers I think that that would be right. I think Peter Ustinov described it as an aircraft carrier sunk between two islands. Just dealing with rock types, because this is where the issue of price and value lead to, and Greenstone is a generic term for seven different types of rock and is apt to be misleading. Nephrite or Pounamu was not permitted under the Mining licences His Honour Justice Anderson noted. Bowenites and Serpentine, and in some of the material that's referred to as Serpentinite, but it is the same thing, were permitted. People experienced in such rock types can readily tell which is which rather as a gem specialist can recognise the best diamond and distinguish grades of quality from lesser specimens. Serpentine can be used in decorative stone walls. Your Honours if I can just take a moment so you can see what's involved. I'll hand this up to the registrar. That's marked '4'. That's Pounamu or nephrite from Mount Griffin. These two examples – they're marked 3 and 3A – are super Bowenite, which is identifiable by its translucence, and the reason there are two samples is that it's also identifiable by its pink crust. Now that value is \$10,000 a tonne. This is Bowenite. One hesitates to call it ordinary

Bowenite, but the value of that is \$4,000 a tonne, and that plate is made from Serpentine, so that just gives Your Honours

Elias CJ Can I see the first one again. Sorry I didn't look up. Oh yes, thank you.

Carruthers Now I'll just have that handed up to the Registrar so you can see it.

Elias CJ I don't think that's necessary, no, thank you it is nice to look at.

Carruthers So let me come to the sale agreement. Glenharrow's purchase of its Mount Griffin Mining licence from Michael Meates, started life as a simple transaction involving unrelated persons dealing at arm's length. The sale agreement for \$45 million dollars; cash deposit of \$80,000; and payment of the balance by way of cheque exchange. That balance being funded by vendor finance for \$44,920 thousand dollars. Documented by two different lawyers acting independently for each party.

Anderson J Am I correct in my understanding that the \$80,000 was derived from a loan from a company owned and controlled by Mark Meates?

Carruthers No I don't think that's right Your Honour

Anderson J It may not be relevant to anything, I'm just trying to get the picture to see how a \$100 shelf company comes up with \$80,000.

Carruthers Well I think it was as much as Mr Fahey could afford

Anderson J I read in one of the submissions that there is a debt of almost \$80,000 owed by Glenharrow to a company controlled by Mark Meates.

Carruthers Your Honour I'll come back to that when I can.

Anderson J It may have no relevance.

Carruthers No let me deal with it because it may have no relevance because of the Judge's finding that these people were dealing at arms length. Through Glenharrow's Gerard Fahey, a purchaser who had a life-long knowledge and experience of mining in Pounamu. He thought that he had made a bargain purchase and would become a rich man from mining and selling high quality Bowenite, and then I've just dealt with some of the cross-examination. Mr Fahey didn't think anything of the wisdom of his purchase or the GST position, and he didn't take valuation advice. Instead he sought registration of the Mining licence and sought to obtain necessary work programme consents. The

simple transaction turned into a nightmare for Glenharrow and Mr Fahey. Every conceivable object was put in their way by Inland Revenue, Crown Minerals, and the Department of Conservation, when they attempted to obtain Mining consents to the work programmes, and I've referred to the Judge's findings on those points where the Commissioner actually wrote and said that the licence should not be granted.

Blanchard J Was it necessary as a matter of mining law for the licence to be conveyed into the name of Glenharrow before Glenharrow could start exploiting it?

Carruthers I thought that was so. I'm instructed that one beneficial ownership passed he was entitled to commence mining, but I'll check that from the evidence too Your Honour.

Blanchard J So it could have been done then by a transaction which deferred the passing of title?

Carruthers I think that must follow.

Blanchard J So it could have been done by a conditional purchase agreement?

Carruthers To allow the mining to commence straight away is that the point?

Blanchard J Yes.

Carruthers Yes I think that

Blanchard J I'm just looking at the choices that were open commercially.

Carruthers Yes, I think that must follow. But Your Honour, from the evidence you will find an analysis that makes it very clear that the vendor finance was not the end of the transaction as conceived. One of the events that occurred was that Mr Fahey was looking at franchising, and it was franchising of his O'Malley's Hotel in Christchurch, and he went to a franchising conference in the United States and there met a Mr Lim, who was a very significant Asian businessman who knew about Mount Griffin, and this is all before Mr Fahey acquired the licence, and was looking for a supply of 500 tonnes a week to be supplied into Muslim countries, which was his interest. And it was intended he wanted to have a priority and it was that the satisfaction of the purchase price was to be financed by Mr Lim's payment for his access to the 500 tonnes a week. So what happened then was that there was the Asian collapse and that transaction didn't ever go ahead, and events overtook this. So

Blanchard J Are you saying that Mr Lim was going to put up \$45 million dollars?

Carruthers I think Mr Lim was going to put up more than that.

Blanchard J Up front?

Carruthers For the supply, yes.

Blanchard J Is there anything about that in the judgment?

Elias CJ Well is there any evidence of that?

Carruthers Oh yes there is, there certainly is. The discussion of it begins at para.45

Elias CJ Of which?

Carruthers Of the High Court judgment. Paragraphs 45 and 46. Oh perhaps really at 45.

Blanchard J That doesn't indicate any up-front financing from Mr Lim – merely that he would be a buyer.

Carruthers If Your Honours will go to volume 2, at page 178, at para.160 and then into 161 they would put money up front for exclusive distribution rights in their countries that helped me make up my mind to buy the licence, and then there's an analysis in 162, and then that the Washington Conference continues on para.180.

Blanchard J Well it would be quite a jump to conclude from that that Mr Lim was talking about putting up \$45 million dollars.

Tipping J Was this equity capital or just payment in advance for product?

Carruthers It wouldn't much matter would it?

Carruthers I don't think it's spelled out in any particular way but the relevance of it is, is that standing behind in concept, standing behind the decision to purchase, was the fact that there would be significant finance coming from Mr Lim and if you reflect on the quantities – I can probably do the sums

Blanchard J I don't think it's necessary.

Carruthers No. But Your Honour the only point of it is that this wasn't a transaction that was conceived solely on the basis of the vendor finance.

Blanchard J But that's the way it ended up?

Carruthers Yes, that was the result, but not the purpose or intention. And I think I was dealing with the interaction between the Commissioner in relation to the licence, and then the submission is made. The Commissioner asserted s.76 avoidance against Glenharrow, whereon the evidence no thought had been given to any GST ramification when the sale agreement was entered into.

Tipping J What significance has the material on the previous page, 177 – the discussion about the evidence of a previous affidavit where he said he wanted the refund for capital work, and he refers to a Sky Train and confirms the affidavit. Well obviously the getting of the refund was a significant feature of that financial plan.

Carruthers Oh I don't think Your Honour can say that for a moment, because the Judge has found squarely that no thought

Tipping J Well you're asking us to go back into all these facts and so on Mr Carruthers.

Carruthers No, I was just answering Justice Blanchard on the basis when he was asking if there were other ways of doing it, and just pointing out that there was another dimension from the Judge's finding.

Blanchard J But that dimension disappeared so far as the method of payment was concerned.

Carruthers It disappeared after the transaction had been entered into. The Asian crash came after the transaction.

Blanchard J Mr Lim didn't enter into the transaction; he didn't make any promises. We have only the two parties – Meates and Glenharrow.

Carruthers Yes, that's right. But Your Honour's looking at it from a legal construct. If one looks at it from a

Blanchard J Well I'm trying to look at it from a commercial construct.

Carruthers Well from a commercial construct you're looking at a man who had a life-time experience of mining on the West Coast, who recognised the substance of this resource, and who did a lot of preliminary work

before he bought the licence, and knew that he had a market. I've gone on to look at the Commissioner's hindsight approach and the all or nothing basis and I've noted that this is really on the basis of what the Commissioner thinks people should have done, and that goes to the *Cecil Brothers and Europa Number 2* test. And I've submitted even after enquiry and clear explanations to the contrary during his investigation, the Commissioner brought to the High Court his allegation of sham with its corresponding assertions of fraud and perjured evidence, and that's a finding by the Judge. All 66 of counsel for the Commissioner's points in support of these allegations failed before the Judge, who accepted the witnesses honesty and genuine belief in the integrity of their agreement, and the allegations were actually not put directly to the witnesses at trial. Notwithstanding the findings of fact while purporting to accept them with what is lip service acknowledgement of their input, the Commissioner seeks to support the Judge's s.76 assessment on a basis that is far removed from the Commissioner's own adjudication report, and counsel's concessions before the High Court. Counsel for the Commissioner correctly told Justice Chisholm that his approach was all or nothing. The Commissioner's case is focused on disregarding the vendor finance, and I've submitted that value has nothing to do with that. In truth on analysis the Commissioner does not actually accept that there was no sham concerning the vendor finance. In order to avoid the inevitable legal and consequence of the Judge's findings of fact, the Commissioner brings before the Court the dressed up proposition that what the Judge held to be payment in law is not really payment at all in commercial terms, whatever that means, and that such payment is somehow disqualified because the vendor finance amount, which was lent, is said to be conditional on the success of Glenharrow's mining project. And the Court of Appeal majority wrongly accepted this contention which when properly understood is a finding of sham. Now because the Commissioner failed in the High Court to reduce the input value to just the deposit amount of \$80,000 on his sham or s.76 contention, and as he had not cross-appealed on that aspect Glenharrow then sought payment of the GST input amount on the \$3,128 million. This was the Commissioner's original valuation amount if the sham argument failed. The application was made to the Commissioner by Glenharrow, because that amount could not possibly be in further contention between the parties. The principled Commissioner, exercising his undoubted powers of care and management and properly directing himself in law as to the taxpayers' partial success, would have exercised his discretionary power and paid that amount on request with interest. The Commissioner did not do so, he obfuscated.

Elias CJ Well how does this really help us decide, and the latest suggestion of obviscation. So what - if he was able to cross-appeal, don't we just have to deal with the merits?

Carruthers Well Your Honour to that is yes, and I expect the Commissioner is entitled to change his argument at every turn in the Court.

Elias CJ Yes.

Carruthers Well let me come now to the GST Act and look at the scheme and deal with it in this way. And I'm going to take you through this on the basis that the accompanying paper provides the specific provisions and I can just explain what the scheme is from the note that you have, and the starting point is that the charge, the tax charge, the charges imposed by s.8 at 12.5% on any supply defined not being an exempt supply. That supply, known as a taxable supply, being made by the registered person in the course of its taxable activity by reference to the value of that supply. Glenharrow registered as required under s.51 because of its conduct of the taxable activity as a miner, and s.6(1) defines taxable activity to include a business, and in this case the registered person is Glenharrow. It is making a purchase of the mining licence for the principal purpose of its taxable activity being the conduct of a mining business – that is in this case the relevant supply is of the mining licence from Michael Meates, an unregistered person, to Glenharrow as the registered person. Exempt supply is defined in s.2(1) by reference to

Elias CJ Can I just ask, was Mr Meates ever a party to these proceedings?

Carruthers No.

Elias CJ Yes it doesn't matter. It's just that the consequences may effect him if the Commissioner were to succeed.

Carruthers In what way is Your Honour suggesting that that might

Elias CJ Well my reading of the statute was that the Commissioner could treat him as though GST registered, if the Commissioner is successful. I just wondered whether he had ever been a party to the proceedings.

Carruthers No, he's never been a party. And s.14(a) exempts any financial service as defined by s.3, and sections 3(1)(b)(f) and (k)(a) and they are the issue or payment of cheques; the provision of credit, and the payment or collection of any principal or interest in respect of any debt security are exempt supplies. The provision of the vendor finance to

Glenharrow and its repayment, including any interest, by Glenharrow are exempt supplies accordingly.

McGrath J And that's where you say the Court of Appeal went wrong is it, in coming into the way it dealt with the monies that had been paid?

Carruthers Well I think under the Tax Administration Act the Court of Appeal could not interfere with the assessment that had been made and that apart from that any issue was time-barred, so

McGrath J I'm not concerned with that, what I'm trying to ascertain is whether you're drawing this to our attention because the Court of Appeal did come in the end to characterise the monies that were paid as being taxable? But is the point of this discussion here to say that they were exempt supplies?

Carruthers Yes, but I hadn't actually focused on those payments in the Court of Appeal, but the whole of the vendor finance is an exempt supply

McGrath J Exempt supply, yes, thank you.

Carruthers Yes.

Elias CJ I haven't looked at the sections. Is it important for your argument that we go to them or

Carruthers No Your Honour, I think that the narrative that I'm giving you is sufficient for my argument, but Your Honours will at some point want to satisfy yourselves, which is why I've assembled that green paper to follow exactly the order in which I'm dealing with them now.

Elias CJ Thank you.

Carruthers So then I've submitted that it's necessary to understand the Act's mechanics to see how the charge is achieved, being the concept on inputs and outputs provided for by s.20 – the section prescribing the calculation methodology. The critical point

Elias CJ I'm sorry, I'm going to be quite slow on this because I'm not familiar with GST, but if the definition exempts financial service, I can understand that you're saying that the exchange of cheques is a financial transaction, but aren't we meant to be looking at the transfer of the licence?

Carruthers Yes.

Elias CJ And does that fall within the definition?

Carruthers Yes, for GST purposes you are only concerned with the transfer of the licence. They are what we come to as the second-hand goods.

Elias CJ Well why do you say that the transfer of the licence is exempt as a financial service? Oh you're not saying that.

Carruthers No I'm not saying that.

Tipping J It's the transaction constituted by the loan that is the exempt supply.

Carruthers Even the exchange of cheques is the exempt supply.

Tipping J The supply of the licence is not exempt?

Carruthers No, no, and it is on that transfer that the Act bites.

Elias CJ Oh I see.

Carruthers So in fact that's the very next sentence. The critical point is that the GST tax charge is imposed on the goods themselves by reference to their value at the point of and at the time of supply. The obligation to account for GST is imposed on the registered person concerning the supplies made to – that is inputs – and supplies made by – that is outputs – by that registered person, and I've given you the reference. The time of supply is determined by s.9, and under that section a supply occurs when an invoice is issued by the supplier, being the person making the supply or by the recipient – that's the person receiving the supply. In this case Glenharrow is on the invoice system of GST accounting. There's a payment system and an invoice system, and Glenharrow is on the invoice system prescribed by s.19 for the purpose of calculating the tax payable which includes the receipt of funds. Now the next issue concerns Michael Meates, an unregistered person, has supplied second-hand goods to Glenharrow, being an input to Glenharrow as a registered person. Goods includes all kinds of personal or real property so that second-hand goods includes the mining licence being an interest in land. Because Michael Meates is the vendor, and he is an unregistered person, he has no lawful right or ability to issue a tax invoice as defined. Tax invoices are the cornerstone of GST accounting and they are critical documents for all registered persons and for the Commissioner in maintaining his audit over the entire system. Generally it is the registered person supplier who must issue the tax invoice, which must contain the seven different particulars specified in s.24(3). Every such tax invoice is relevantly an orthodox business record of both the supplier and the purchaser.

They must be kept as part of the books and records under the Tax Administration Act for the Commissioner's audit and inspection purposes. Now 2.24(7) makes a specific provision for the recipient to evidence the receipt of second-hand goods by creating records which are the mirror image of the orthodox tax invoice.

Tipping J Is that because there's a greater likelihood here that the supplier will be unregistered?

Carruthers No

Tipping J Just as a matter of mechanics Mr Carruthers?

Carruthers Yes, yes it is.

Tipping J It is, surely.

Carruthers The amount of the consideration for the supply is pivotal for the purposes of the tax calculation sections, and I come to that, and the tax fraction definition is in s.2(1). The value of supply is measured by the consideration for the supply, and where as here the consideration is expressed as being an amount in money, namely \$45 million dollars, the consideration is that money amount. Money is defined in s.2, to include promissory notes and bills of exchange, so that it includes the payment of a price by cheque. Section 3(1)(b) that I mentioned earlier – the payment of the purchase price of the licence – is an exempt supply of a financial service. However if the parties to the supply are associated persons, then the consideration in money is deemed to be open market value. Associated persons are defined by reference to the Income Tax Act definition and it concerns generally relatives, married persons, trusts with common beneficiaries, individual shareholders with 50% plus shareholding, and also companies that fall within the same rubric, and companies with significant common ownership, 50% plus, and persons with interests in partnerships. Open market value is also a concept relevant to supplies effected by way of exchange of goods or services – for example barter transactions for any supply regardless of association. So then coming to deal with associated persons and open-market value, sections 10 and 4 requires that associated persons, even if they pay for supplies in money, must account for the value of those transactions at open market value. The amount of money may be too high or too low and is not the basis for the GST tax charge. Whereas in the case here, there is no such open-market for such a licence. Section 4(3) directs that a similar supply be evaluated as defined in s.4(1)(a) characteristics, quality, functional components, materials, reputation. In short, and generally, the GST Act respects the price paid in money

between persons at arm's length subject to s.76. I'm looking now at the calculation. Section 21 requires the registered person to account to the Commissioner for GST is the tax payable in respect of the relevant tax period. Input tax which relates to the purchases made by the registered person are governed by s.22. Generally no deduction is permitted unless the registered person has a tax invoice as prescribed by s.24. For the principal purpose of making taxable supplies, an input tax deduction under s.20 is only permitted to the registered person who acquired the second-hand goods for that person's principal purpose of making taxable supplies, and this is a critical condition in input tax definition. For second-hand goods, by definition there cannot be a tax invoice, however in respect of the supply of such second-hand goods, s.22C permits such a deduction so long as s.24(7) has been complied with. Section 23 allows as a deduction from the amount of output tax, being the amounts of tax on all sales of supplies in that period, for a registered person on the invoice basis, the amount of input tax specified in para.A and sub-para.1(a) – (i)(a) sorry. However, notwithstanding that the recipient is on the invoice basis for its GST accounting, sub-para.(i)(a) allows an input tax deduction in respect of such goods only to the extent that payment in respect of that supply of second-hand goods has been made in that taxable period. Sub.section (i)(a) refers to and thereby qualifies s.2(1)s definition of input tax, para.C.

Tipping J But the payment can be by bill of exchange obviously?

Carruthers Yes.

Tipping J So clearly there was a payment you would say.

Carruthers Oh yes, yes.

Elias CJ In para.45 and you say 'it must be for the principal purpose of making taxable supplies', what's that a reference to? What section? Is that section

Carruthers It's a reference back to the definition

Elias CJ Of taxable supplies.

McGrath J Input tax definition.

Carruthers Yes.

Elias CJ I see. It's just that I actually would find it useful to go through the provisions, because we're just taking it from you in narrative form, but I'll be able to look at it later. It's the input tax definition?

Carruthers Yes it is.

Elias CJ Thank you. 'Acquired for the principal purpose of making taxable supplies. Goods and Services must be acquired for the principal purpose of making taxable supplies'.

Carruthers That's right.

McGrath J Just while you're interrupted Mr Carruthers, that definition is no longer in the Act I understand? Or even deleted.

Carruthers I'll check it. Well I'm being helped Your Honour so I can answer your question now. It has been changed and it's now s.3A.

McGrath J Thank you.

Carruthers I had got to para.48. Sub.para.(i)(a) refers to and thereby qualifies s.2(1)s definition of input tax para.C. This paragraph prescribes the tax fraction defined in s.2(1) as $1/11^{th}$, reflecting the current 12.5% rate of the consideration of money for the supply, being a supply by way of sale that is not a taxable supply, to a registered person of any second-hand goods. And as noted above, s.2(1)s input tax definition, para.C, expressly conditions the allowance of any input tax deduction amount concerning the supply of second-hand goods only to those acquired by the registered person for the principal purpose of making taxable supplies. Now Your Honour the Chief Justice with respect is right, this section of my argument, my explanation of the Act, does need to be gone through thoroughly by reference to the statutory provisions but I've tried to set it out as clearly as I can so that you can see where the argument derives from. Your Honours I'm just about to move to the general scheme of the Act. Is that a convenient moment?

Elias CJ Yes, we'll take the adjournment now thank you.

11.28am Court Adjourned

11.48am Court Resumed

Elias CJ Thank you.

Carruthers Your Honours I had got to my summary of the general scheme of the Act, having taken you on a narrative through the provisions, and the general scheme for this case is this, that Michael Meates is not a registered person. Glenharrow is a registered person on the invoice, GST accounting system. The parties are unrelated and are at arm's length. They are not associated persons. The mining licence is a second-hand good acquired by Glenharrow for the principal purpose of conducting its taxable activity of mining. The agreement for sale and purchase for the \$45 million dollar price provides for consideration of money. The open-market value rules do not apply to that agreement accordingly – putting s.76 to one side. Glenharrow made two payments. The first of \$80,000 as a deposit, and the second of \$44 million dollars odd on 28th November 1997, to acquire the mining licence. Glenharrow complied with the second-hand goods records rule in s.24(7). Glenharrow was entitled to claim its second GST input amount, being 1/11th of \$44 million dollars, when it paid that balance purchase price by cheque on 28th November 1997. Michael Meates provision of vendor finance on 28th November 1997 of that \$44 million dollars to Glenharrow is the supply of an exempt financial service. Any repayment by Glenharrow of principal and interest thereon is the supply of an exempt financial service, and in the relevant return period, being the period February/March 1998, Glenharrow's input tax deductions exceeded its output tax entitling it to seek a refund of that excess in terms of s.45. So I'll turn now just to clear away that issue concerning the vendor/finance repayment. Dealing with the Court of Appeal majority - correct that Glenharrow made two payments of the amounts itemised by the Court, and I've identified the totals. As noted, each such repayment is an exempt supply. Glenharrow was not entitled to claim any input credit deduction in respect of either amount; in respect of either period, and it has not done so. Each such period has been correctly returned by Glenharrow and the relevant returns have been accepted by the Commissioner and assessed accordingly. Each such return is deemed to be correct accordingly and the Court has no jurisdiction to make the orders that it did. The Commissioner's position in trying to uphold the Court of Appeal is really opportunistic and it directly contradicts the position as correctly submitted in the Court of Appeal by both parties. That is that there was no jurisdiction to do what the Court was proposing, and the majority is incorrect as a result. Now I've come

Tipping J You mean the Court can't revise the assessment, it has to go back to the Commissioner?

Carruthers Well it was time-barred anyway.

Tipping J Well time-barred anyway.

- Carruthers Yes, but Your Honour there's a provision in the Tax Administration Act that sets out the challenge procedure and otherwise the assessment is really inviolate except under the statutory challenge procedure. And that's the position that was recognised in argument.
- Elias CJ Mr Carruthers, this submission that you've handed in and are reading through is very difficult to absorb in this way, and that is really why the rules provide for submissions to be put in writing ahead of time, so that counsel can speak to them, and you can engage the Court, which is a much more effective way of putting your points. If you're going to read through the whole of this, I'm just wondering really whether it would be sensible for us to take an adjournment so that we can read it and you can speak to the point.
- Carruthers Your Honour, yes I accept the criticism that is behind Your Honour's statement to me, but of course we get to the position where we have put in our written submissions; the Commissioner has put in his, and what we need to do in argument is really to synthesise where the case is at this point.
- Elias CJ Well for myself I would have found a two-page summary would have been very helpful. Now it may be that actually, except you've rushed through it so fast, that I need to go back to it, that your para.50 provides something like that as a roadmap, but really taking it from you as you read it out I'm slipping behind on it. So you might either want to develop some of these things or you might want to consider whether it would be better for us to read these submissions and then you can speak to them.
- Carruthers Your Honour I think that the better course would be to allow you to read the submissions and I'm then content to headline that that I want to refer to, but without wanting to engage or disagree with Your Honour, this procedure really was followed so that Your Honours wouldn't have to make a note of those parts of the Commissioner's argument that we wanted to engage on, so I just ask you to accept that it was well motivated
- Elias CJ Well I understand that but at the moment I'm finding it difficult to grasp what is in response to the Commissioner and whether this is a total substitution for what we have and how it all fits together. Now I haven't asked my colleagues. It's just that as soon as you started I was reading back over what you had already read out because I hadn't absorbed it, and it may be that my colleagues would prefer you to trundle through till lunchtime at least.

- Blanchard J I think I would prefer the trundling to continue till lunchtime and over lunchtime we'll have a chance to catch up.
- Elias CJ Well you may but I have a meeting, so I shan't be able to read it.
- McGrath J Perhaps we should have a longer lunch period.
- Anderson J I prefer to adjourn now, read it, and come back at 2.15pm.
- Blanchard J Well as the Chief Justice has a luncheon engagement, it might be more sensible.
- Elias CJ A luncheon engagement is putting an icing on it.
- Blanchard J It is very unsatisfactory that we're put in this position.
- Elias CJ I accept entirely Mr Carruthers that it may be in the end much more helpful to have it in this form, but it's not really assisting me to be sure that I'm understanding your argument properly to have you simply read through it in this way.
- Carruthers Yes, I accept that and Your Honour one of the disadvantages is that right at the start of it I have to begin with what is a complex interlocking of statutory provisions. But Your Honour if I can just make this submission. This is not intended in substitution for what we've done. This is intended as I said a moment ago to really meet the Commissioner's argument and synthesise what we've said or really pick the points that are an issue with the Commissioner's argument. But Your Honour I'm content with the course that's proposed.
- White Your Honours just before you do, I was just wondering whether there was one matter I could raise with Your Honours. It is a matter that we have raised with my learned friends before the hearing, and if Your Honours just turn to page 25 of my learned friend's notes of the oral argument, you will see there under the heading 'second question' – in fact the price was not grossly inflated, there then follows quite a number of paragraphs that address the factual material in the case which aren't as I understand it in the appellants' original written submissions, and the Commissioner has made it clear I believe in the Commissioner's written submissions that on this issue the Commissioner's position is that there are concurrent findings of fact in the High Court and in the Court of Appeal, and our first position is that it's not appropriate for this Court in fact to be re-trying effectively these matters. Of course it's entirely a matter for Your Honours, and if Your Honours go down that track then the Commissioner will need to respond, but it's not a matter, I think one of Your Honours suggested

that it was possibly selective, and the Commissioner's response will be yes it probably is selective and there will be other matters of fact that the Commissioner would wish to draw Your Honours' attention to. I just thought I ought to raise that now before Your Honours start reading that material.

Elias CJ Well I'm not proposing that we would go to the references apart from perhaps the statutory references, and it may be at this point we'll either have to work out with Mr Carruthers where he's going or we may need to allow him to take us to the references then.

White Yes, I just thought it might be of assistance to know the Commissioner's position.

Elias CJ Yes, thank you, that's helpful. Yes, well we'll adjourn until 2.15pm.

11.59am Court Adjourned

2.16pm Court Resumed

Elias CJ Thank you.

White Your Honours before my learned friend resumes, having had the opportunity now like Your Honours reading ahead of the note of oral argument, the Commissioner now does actually wish to object to the Court receiving the notes of oral argument from pages 25 to 41 – that's paras.106 to 164 – on two grounds. First that that's not within the terms of this Court's approved grounds of appeal. And secondly all that material should have been included in the appellant's written submissions as required by the Supreme Court rules. And as to ground 1 Your Honours will be aware of the two questions that were approved. The first one is having regard to the finding not challenged in the Court of Appeal, but the transaction under which the appellant acquired the mining licence was not a sham, whether the Commissioner was nevertheless entitled under s.76 of the GST Act as it stood at the time, to treat the transaction as void and to adjust the amount of tax refundable to the applicant. That in our submission involves an application of s.76, or the question of the application of 76 to the facts of the case as found. And the second question is if so, whether the Court of Appeal correctly determined the amount of the adjustment, i.e., in the light of the facts as found. And if the facts are now going to be put in issue by the appellants in this way, then the Commissioner will wish to invite this Court to review other facts found by Justice Chisholm, for instance relating to the genuineness of the transaction, because the Commissioner doesn't consider that those

findings are supported by the evidence either. And as to the second ground, that is that these matters should have been included in the written submission, the Commissioner would require regrettably, if Your Honours were to receive the submissions, an adjournment of the case to respond adequately to the extensive new matters raised in the 15 pages of notes for oral submissions which extend far beyond the points made in the two pages in the appellants' written submissions on question 2, and it is respectfully submitted Your Honours that the Commissioner was entitled to proper notice in advance of these matters in order to be in a position to respond properly and to assist the Court.

Elias CJ Mr White, just on the grounds you say it's just a question of application to the facts as found

White Yes Your Honour, that was the first point.

Elias CJ Where do you get the facts as found?

White Well I was reading the approved grounds of question 1, which is having regard to the finding not challenged in the Court of Appeal, but the transaction under which the applicant acquired mining licence was not a sham

Elias CJ Yes.

White So that's obviously to be accepted. Whether the Commissioner was nevertheless entitled under s.76 to treat the transaction as void, and to adjust the amount of tax refundable to the applicant, and one would have thought Your Honours if you had intended by that to enable the appellants on question 1 to raise issues of fact, that would have been disclosed. Indeed as I understand the appellants' argument, they're not seeking to raise the questions of fact in the context of question 1; they're seeking to do so in the context of question 2. But of course

Tipping J Well I think there's a sort of interlacing

Elias CJ Yes.

White Beg your pardon.

Tipping J Some interlacing.

White Yes it is. They're trying to argue under question 2 that they can invite the Court to revisit the question of value – indeed their oral

submissions are explicit. The second question, they head it up on page 25. In fact the price was not grossly inflated, but they're raising that in the context of question 2, but as Your Honour Justice Tipping recognised, that goes straight back to question 1.

Tipping J Well if it wasn't grossly inflated, I would have thought that was the end of the case.

White Well that may well be the case, but there is no issue – I'm sorry Your Honour.

Elias CJ I'm sorry, that point really means though that it's very difficult to disentangle the question of valuation Mr White. I have huge sympathy with what you're putting to us but insofar as it's based on the terms of the questions that the Court posed, it may be that the questions weren't best expressed.

Tipping J Well with respect, I wasn't I think part of the leave panel, but when reading the ground in preparation for this hearing, it never crossed my mind that there would be a factual issue underlying any of the proposed grounds, but in that I was obviously in error – a major central fact to it.

Elias CJ I haven't gone back to the submissions as filed of the appellant to compare. You say there were two pages on this. Perhaps I should have a look at them.

Blanchard J Pages 28 to 30.

White That's right Your Honour.

Blanchard J Consisting of 7 or 8 paragraphs.

White Yes, and we now have 15 pages and

Elias CJ It's not the volume though is it, it's whether the substance has been raised?

White It's the detail Your Honours, and my appreciation of the detail now raised, which wasn't previously raised, is that if Your Honours were to venture into that area, the Commissioner would need time to respond.

Elias CJ Well I can understand that, but it's a slightly different point than the

White Well I had two grounds Your Honour, but I stand by the first one and my reading of the questions was exactly the same as His Honour

Justice Tipping's which is that those questions stood without the Court being invited to in effect have the trial again, because what you are going to be asked to do is revisit the High Court Judge's finding that the value was grossly inflated.

Elias CJ Leaving aside though the extent of the discussion and the oral argument, in the submissions for the appellant, the topic is raised is it not, or do you say that it's not raised

White It is raised superficially Your Honour in a manner in which the Commissioner was of course prepared to respond, but it has transpired as a result of communications between the parties in recent days that we anticipated in fact that it might go considerably further, and now that's been confirmed by the submissions which we've seen for the first time today.

Elias CJ So your point would be answered if we simply ask the appellants to address the submissions in the argument which was filed?

White Well again we were still going to raise at the outset of our submissions Your Honour that the way in which it's expressed in the second issue still goes beyond the questions that the Court posed.

Elias CJ Yes, but if we were to do, but not pre-judging how you might fare on that argument, the practical course would simply be to endure and determine at a later stage. It's a little bit different when there are so many more pages perhaps.

White Well counsel for the Commissioner thought it appropriate to raise this matter with Your Honours now in view of the new material that we've only just received today, to indicate our position in respect of that.

Elias CJ Yes, thank you.

White We're in Your Honours hands. If Your Honours wish to venture into the factual matters, we will of course assist the Court by responding, but we may require more time to do so.

Elias CJ Yes, thank you Mr White. Mr Carruthers if you simply addressed us orally on paras.85 to 92, would that meet your purposes?

Carruthers Yes it will Your Honour. My learned junior is going to address that second question, but I resist what the counsel for the Commissioner has said and if you give me a moment may I come back to your question. In the application for leave the grounds of proposed leave, s.4 of the application, it's contended that Justice Chisholm made three

primary errors of fact which are not at all referred to let alone the subject of any examination in the Court of Appeal as follows concerning the value of the mining licence, and then the three matters are set out. And in the submissions, and they are the three matters that we are relying on, that in the submissions at page 9 – that's in support of the application for leave, appellants contentions, the value was at least \$45 million dollars, and we set that out.

Tipping J But you didn't get leave on those points did you?

Carruthers Well Your Honour may I ask perhaps rhetorically, what is question 2 about, unless it is that having got to the point that s.76 applies, what happens and how does it happen.

Tipping J But you're trying to make it bite on the earlier point as I understand you, not confined solely to the reconstruction issue.

Carruthers No, no, that's right. When Your Honour put it as interlacing I acknowledged that in response to the Chief Justice at the start of the hearing, because part of the analysis of purpose of whether the section applies, is not just my argument on specific provisions. That's the part I have argued – specific provisions – but I have also said that what supports that analysis is if you look at what the value was, leaving aside the price, then the objective purpose is actually supported by that analysis, so you are right that I am drawing on that question of value which is under question 2 to support the analysis on question 1.

Tipping J But what I personally find very difficult Mr Carruthers, if I can be blunt about it, is to be faced with 15 pages of oral speaking notes in elaboration of two and a bit pages of submissions. I just find that with great respect extremely unsatisfactory.

Carruthers Well Your Honour conceptually there is nothing different in the oral notes, but what they do is illustrate why the propositions in the written submissions are correct.

Tipping J Well with great respect it seems to me to suggest that the homework hasn't been done properly for the purpose of the written submissions. That's where you're supposed to lay out your full detailed case, and at the hearing you're supposed to speak to that case. Not add huge amounts of detail, otherwise our rules are a farce.

Carruthers Well Your Honour I'd have to say that in 20 years of experience before the Privy Council, I have followed the course I followed this morning in I think every appearance I've done, and

Tipping J Well with no disrespect to the Privy Council, our rules are different. You're living in the past.

Carruthers No with respect I'm not living in the past - it's not a place I find very comfortable. Your Honour the shape of the Privy Council rules is comparable. You have to file a case that was your case, but from time – I'm sorry Your Honour.

Elias CJ Well I was just going to say I don't think you really need to carry this further. What

Carruthers No thank you. May I come back to Your Honour's question now?

Elias CJ Yes.

Carruthers My junior will address on value by reference to the written submission

Elias CJ Yes, and the references in the written submission because I think the problem – I'm not so troubled by the additional words, although they are difficult to absorb when one's read the other, and one would have hoped that the abstract from the oral argument would be in summary form, so more words frankly doesn't help, but is not necessarily much worse than that. Poor advocacy I would suggest. But if there are references, and I've just had a quick look through to compare the two, and there are additional references, then Mr White is right, that he hasn't had notice of those, so what I suggest is that when – Mr Harley's doing this argument? – when Mr Harley addresses us he should speak to the submissions that we have received. Now that is not to determine the argument that Mr White has foreshadowed he was going to address to us anyway at the beginning of his submissions, that we shouldn't get into all of that, but Mr Harley is forewarned about that, and I think we will make better progress if we press on on that basis unless anyone has any other views.

Tipping J I am distinctly unhappy about it but I'm willing to go along with it.

Elias CJ Grit your teeth.

Carruthers Your Honour might I just make this submission.

Elias CJ Yes.

Carruthers Our argument does not challenge the findings of fact made by the Judge. What it does challenge is the conclusions that he draws from it.

Elias CJ The judgments. Yes I understand that Mr Carruthers, yes.

Carruthers Yes it is, yes, I thought Your Honour did from the reaction you gave me this morning.

Tipping J But you are directly challenging the conclusion in both Courts below that this figure was whatever the expression was, grossly inflated or

Carruthers Yes I am, but that's not a finding of fact, that's a conclusion from facts that had been found, and that's part of the analysis that one would expect an appellate Court and I'm not saying

Tipping J Are you really saying that we're into this because the Court of Appeal didn't do a good enough job with it? That seems to me what you're saying.

Carruthers Well I'm certainly saying that, but

Tipping J That there's a miscarriage because they didn't do justice to your submissions and therefore we should get in

Carruthers No, they didn't do justice to the evidence, ah to the findings of fact and our submissions.

Tipping J But you are saying that unless we do it there is a risk of a miscarriage because the Court of Appeal didn't do it properly?

Carruthers Yes I am, and I'm submitting that the Judge made appropriate findings of fact, and when you go to those findings of fact, it is the process of reasoning.

Tipping J If I can help you?

Carruthers Yes.

Tipping J I can understand it being put that way

Carruthers Yes, that is the argument

Tipping J Because frankly I wouldn't want to give a bar to sort of third running of the facts if there was a proper treatment of it at the first two stages even though your client wholly disagrees with it.

Carruthers And I do understand the appellate process in that respect Your Honour and we're not endeavouring to do that at all.

Tipping J So the reason why we're doing it is that your submission that the Court of Appeal didn't address your submissions sufficiently or fairly or properly?

Carruthers Correctly, yes.

Tipping J Right, well now that's

Carruthers And it did not perform its error correction function.

Tipping J Right.

Anderson J You shouldn't need to refer to evidence, you should be able to point to the findings in the judgment and extrapolate from that.

Carruthers Well I can, but Your Honour let me just illustrate for a moment. There was a clear finding preferring the evidence of Mr Davidson to Dr Rabone, and the very clear finding saying that Dr Rabone was unsatisfactory. So what the Judge did was to use Mr Davidson. But what he has failed to appreciate from the material that he had, which is clear from Mr Davidson's evidence, that Mr Davidson was talking about one year, and he has worked all his value calculations on one year. Now this licence had three years before any question of extension rose. So the moment that you get into that analysis you can see the finding of fact is there. I prefer Davidson's evidence. But then demonstrably from Mr Davidson's own evidence, there is an error as to what that evidence was. So I can point to the finding to that point, and that's the approach that we propose to adopt. But Your Honour the Chief Justice, Mr Harley will follow that process.

Elias CJ Thank you Mr Carruthers. Now we have had the opportunity to read with care too up to the second question so you can proceed on that basis.

Carruthers Right, and I will just headline the issues that I want to deal with. Can I pick up three issues that arose from this morning? In answer to Your Honour Justice Anderson first on the \$80,000, if I give you a reference to Mr Fahey's evidence – you don't need to go there Your Honour but I'll give you the reference. It's in volume 4 at page 605 and he was being cross-examined, and the \$80,000 came from \$60,000 that he borrowed from a friend of his, a Mr Ken Hickler, and he used \$20,000 of his own cash and then he later repaid Mr Hickler as the evidence says. Now those arrangements have nothing to do whatever with the subsequent debt which was Glenharrow's debt, to a company called Ryde Holdings Limited which may sound a note of

familiarity, and it's actually in the notes and in the Commissioner's submissions as RightHoldings Limited, but it's Ryde Holdings Limited and that was the company connected with members of the Meates family, including Mr Mark Meates. That debt was \$76,725 dollars and it's dealt with in volume 4 at page 673 between lines 10 and 18.

- Tipping J Is that quite an independent transaction?
- Carruthers It's a subsequent transaction, and it is unrelated, yes.
- Elias CJ Not for repayment of the \$80,000 earlier borrowed?
- Carruthers No, no, you will see from the evidence I didn't really want to be put to say
- Elias CJ No that's fine.
- Carruthers But the source of the repayment is identified from the notes. It was a personal matter.
- Elias CJ Yes, thank you.
- Carruthers In answer to Your Honour Justice Blanchard on working the mining licence, it is correct that beneficial ownership is enough to create the right to mine, but before you are allowed to mine you need a work programme that is approved by the Inspector of Mines, and that work programme was formulated by Mr Davidson and there were then two features – one was a consent process, and one was approval of the work programme. And on the consent process there were lengthy delays and I'll give Your Honour the reference to the High Court
- Blanchard J I think that's drifting off the subject of the question.
- Carruthers Alright, I'm sorry I didn't
- Blanchard J You seem to have answered my question. All I wanted to know was whether the ability to mine depended upon having the mining licence in your name, and you are saying no.
- Carruthers I am saying no, but I am saying that there were other constraints.
- Blanchard J Those are quite irrelevant to my question. The answer you've given is actually helpful.
- Carruthers Yes.

- Blanchard J But those other matters are no doubt important to you but they're quite separate matters.
- Carruthers Yes, as Your Honour pleases. Now I had got to page 11 and I was dealing with s.76. I've noted the section in para.54. In para.58 the section then on our submission does not attack a prohibited effect. Its focus is on purpose and intention concerning the entry into the arrangement. Then I've drawn attention again to the review I took you to earlier and noted that that review supports the argument which we're making and then in the next para.60 said there would be no reason for making the amendment if it already applied to an effect, so we draw support from that on the basis of purpose. Going then particularly to the issues in the first question
- Blanchard J Can you clarify what is meant by the words in parenthesis – the reference to *Ashton*?
- Carruthers Oh yes, that really is a combination of *Newton*, which looked at end in view and *Ashton* which looked at the words purpose and effect in what must have been s.108 at that stage I think.
- Blanchard J Yes.
- Carruthers So there is a distinction being drawn between purpose and effect in those cases in the sense that one is looking at end in view and we have a section that doesn't have effect in it at all.
- Tipping J I thought *Ashton* basically said that if a transaction has objectively a particular effect, that can be deemed to be its purpose, and it's more logical if you like to drive it off effect. But I take your point that neither word purpose or effect is present in our present section.
- Carruthers No, no.
- Tipping J I think, is it Viscount Dillon, who gave the advice in *Ashton*? I feel I may have the wrong case.
- Carruthers No, you're in the correct and Your Honour's correct, and the passage is at page 722, and just so you can note it, it's under tab 1.
- Tipping J But the puzzling thing about this case is that we don't have any statutory reference to either purpose or effect. We simply have a sort of an elision which jumps directly from arrangement to defeating.
- Carruthers Intent to defeat, yes.

- Tipping J Well no not intent to defeat.
- Carruthers No, no, you're correct, it's the other way around, yes.
- Tipping J So it's a most curious piece of drafting, if I may respectfully say so because it doesn't really give any overt clue as to the right approach.
- Blanchard J When you say that s.76 is about purpose, can you explain what you mean by that and whether it's any different from purpose in the new s.76?
- Carruthers What I say about purpose is that it is the conclusion to be drawn from what the parties said and did in relation to their transaction, so in this case where the parties have not directed their minds at all to GST, or any GST implications, it cannot be said that their purpose was to defeat the intent and application of the Act.
- Blanchard J Well if that's the case, it might be different from purpose or effect or indeed the word purpose alone in for example s.108.
- Carruthers Yes.
- Blanchard J The crucial passage in *Ashton* has always puzzled me because it seems to be circular.
- Carruthers Yes.
- Blanchard J It says if arrangement has a particular purpose, that will be its intended effect. Now if you took that just by itself, the kind of purpose you're talking about might not be very different. Then it says if it has a particular effect, then that will be its purpose, so it doubles back on itself.
- Carruthers Yes.
- Blanchard J And it goes on to say 'and oral evidence to show it has a different purpose or effect to that which is shown by the arrangement itself is irrelevant'. I think you have to read that as a whole and the only sense I can give it is that its effect that counts where you have the composite phrase purpose or effect, and that the purpose is judged by the effect in what you look at is what the transaction does. What the arrangement achieves and you're not allowed to look at anything else.
- Tipping J And that is what it achieves objectively, not what the parties had in their minds.

- Blanchard J Yes.
- Elias CJ But your provision is different.
- Carruthers The difficulty with that analysis is again what takes that transaction from the specific rules that are required to be followed and which were followed, very explicitly under the statutory provisions that I took you through? What takes that transaction from there into s.76?
- McGrath J The opening words 'notwithstanding any other provision' etc is perhaps the answer to that question. Because that surely indicates that whatever is the position with s.BG1, s.76 is intended to have an over-arching effect.
- Carruthers Yes, but with respect it doesn't actually answer the question of what is it that takes it out of the specific provisions which are complied with into defeating the intention and application of the Act.
- McGrath J Surely it means that s.76 is to apply despite whatever the specific provisions may stipulate, and I'm not saying that's the s.BG1 approach
- Carruthers No, no, I know.
- McGrath J But that's what seems to me the opening words that the section rather suggests, at least read literally.
- Carruthers But there's still the logical difficulty of what is it that then makes the arrangement defeating the intent and application of the Act when you've done precisely what the Act requires without any, well I come to use the word 'pretence', or any
- McGrath J I think what we've got to consider, and I'm finding this difficult too, is whether the phrase 'intent and application' – a new phrase in the Act – is somehow what it means is it's not simply to be ascertained by the words of the specific provisions. It is looking to purpose in a broader sense perhaps. I think that's the argument that the Commissioner is developing.
- Carruthers Well I have a difficulty with that because that would actually mean that every GST transaction would have to be considered in the context of s.76, and how do you make that consideration, because what does it depend on, that's the
- Tipping J How do you distinguish between the acceptable tax advantage and the unacceptable tax advantage? I feel this difficulty very much too Mr Carruthers.

Carruthers Yes.

Tipping J I mean it's a sort of dog chasing its tail situation this. You must be allowed sometime to simply take advantage of what's there in the Act. It's that boundary between when you're allowed to do it and when someone comes along and says that's not on.

Carruthers Well of course the irony in this case if you apply that approach is that these people weren't trying to take advantage of anything. They've never turned their minds to it.

McGrath J Well that's the subject of objectivity.

Tipping J Well that was what's in their heads and I think we've gone past that.

Carruthers Right, well

McGrath J I think Mr Carruthers, if I can just continue the conversation a moment further - the way in which avoidance is often identified, or if the inquiry into it is conducted, is by looking at whether in an economic sense, what's happening involves artificial contrivance, and in other words whether what's economically is happening is something different from what legally has been stated in the particular documents, and I'm just saying that I think is the way in which an avoidance provision which overrides specific provisions, you would look for something of that kind to try and see whether what's happening is illegitimate use of the provisions rather than a legitimate use.

Carruthers Your Honour will have to be with respect very careful about the actual structure of the GST Act and the actual scheme and purpose, because you have considerations like exempt supply of financial services. You also have a tension between unregistered and registered persons and transactions between them.

McGrath J Yes, yes.

Carruthers So you've got two interlacing circles with unregistered people here, registered people here and the potential to cross over. So if you don't

McGrath J I think I appreciate Mr Carruthers that in certain situations, most notably when you're dealing as a registered person with an unregistered person, input tax can be a bit of a punt insofar as the revenue is concerned. It allows the credit without really being totally clear it's going to get an offset in due course.

Carruthers Yes, Your Honour is correct

McGrath J If that's what you're talking about in your two circles.

Carruthers Yes it is precisely, but Your Honour that's really a feature of the tax system, both the income tax system and the GST system, and while we focus on the input tax position in this case, what the Commissioner – to use your language – takes a punt on, is that the venture will succeed and in due time the Commissioner will get an output tax.

McGrath J Well it's the Act that takes the punt, not the Commissioner of course.

Carruthers Yes, I beg your pardon, Your Honour's right.

McGrath J What I'm doing really is trying to say it's the way in which an overriding anti-avoidance provision would operate in relation to specific provisions giving entitlements in a piece of tax legislation, will usually come back to whether in particular circumstances there is contrivance.

Carruthers Yes.

McGrath J Certainly I have no doubt that the particular scheme of the Act has to be understood so that the Commissioner and ultimately the Court doesn't get confused between what is genuinely being claimed properly in terms of the Act as a whole as against improperly. But that I think is what in the end we have to examine this case on, and we then come down to the arguments of whether particular matters were contrivances or in fact really were something specifically contemplated by the Act and allowed.

Carruthers Yes, yes, and Your Honour will know that I've come to deal with that in looking at the five propositions from *Challenge* and Justice Richardson's approach to the analysis of that provision in a different context.

McGrath J Yes.

Carruthers May I come back to that in a moment, I just want to check something on one of the cases?

Elias CJ I'm wondering whether I'm being way too simplistic on this, but it follows on really from what Justice McGrath said. I wonder about the use of the Income Tax Case Law in the context of the GST Act, because these provisions are really quite different, and we're talking

about intent and purpose, but here the intent and application is of the Act

Carruthers Yes.

Elias CJ It's not the intent and purpose of the arrangement, and it seems to me that there are two things. One is that s.76 – 'the arrangement has to be entered into between persons to defeat the intent and application of the Act'. The intent and application of the Act I suppose could be said to be the policy that input tax credits are obtained against output tax gained.

Carruthers If Your Honour is thinking that there is a symmetry, there is none.

Elias CJ Well no, there isn't a symmetry, but is that because the Act leaves a gap really what Justice McGrath was saying that it permits a deferral which might be exactly the same end result, whatever the financing arrangements; whatever the payment arrangements, and the Act takes that risk.

Carruthers Yes, but by gap you are just referring to it being a feature in the statutory scheme?

Elias CJ Yes.

Carruthers Yes, yes, which if that's the scheme of the Act as it is, Your Honour puts it correctly with respect, then it's very hard then to see what it is that one must do to move from the compliance with the Act, recognising that on a project like this as with any construction project for example, there'll be a delay, a mismatch, until output tax is recovered.

Elias CJ And the outputs may be totally overtaken by events.

Carruthers Oh yes.

Elias CJ There may never be any outputs, yes.

Carruthers That's right - on the other hand there may be riches undreamed of by the Commissioner which will mean the outputs are very very significant, so that is the scheme of the legislation, and that's why it's very difficult to formulate a test that says in the context of these people, that there is something that they have done that does defeat the intent and application of the Act.

Elias CJ But if you entered into a transaction without any belief that there would be subsequent outputs, would that not defeat the intent and application of the Act?

Carruthers Your Honour is taking it out of the findings in this case altogether.

Elias CJ Yes I'm just really trying to understand the section and how it works because it seems to me that suppose they had actually put up the cold cash but had not been able for one reason or another to mine and therefore the Commissioner missed out on the output tax

Carruthers Yes.

Elias CJ That's really the same position you have here

Carruthers And there's nothing wrong with that.

Elias CJ Well what I'm then putting to you is but if they had no belief that there would be outputs which would attract output tax, would that not be an arrangement which would defeat the

Carruthers Intent and application of the Act.

Elias CJ Yes.

Carruthers I think Your Honour one would be able to objectively say that that's so.

Blanchard J You'd be able to see that they didn't really believe in the valuation in that scenario.

Carruthers Yes, and that case of *Shell* is a good illustration, where all of the companies were put together and it was the case where the taxpayer

Blanchard J Well it was an obvious rort - it was just a structure that had no commercial sense in it.

Carruthers Yes, yes, but I mean one didn't really have to look at commercial sense Your Honour, one could see through it and just see that the subjective purpose was to take advantage of the input provisions in the Act.

Tipping J Is the simplest possible way of addressing this first issue to say on what principled basis can the Commissioner go behind the \$45 million?

Carruthers Yes I'm content with that. That is on what basis can he go behind the transfer of the mining licence. That the money

Tipping J For a money consideration of \$45 million.

Carruthers Yes that's right.

Tipping J On what principled basis?

Carruthers Yes.

Tipping J He's got to demonstrate hasn't he that allowing it to go ahead on that basis, somehow or other defeats the intention and application of the Act.

Carruthers Yes Your Honour

Tipping J It's got to be shown

Carruthers He's got to be satisfied and so he would have to have a rational basis to be satisfied.

Tipping J Now in what way does that defeat the intention and application of the Act, because that is exactly what on your argument, your client is allowed to do.

Carruthers That's right, which is why I paused in the exchange with His Honour Justice McGrath about what is it that takes us out of what on the face of it we're entitled

Tipping J He's got to show us hasn't he that what is on its face a perfectly valid conventional transaction can somehow or other be struck down and be said to be a transaction which it defeats, nevermind purpose, unless it defeats whatever the words are, then you get nowhere do you?

Carruthers Yes that's right, and Your Honour will appreciate that where you have led yourself is into the question of value.

Tipping J Well inevitably we're going to come back to that. Can you go behind if you like the \$45 million? On what principled basis can you go behind the \$45 million

Carruthers That's the question that needs to be

Tipping J That you paid.

Carruthers Yes, that's the question

Tipping J Because you did in law pay.

Carruthers Yes that's right.

McGrath J Mr Carruthers can I just get you to tell us what meaning you want us to attribute to the phrase 'the intent and application of this Act'? The meaning given to those words.

Carruthers I think it is compliance with the provisions of the Act in a way which does not involve, let me use the word 'pretence', but it takes into account of those expressions, those that Your Honours used

McGrath J Yes, right, I think that's helpful thanks.

Carruthers Your Honour Chief Justice you questioned the use of the Income Tax Act cases, and I agree with respect that some care must be exercised, but they are helpful I think in looking at what sort of transactions defeat the legislation, and I think that's the way in which we have used them in the note of argument.

Elias CJ That is really what I'm querying, because I would have thought that GST was all about bringing the inputs and outputs into balance.

Carruthers Yes, but it's actually answering the next question and that is, what is the principle His Honour Justice Tipping said that allows the Commissioner to go behind what the parties have legitimately done.

Elias CJ Well if what they have done is enter into an arrangement to defeat that symmetry between

Carruthers No.

Elias CJ No.

Carruthers No, not symmetry Your Honour, there is no symmetry, but Your Honour's example is

Elias CJ There's not a symmetry in application because there are gaps, there are risks involved, so I accept that there is no exact symmetry, but that's the intent of the Act. If things work properly, they are to achieve that equivalence.

Carruthers Your Honour's example that you gave of a transaction that was entered into without any belief that there would ever be an output tax – a deliberate structure like that.

Elias CJ Yes.

Carruthers That with respect would defeat.

Elias CJ And that's why that key to it is the over valuation, because if it were at a gross over-valuation, then looking at it objectively, they can't have expected that there would be outputs which would meet the input tax credit they obtained.

Carruthers Yes, if that can be formulated into a principle that one could apply, which is

Elias CJ For myself I'm less worried about principles than the statutory language.

Carruthers But Your Honour the one follows the other, because to get into the statutory language and to go behind the specific provisions the question is what is it that has to exist to satisfy the Commissioner that he can go behind the specifics of the transaction which comply with the Act.

Elias CJ If he believes that the arrangement has been entered into between persons to defeat

Carruthers Yes.

Elias CJ So until I hear from Mr White I must suspend conviction, but it does seem to me that there is a subjective element there that it must be intended to defeat the intent of application of the Act.

Carruthers Well that analysis does drive you back to what the parties said and did and the Judge has an appropriate finding

Elias CJ Well except that he's found that there was a gross over-valuation and what I'm putting to you is that it's an available inference from that gross over-valuation that there cannot have been any relief that output tax equivalent to the input tax credit would be achieved and that therefore the arrangement was to defeat the intended application of the Act.

- Carruthers Which doesn't sit happily with his findings that these people had intended to use the mining licence as part of a taxable activity and had not paid any attention to GST.
- Elias CJ But that's looking at the question of the transaction. What we need to look at is whether the arrangement is going to displace the intent and application of the Act. It's the GST, the intent in relation to GST that seems to me to be critical. They may well have intended to mine and even to mine profitably, but was it not an available inference that they couldn't possibly have intended to mine so profitably within the three years left in the licence that the output tax able to be gathered by the Commissioner would equate to the input tax credit they had obtained?
- Carruthers Your Honour with respect is treading a dangerous path. Let me take *Fontera* for example. Now *Fontera*, with its export markets claims input tax on all its activities in New Zealand and there is no corresponding output tax in relation to any of its exports, so on Your Honour's analysis that would be a transaction that would fall foul in the sense that it would have the effect of defeating the intent and application of the Act.
- Tipping J The real problem is through the lack of registration of the supplier isn't it, because if the supplier's registered the thing is self-releasing?
- Carruthers That's right, that's right, and
- Tipping J It's in this particular situation that you have the risk if you like or the punt factor that my brother McGrath was referring to
- Carruthers That's right, yes.
- Tipping J Otherwise the two will just cancel each other out.
- Carruthers That's right, and it is a common situation. This case isn't unique by any stretch.
- Tipping J Well the statute clearly envisages it. It hasn't given a general power to the Commissioner to look at consideration when you have an unregistered person supplying to a registered person second-hand goods, which you would have expected if it had been intended that the Act should have that control. A fairly obvious gap and what I find difficult in this case is that in a sense you can see how people could say well they've got far more than they should have back, but there's no power of the Commissioner, as I understand it, to specifically look at consideration. He's got to bring himself through this very difficult

avoidance route before he can as it were go behind the party's consideration.

Carruthers Yes, and when you say Your Honour they've got more than they should, that's to stop the story before one

Tipping J I was just simply saying that it's easy to see how people might say that, but the point is the Act as the Chief Justice says, it's got to defeat the Act, and it's not defeating anything in the Act as far as I can see on its face. Where I have difficulty is to see what exactly it is defeating. It is presumably defeating the theory that the consideration in these types of cases can be re-examined so as to make it consistent with open-market value, but that's only obliquely there in the Act, and it's not expressly there for the second-hand goods unregistered or registered transaction. I'm just forecasting for Mr White's benefit that I'll need quite a lot of help there because that's what the Court of Appeal majority focused on, and that's what Mr White's submissions focus on, and I'm yet to be persuaded that that works. I can see that it would be nice if the Commissioner could say well I'm not allowing this consideration because it's far too high, but he's got himself protected in associated personal transactions, but he hasn't got himself protected, so he has to go down the avoidance route which I find rather troublesome because it's going to lead to endless arguments as to whether the consideration's within the ball park. And how bad does it have to be before its avoidance? How different does it have to be from open market value before you can say it's avoidance? We're going to have endless difficulties. I know this section's been repealed and replaced, but just looking at it at face value, where are the boundaries.

Carruthers Yes.

Blanchard J Well I think the same problems would probably exist under the new section frankly.

Carruthers Well with respect I agree.

Blanchard J It's almost as impenetrable and if that leads to unfortunate results for the Commissioner, then it's within the Commissioner's ability to come up with a better section if he can get Parliament to enact it. But it does seem to me that if the parties are bone fide in their approach to their bargain – in other words they genuinely believe in their bargain, which seems to be the finding here, and it's a commercial arrangement that makes commercial sense regardless of the tax position, then it's going to be very difficult to use either version of s.76 against it.

Carruthers Well with respect I agree Your Honour.

Blanchard J And I agree with my brother Tipping that once one starts to try to do that perhaps out of sympathy for the Commissioner; perhaps out of a feeling that if one had been the trial Judge; one might not have been so sympathetic in the factual findings, I don't know where you stop. If Mr Fahey had had some millions of dollars, but nothing near \$45 million, the fact that he paid that over up front with vendor finance for a large part of the price, would that be a situation which could be set aside, again assuming the genuineness of the \$45 million.

Carruthers Yes.

Blanchard J Misguided though the Commissioner says that figure actually was as a valuation.

Tipping J I don't want to harp on this but I mean how misguided does it have to be? Is it just that the Commissioner is going to come along and start saying well you paid too much for that so I'm not going to give you the input tax credit. It's a very blunt instrument this, to carry all that weight on avoidance, defeating the Act, whereas if he wanted the power to adjust the consideration for input tax credit purposes, like he can for associated persons and so on, he can jolly well get it.

Carruthers Your Honours we have discussed the question of really what is the gatehead but if one goes back to the definition of input tax, in this case they're goods acquired for the principal purpose of making taxable supplies, so if you get to that position with the findings that we've got about the *bide fides* of the parties.

Elias CJ Are they bone fide as to paying tax, or what was that definition again?

Carruthers They were bone fide in acquiring goods for the principal purpose of making taxable supplies.

Elias CJ Yes.

Carruthers So the acquisition of the licence

Elias CJ Does the finding of fact address that definition?

Carruthers Yes it does

Blanchard J Yes.

Elias CJ Yes alright, no that's fine.

McGrath J Mr Carruthers there's one aspect of this case I'd like you to give me your perception on. It's really picking up on the helpful way in which you offered a meaning for intent and application referring to in effect requiring before the avoidance provision could be operated there was something in the nature of artifice, contrivance etc. Is there in this case at least some difference that might be arguably suggested to have artificial features in the economic nature of this arrangement, as opposed to its juristic formulation? In other words the juristic formulation was quite clearly a transaction I'm satisfied was for money and it was actually given effect. There was a payment; it was a loan and so forth. But looked at economically, is it arguable that it wasn't in reality that at all because of the use of a low capital company and that the real economic situation was that this licence would be paid for if and when it was worked successfully? And I'm looking at this now objectively, and that requires an assumption on the meaning of the section which I don't want you to go into because I certainly respect the issue there, but might it not be said that there was something of the contrived about the economic nature of this arrangement which can be contrasted with the legal form?

Carruthers No, what you have are legal obligations which do affect the economic position of Glenharrow which has an obligation to pay. So there's nothing in that form that if you look at Lord Templeman's five examples

Tipping J I'd rather not.

McGrath J Go on. I'm happy to if you think it will shed some light on this issue, yes.

Carruthers Well in each of those there was no economic exposure or risk in any of them. In this one there is a clear economic exposure and risk. There is an obligation to pay. Your Honour I think that

Blanchard J Well yes, of \$100 company.

Carruthers Well

Blanchard J The company was exposed to risk of liquidation. It was never much exposed to the risk of payment unless it managed to extract a whole lot of stones from the ground.

Carruthers Well Your Honour how different is that from the exposure that any other company has, and we have enough examples now of companies

that are beyond their start-up position that have not been able to meet their obligations, and it's never been suggested that there should be guarantees or

McGrath J I think the comparison you're being invited to help us with is in relation – the reality of Glenharrow's in its financial capitalised situation compared with the apparent reality of a completed transaction with \$45 million dollars having passed hands.

Carruthers But Your Honour will appreciate that in this you are dealing with a part of the transaction that is recognised by the statute as being an exempt supply. It's financial services. It's recognised as being exempt, so to analyse

McGrath J I'm not quibbling about the \$45 million dollars here, I'm just quibbling about the legal form of what happened as opposed to the arguable economic reality

Carruthers But you have the distinct advantage of looking at what's happened when everything has gone wrong.

McGrath J I'm trying not to Mr Carruthers, I'm trying to look at it on day one when the contract was signed.

Carruthers Well if you're looking at it at day one, what these very experienced

McGrath J Well settled if you like.

Carruthers Pardon.

McGrath J Sorry, on the day it was settled perhaps might be a better way of putting it, yes.

Carruthers Yes, I'm content with the way Your Honour's put it. But what you're looking at then is two very experienced people in the area who thought that this was going to work, and who had – Mr Fahey particularly – who had a background having gone through the whole economics of it carefully, thought it was going to work. Now the fact that it hasn't worked leaves Your Honour to make the analysis that you do, so if you look at whether those parties where Mr Fahey and Glenharrow thought they were economically at risk, the answer has to be yes.

Blanchard J They could have structured it in a way which was more akin to the economic reality by leaving the licence in the name of Mr Meates until

payments were completed, but allowing Glenharrow to do the work and extract the stone and sell it and make drip feed payments.

Carruthers Yes, but Your Honour these are choices. We're talking about choices that are available to them, and as *Cecil Brothers* and *Europa No. 2* say, it's not for the Commissioner to tell parties what price they should pay or how they should structure their transactions.

Blanchard J Well I suppose your answer might be yes, but what I've suggested to you is one possible structure, but the structure they did adopt was nothing novel. It was simply conveyance and mortgage-backed.

Carruthers That's so

Blanchard J And that the payments followed the conveyancing.

Carruthers With respect, yes, and both sides were separately legally advised. It was a conventional transaction. Does that bring me back to the first question on page 12?

Elias CJ Well I think you've probably covered an awful lot of your

Carruthers I think I have, I think I have, and Your Honours will see that there is a structure where what we have dealt with is to take the issues that the Commissioner has raised in his submissions in response to ours and worked through those and Your Honours if the indication is Chief Justice that you're giving me is that I can go really to just perhaps recapitulate by dealing with the conclusions that I've made, I'm content to do that.

Blanchard J There was one paragraph that struck me as having something quite remarkable in it and I'm really just giving you an opportunity of walking away from this, but para.94 seems to try to draw some kind of distinction between a sham and a masquerade.

Carruthers Well I think

Blanchard J You don't really mean that do you?

Carruthers No I think I was really looking at the facts of *Miller* in that case. I don't mind what expression is used Your Honour.

Tipping J It's not this case anyway.

Blanchard J Yes.

- Carruthers Well no, and it's just it's illustrative that *Miller* was a case where it was set up as a sale and it wasn't. Your Honours I think I have covered my ground. If I can just invite you to deal with paras.100, 101, 102, which gathered together what I've been
- Tipping J Well I was going to ask you for some help with 101. I found that rather hard to get the mind around Mr Carruthers. Can it be simplified into a more sort of succinct proposition?
- Carruthers I think that really it draws, yes Your Honour can put that to one side if you have followed the summary of the contentions that I discussed on page 1. I think page 1 puts it much better than that.
- Elias CJ Do you want us to delete this then?
- Carruthers I'm not sure that I'm that ambitious Your Honour, but I think if you're looking at para.101, it's better expressed than in para.1.
- Tipping J See para.1?
- Carruthers Yes, yes, I think deal with it that way. 102 I draw together what I've been discussing up to that point and then I've put in my series of propositions in that section on conclusion. And unless Your Honours have any further questions I'll invite my learned junior to address you on the value issue.
- McGrath J Just before you go perhaps *Europa No.2* is a case that's been mentioned from time to time Mr Carruthers and would you say that the principle in *Europa No.2* that you've expounded applies if there was in fact a contrivance, or is that
- Carruthers No *Europa No. 2* goes off on the basis that there was not a contrivance
- McGrath J Well it says you have to look at the surrounding arrangements to see if there was anything there.
- Carruthers Yes, and it recognises that the parties were free to make what arrangements they chose where there were choices and of course dealt with the *Cecil Brothers* point about price.
- McGrath J It's just that it's a decision that you've been very emphatic about. It doesn't seem to have always been received in such a clear cut way in New Zealand and even in the *Peterson* case, Lord Millett does seem to say of course it all depends on whether the expense was truly incurred.

Carruthers Yes, yes that's right.

Tipping J Isn't it this Mr Carruthers, that the parties are free to make whatever choices they like provided they don't stray into artifice, contrivance, pretence, or whatever. Those choices are off limits, but short of that you're in the clear.

Carruthers With respect yes, that's the argument that I think I've consistently made in a number of cases now. May it please Your Honours.

Elias CJ Thank you Mr Carruthers. Yes Mr Harley. Page 28

Harley I heard you Ma'am and I'll do as instructed. I would like to make the point however that the form of the note that was submitted today in respect of this issue is materially identical to that which was used in the Court of Appeal. There's been no change to it. It is not new to the Commissioner. The reason for addressing this issue in this Court is that the Court of Appeal didn't address the issue of value at all. The observations that Your Honour the Chief Justice made this morning that there's a concurrent conclusion but there are not concurrent findings of fact is entirely right. Indeed the Court of Appeal disregarded the value of the licence altogether because it's completely inconsistent with its own theory of the case, which has got nothing to do with value. The third point I wanted to make, possibly setting myself up as a Kamikaze pilot in front of Your Honours, is that I'm familiar with the Court's decision in *Bryson v Three Foot Six*. I understand what it means, and I

Elias CJ I don't understand why it has any application, so maybe I've just forgotten it.

Harley Because in paras.25, 26 and 27, the Court has demanded that when arguing against a Judge's conclusions in terms of findings of fact, one must meet the language of the decision as a very high hurdle and that it is a rare case. I understand those standards and I can meet them.

Blanchard J You would have to show in accordance with that, that the Judge took a view of the facts which could not reasonably be held.

Harley That is my submission, yes Your Honour.

Blanchard J And that the Court of Appeal has fallen into the same error?

Harley Well yes, but they didn't treat the point because they didn't need to. It's completely inconsistent.

Elias CJ But hang on. *Bryson* was an Employment Court matter, so the only appeal was on questions of law.

Harley Yes Your Honour.

Elias CJ We're talking about a general appeal from the High Court to the Court of Appeal.

Harley Yes Your Honour.

Elias CJ I don't think you need to worry about *Bryson*.

Harley I didn't want to be the Kamikaze Pilot Ma'am.

Elias CJ I might be that.

Harley To deal with the submission if I could take Your Honours first to para.86 of the written submission, the proposition concerns Dr Rabone and his 40,000 tonnes. In that paragraph I observe that Dr Rabone was in basic error believing that 50% of the mining licence was outside of the area that he was asked to consider. Now I can show you on the map that's before the Court how big that error actually is, but it is in his own words a colossal error, which he accepted in cross-examination. And it infected, if I can put it that way, his responses to questions in cross-examination because he couldn't really accept that that was the error that had been made, and in fairness to him it should be made clear, it was not his error. He was given a map and on the map the pegs are located, if I can put it this way, manually. Someone takes the written description of where the pegs are and translates it to the map. There was no survey.

Tipping J By co-ordinates, just simply by plonking it where they were told the co-ordinates were?

Harley By the written description there is no co-ordinate.

Tipping J Oh.

Anderson J There's a big red bowl of iron in the spruce tree.

Harley Yes, and if you look at the third cloud on the blah, blah, blah.

Tipping J It's a little bit less sophisticated than I had in mind.

Harley Indeed. Now I can show you where that error is and how big it is, but the net result of it is that he disregarded the most valuable reef, although he had actually walked down it, and he'd measured it, but having gotten himself to a state of mind if I can put it that way, we didn't understand that he was in the wrong place. He could never budge himself, and so his evidence in chief is there was never more than 40,000 tonnes of stone. When he's confronted with the error under cross-examination, he immediately changes his evidence and said no, no, that's not what I meant. What I meant was you could never take off more than 15,000 tonnes in three years, so if 40,000 is the amount, there was far more than 40,000, but I never had to consider it.

Tipping J You mean because it wasn't achievable within the timeframe?

Harley It was never achievable and if there's common ground in this case about anything, it's that. There is so much stone on this mountain, and high quality stone, in the three years and whatever is added on if any, it would never be possible – I think the evidence is that if Mr Fahey had been able to mine something in the order of I think it's 30,000 tonnes a year, it would take him 184 years to extract the volume that was identified in site.

Blanchard J Where exactly is Mount Griffen?

Harley It's on the West Coast of

Blanchard J Yes I know that. Which valley gives access to it?

Harley Your Honour I can take you to the map.

Anderson J It's okay to have a view then.

Blanchard J It's a pity we are not having a view.

Harley I beg your pardon.

Anderson J It's okay to go for a view then.

Harley And you're invited to go for a view if you like, as was the Judge twice, and he declined.

Harley It's in volume 5 I think the map.

Blanchard J Well I don't want to hold things up on this, I'm just curious.

Elias CJ Does anyone have a licence there at the moment?

Harley No.

Blanchard J Ngai Tahu.

Harley Ngai Tahu has a monopoly.

Tipping J This is sounding more and more attractive by the minute.

Harley It's a good deal Your Honour.

Tipping J Is it open to application?

Harley I beg your pardon?

Tipping J No, sorry, I'm being facetious.

Harley Well I was going to join you with it.

Anderson J Was this site un-worked for about 80 years.

Harley Yes Your Honour.

Anderson J Notwithstanding the vast amounts of fabulous stone there.

Harley Correct, and in the brief of evidence and his cross-examination, Michael Meates explains how it is that he came to realise what an extraordinary resource this was, partly by flying over it and noticing that the rock had a strange colour in the sunlight, and then he was given the prospectus which refers to the jewellery grade Serpentine, and then he started to test it, and to test drill it, and to take samples and to get the samples tested by experts who were familiar with carving – I'm going to use the word 'Greenstone' – but you understand that I don't mean nephrite.

Tipping J Mr Harley, if the essential control if you like was how much they could get out per year in terms of their licence with all the restrictions and what not, what does it matter what the total was?

Harley It matters in terms of Mr Mark Meates the valuer. He assumed 15,000 tonnes per year for three years – a total of 45,000 tonnes.

Tipping J Yes.

Harley He assumed multi-site mining in order to extract that volume and the critical evidence which is ignored by the Judge, and we say makes all the difference, is what's called high-grading, which is recognising the Bowenites and super Bowenite

Tipping J So there's no argument about the tonnage, it's the quality within that tonnage, that's the key point is it?

Harley Yes, yes it is.

Elias CJ It must be also the ability to extract 15,000 tonnes a year.

Harley I'm not sure what you mean by that Ma'am. Do you mean can I get a helicopter and work a helicopter so I can lift 15,000 tonnes a year off? The answer's yes. Can I operate a number of machines to chop up the rocks so that I've got 15,000 tonnes a year to lift off per year – yes.

Elias CJ I thought this was pick and shovel stuff.

Harley No Ma'am.

Elias CJ No, alright, sorry. Move on because I'm behind on the facts.

Tipping J I think I misled you when I made that reference to the Wellington Airport.

Elias CJ You did.

Harley We'll come back to Wellington Airport and its relevance.

Tipping J Right, thank you Mr Harley.

Harley Any old airport will do, it's just that Wellington happens to be about 2,000 long and gives the right dimensions. The map is in volume 6 in Mr Rabone's report, which is behind tab 4, and it's between pages 6 and 7 of that report. So what I'm trying to direct your attention to is that.

McGrath J I've got that.

Harley Yes Your Honour. Right in the middle where I've drawn my pink bit you'll see the mining licence 32 2682

McGrath J That's at the upper map is it? Were you not expecting us to have a colour?

Harley No, no, I just did it for myself.

McGrath J Could you just show us it again.

Harley So as I could find it, yes.

Anderson J What volume?

Harley It's in volume 6.

Tipping J Where does it lie in relation to Lake Brunner? Is it north of it, west of it, east?

Elias CJ South.

Blanchard J Is it up from the Arahua Valley? I've been in there.

Harley Your Honour's invited again.

Elias CJ I can see the Lake Station on this map.

Harley Yes.

Tipping J Goodness me, there's another very desirable spot.

Elias CJ Anyway move on.

Harley Yes Ma'am.

Elias CJ We'd all rather be in the South Island I think.

Tipping J But you were explaining Mr Harley that although the 15,000 a year is a constant, it's the quality within that 15,000 that's the key present dimension.

Harley Yes, yes I am.

Tipping J Yes.

Harley Now Dr Rabone's

McGrath J Madam Registrar, could you give that to the Chief Justice please?

Elias CJ Thank you.

Harley Yes Ma'am, that one's mine, but you can have it if it helps.

Tipping J We'll give it back to Mr Harley.

Harley Can I go back Justice Tipping to your question. The evidence of Mark Meates, who did the valuation, supported by Michael Meates, is that it was always possible with helicopters to lift 15,000 tonnes per year off, and Mark Meates' valuation used the 15,000 as the constant. Dr Rabone's evidence was it wasn't possible to lift off by helicopter more than 4,600 tonnes, and the Judge rejected that evidence. The next thing he did, and I don't mean this to be disrespectful, but he cherry-picked the middle which was 9,460 tonnes which he said he took from Mr Davidson's report which is in tab 10 of the materials. Sorry, volume 10.

Tipping J 9,000?

Harley 9460 tonnes per year.

Tipping J From Davidson?

Harley Yes.

Tipping J Well was that not open to the Judge or you were about to come on and tell us why it wasn't?

Harley I'm going to come back to that question in a moment Sir, but for a number of reasons on certain of the arithmetical scenarios, that makes no difference, we'll get to \$45 million dollars. But he was never, the Judge was never right to reject the 15,000 tonnes without giving a reason as to why the helicopter assumptions were incorrect, and why the mine could not be operated in the way that the witnesses for Glenharrow said in respect of taking off the 15,000 tonnes per year.

Tipping J Is it a failure to give reasons for rejecting the 15,000 that's the central focus of the argument?

Harley That's one part of it Your Honour, but I'll show you with the arithmetic

Tipping J Yes well never mind what the arithmetic may show, I'm just curious

Harley I'm saying the Judge never gave a reason for rejecting 15,000 tonnes except that he said that Mark Meates' approach to valuation was unorthodox. He does not discuss at all the evidence that was given by

Michael Meates, Gerard Fahey, Richard Fahey, as to the ability to use heavy-lift helicopters to extract 15,000 tonnes a year.

Blanchard J Someone mentioned the condition about only being able to use pick and shovel. Was there such a condition?

Harley No, not in those terms. This is the hand-held equipment restriction and yes there was a hand-held equipment restrict and on occasions that was lifted and then it was rescinded. I think that happened twice.

Tipping J Is a helicopter not a hand-held piece of equipment?

Elias CJ It doesn't extract the stone.

Harley It's not the mining equipment Your Honour.

Tipping J It's not the mining equipment – this is to get it out?

Harley Yes.

Tipping J You can take it away by helicopter, that's perfectly alright.

Harley Now in the materials that were put in evidence by Mr Richard Fahey. He went to Italy and he inspected a Serpentine Mine in Northern Italy on the Swiss/German Alps border, and he produced in evidence a number of brochures of mining machines which were compliant for hand-held purposes. We're talking about substantial diesel engine powered diamond saws, but they're not whirly-gig blade saws, they're shoe-lace with diamonds in the lace. The equipment shown is drilling equipment that drills around the outside of blocks. The shoe-lace is threaded through - you turn the machine on – you put some water on the razor-blade so to speak, and then you go and start the next one.

Anderson J Right, so it has to be hand-held but it can be other than hand powered?

Harley Indeed, indeed, and these brochures have got heaps of this equipment through it and they show in diagrammatic form and in actual photograph form how this equipment works, and the evidence that's given by these parties is that this equipment was all perfectly suitable for the job.

Anderson J I suppose when the licence was issued it was a question of picks and shovels on the one hand or traction engines on the other. It's just that technology overcame the constraints.

Harley Yes as I understand Your Honour, in the 1912 mine the traction engine wasn't actually on the mine. That was down on the ground, and the saws were steam-driven or electric saws to cut the slabs on what's called the quarry reef. I can take you to the detail of this evidence if you wish but I can cut to the chase. Your Honour the Chief Justice I'm reminded that this isn't a thriller

Anderson J It surprises me.

Harley The point is that the witnesses all agreed, including Dr Rabone, that it was possible to identify what is called the high-grade Bowenites by sight, and in respect of two particular sites, there was what is described as a reef within the reef, and the reef within the reef translates to super Bowenite, and it was in large quantities within two of the particular sites. One being the Hutt Reef; the other being the Quarry Reef. Now why this is important is Mr Gerard Fahey's evidence and the other witnesses, Mark Meates and Michael Meates, said that if they'd known that the mine could only be conducted for three years they would quote butcher the reefs – which means in my language, go for the great stuff first. Mr Davidson's report, and his mine design, was never constructed with that approach. He took what was an orthodox bench approach to mining, but he did identify high grading, or the potential for high grading in the second year. If you would look at volume 10, at page 79, you will see a schematic drawing of a single site, multi-face extraction of the blocks, and you will note please at the bottom righthand corner 'full-scale quarry production' and as the context of the report makes clear, he's talking about on the quarry reef. Now if you turn the next page to page 80, you will see a 3D drawing where he sites the mine for the first year right over what's called the hanging wall and in the middle of the 3D you'll see the Antigorite rich unit, year one bench development. So he has taken an orthodox design benching process and put it directly over the high grade resource for the purposes of what is a feasibility study.

Tipping J Just give my unfamiliarity with this Mr Harley, but was this an exercise done in advance, or was this an exercise done after the dispute with the Commissioner arose?

Harley It was done three times just before – I just want to be careful what I say here. Mr Davidson first produced a report in 1991 I think it was, which Mr Fahey knew about but he didn't know about it at the time he bought the licence – he became aware of it afterwards. It was then Mr Davidson's first feasibility study in 1997 which was done after he had bought the licence – then he revises that to a Mark 2 version, if I can put it that way, for 1999, and this is the after event 2003, this is what it would have looked like, and he brings forward a lot of the work

and concentrates it, but there are important differences. This report for instance does not include any references to boulders. Now the evidence is from the witnesses that there were over 8,000 of boulders. There were so many boulders of high-grade quality they stopped measuring them and started counting them. Some of them were so big they were estimated to weigh over 600 tonnes each, and on the photograph that has the mine and the sites laid over it – this is in volume 12 – it's the very last exhibit from memory, you will see those boulders with red dots and their location. And it's the easiest way to understand the error that Dr Rabone was led into

Elias CJ Sorry, what volume?

Harley It's volume 12 and it's the very last tab – the item. This isn't particularly easy to follow Your Honours. If I could approach you I can show you the drawing that I've done which outlines the pegs or I can hand it to the Registrar. It's this.

Elias CJ Yes.

Harley Right through the middle is the mistake that Dr Rabone is led into. It starts at peg 2 and goes right through what's called the Razorback

Anderson J What's the volume and page?

Harley Volume 12 and the very last tab. I found it easiest to draw a line around the pegs to understand the dimensions of this, and if we start at the top corner here which is peg 1, and peg 2 is right down the other end. Then peg 3 goes back into what is the V, so you'll see peg 4 right in the middle of the valley

McGrath J Is there a line between 2 and 3 on your

Harley Yes Sir.

McGrath J Yes, and then to 4, yes.

Harley And then 4 to 5; 5 to 6, and then 6 to 7, and then it goes back to 1. and in my biro drawing which I've just taken from a drawing of Dr Rabone's, it starts at peg 2

Elias CJ Sorry, where's 6?

Blanchard J Down the bottom of the page.

Elias CJ Oh I see, yes I can just see it. Well you haven't got the dot. You've got peg 6.

Tipping J Oh I see, yes. So as you say there's a V can't comprise 3, 4 to 5.

Harley That's correct. Now on the line that I've drawn in biro with in and out, Dr Rabone was led into error in terms of the whole of the top half of the licence, and that excluded from his appraisal, the reefs that are showing in that top half up to the Razorback, and because of the way

McGrath J Could you just demonstrate that part that what he included? Run your hand over the part.

Harley The line goes across. (Mr Harley holds up aerial photo)

McGrath J Right thank you.

Harley That's what he said was out, and that's what he said was in, and because of the way this drawing was incorrectly mapped he saw also that the licence included what's called a Cold Creek which was way off the bottom corner and he added 10,000 tonnes to his calculation to get the 40,000, but it was never on the licence.

Tipping J So he put some in that shouldn't have been in and took some out that should have been in?

Harley Yes.

Tipping J How on earth could all that happen?

Harley Well to be fair to him, he couldn't understand that either, and he just couldn't accept it, but the Judge on the basis of the surveys that were presented, he was absolutely clear that Mr Fahey was always right about the licence and what it encompassed.

Tipping J But if you do the sort of child's trick of drawing up all the lines between 1 to 3, you can't get it wrong. But did he ultimately accept, or are you saying he didn't accept he'd made a mistake?

Harley He didn't really accept it, no. He couldn't accept it.

Tipping J But the Judge in effect found that he'd made a mistake

Harley Yes he did.

Tipping J Right, well that's probably what matters.

Harley Yes. I've gone at a fair canter into what is a lot of very detailed evidence, but what needs to be understood about Mr Davidson's third report is, it only deals with the first year and it only deals with the production of 9,460 tonnes on the basis that it is an orthodox extraction of benching, not high-grading. And in his base case 3 where he optimises returns, if you go to page 88 of his report, you will see total production revenue of just over \$15,000 million.

Tipping J I've put it away – what volume again?

Harley 10.

Tipping J At page?

Harley 89. I'm sorry, the \$15 million is at 88, and the net revenue in the first year is \$7.447 million, and the reason that I'm submitting to you is that there's a problem with this is that the Judge has come to a valuation of \$9.757 million for the whole lot over the three years, whereas Mr Davidson's saying in year one on the optimised base case 3, the first year's net revenue is going to be \$7.447 million, and I'm saying in addition to that, if you take the high grading that would have normally followed in respect of the diagram that he drew, then we're talking about very substantial revenue in years two and three. And in the written submission, sorry, the note that's been supplied, I've put in some of the arithmetic, but it's very easy to get to over \$45 million and on some scenarios it's very easy to get up to \$180 million, which was Mark Meates maximum value. Now the Judge didn't take the report for what it is and my submission is he's mis-applied the 9,460 tonnes just to get the number of 9.460 tonnes without appreciating what this report is telling the reader in terms of the orthodox structure of a mine that was supposed to last for over 30 years and where he never factored in high grading at all.

Tipping J So it's very much too conservative?

Harley Yes.

Tipping J That's the logical consequence of your submission?

Harley Yes, yes, and I've set out

Tipping J And it wasn't a basis for reducing from 15,000?

Harley Well Your Honour I'm making that submission too, but even at 9,460 tonnes, in year one we've got \$7.45 million dollars and he hasn't taken

into account years two and three, because Mr Davidson never did it. So the value of \$9.757 million dollars can't be right.

Tipping J So the Judge misunderstood that Davidson was only speaking of year one, is that what you're saying?

Harley The Judge has taken the 9,460 tonne number and forgotten about everything else. I use the expression, and I hope not disrespectfully, he cherry-picked it, because it was in the middle of what had been Dr Rabone's position at 4,600 and Mark Meates 15,000, so he doesn't actually come out and say it, but he's chosen Mr Davidson because he's the person who's the most independent, and he does say that in his judgment.

Tipping J But he hasn't made allowance for the point you're making – the butchering point?

Harley No.

Tipping J Is that the key failure by the Judge?

Elias CJ And the two years.

Tipping J And the one year point?

Harley Yes.

Tipping J The butchering point and the one year point?

Harley Yes, yes.

Tipping J I can understand the butchering point entirely. Now this one year point, are you saying that the Judge has not appreciated that the \$7.447 million dollar figure was only related to year one?

Harley Well he never used the \$7.447 million dollar figure at all, he only used the 9,460 tonnes in order then to transport it into his reasoning to say what the resource should be per year. What he didn't do was take the rest of Davidson and what he's saying in this report across with him and understand the implications in respect of those numbers.

Tipping J I am probably getting to it late, but I understand the butchering point completely

Harley Yes.

Tipping J Because he hasn't appreciated that Davidson was on a different premise. Now what is this number of years point? Can you just explain that again for my benefit?

Harley Yes. Without getting into the hypotheticals of how long this could have been extended for, we've got 3.3 years to termination date to start mining, so over 3.3 years the evidence for Glenharrow is, high grade multi-site, and you do it over three years. If you take Davidson and you focus on what is the quarry reef site, and you're directly over the high-grade resource, and you're only dealing with a single site, in the first year his numbers produce \$7.447 million dollars. Now the Judge's numbers on the approach he took to valuation using Mr Frankham, comes to \$9.757 million dollars over three years.

Tipping J Got it, thank you.

Harley It can't be right.

Tipping J Thank you.

Harley And if you do factor in high-grading in years two and three, and you do multi-site as in two sites or three, the values go up significantly depending on the assumptions you make as to the quantity of high-grade stone. If Mr Fahey was actually right; that he really did own a Goldmine up there, and he high-graded super Bowenites at 9,460 tonnes times two, it's 19,000 tonnes a year times \$10,000 dollars per tonne, he's a very rich man very quickly, and I suspect Mr Michael Meates would also be a rich man but not as rich as he should have been, and that would have been an interesting debate for the Commissioner then to put up the GST input credit allowance wouldn't it? I'm in your hands.

Elias CJ Well, have you nearly completed?

Harley I would urge Your Honours to read the note, because all the references are in that note to all the evidence that supports everything that I've said to you. There's nothing new in it. It was all as was submitted in the Court of Appeal. Exactly the same argument was made to them.

Tipping J And is the note pretty well word for word what was in the Court of Appeal?

Harley Yes, yes it is.

Tipping J Pity it wasn't put in the main submissions you know really. I can understand the motive, but

Harley Your Honour I don't want to get into trouble for this, but I tried hard to observe a 30-page rule and we did. Now I set out in the application for leave the grounds for leave in respect of this part of the argument. There's nothing I've said to you that's different from that leave application

Tipping J Yes alright, but I don't want to provoke further unhappiness on the subject Mr Harley.

Harley And I don't want to either. I wish I'd indulged in exceeding the page limit too

Tipping J You probably got ticked off for that so you can't win.

Harley And that's why I didn't make any comment about the Commissioner not being able to count either.

Tipping J I put my hands up Mr Harley.

Harley So do I. That's it Your Honours. Mr Carruthers wants to correct one piece of arithmetic of mine. It's my mistake not his.

Elias CJ Yes thank you Mr Harley.

Carruthers Your Honours can I just correct the tax fraction and if I can take you to page 9 of the note at para.48.

Tipping J Is it the one 1/11?

Carruthers Yes it should be 1/9th, yes and that's the penalty of going back through the history of the legislation. 1/11th was perfectly appropriate on the initial figure and the same mistake is on page 10 under letter G, but it's 1/9th.

Tipping J Happily on this occasion I was not misled Mr Carruthers.

Carruthers No I didn't think for a moment you would be Your Honour, it was just us misleading ourselves.

Elias CJ Alright thank you. We'll take the evening adjournment now and resume at 10 am tomorrow.

4.15pm Court Adjourned

Glenharrow - Part 2 – Wednesday 9 July 2008

10.03am Court Resumed

Elias CJ Thank you.

Carruthers May it please Your Honours, there are two matters I want to deal with before my learned friend addresses for the Commissioner, and I want to first respond to the Commissioner's complaint that what was in our note was new material and at the risk of being further castigated, I have provided for you a copy of the written material that was used to address the Court of Appeal, and you will see that it has a striking resemblance to the section on value which is question 2. Now the matter was dealt with in a different order in the Court of Appeal, but I would just invite you to look at the material and compare it with what we have put in, and as was explained yesterday, what was addressed in the note of oral argument really underscores the written submission by giving references and pointing away the evidence. So it simply is not available to the Commissioner to say that this is new material. It was traversed in the Court of Appeal in that form.

Elias CJ I'm not sure that the Commissioner's counsel was saying that it was new to the Commissioner. It was new here and that therefore he hasn't responded to it in detail, so it may be that we're sort of fighting in a paper bag here Mr Carruthers. We have understood the point that you're making and it may be, depending on whether Mr White wants to make a big issue of it, it may be useful to look at the comparison, but I think we understand what you're saying.

Carruthers Thank you. I should just add that there are some new paragraphs. I think there are about four and they are taken from Mr Harley's notes that were made to which he spoke at the hearing, and indeed for two paragraphs in here he handed in a hand-written note from which he had spoken, so it is our position that there is nothing which the Commissioner has not already dealt with.

Elias CJ Well it's useful in any event to know what the argument was in the Court of Appeal given the contention that the Court of Appeal hasn't dealt with it.

Carruthers Yes thank you Your Honour. The second matter I wanted to deal with was really to I hope assist Your Honour Justice Tipping in relation to Dr Rabone's evidence, and you will recall being taken to that map yesterday as being definitive

Tipping J You mean how he could have made such a whopping mistake?

Carruthers Yes, it's material that I had in my note but I just want to show you how egregious it was.

Tipping J Look I accept it was an egregious mistake. I was curious as to how it come to be made, but I don't think that matters because the Judge found.

Blanchard J Haven't we got better things to pursue Mr Carruthers?

Tipping J Yes.

Carruthers Alright, if Your Honours please.

Elias CJ Thank you Mr Carruthers. Yes Mr White.

White If Your Honours please it does appear from the submissions yesterday and the exchanges between my learned friends and Your Honours, that there now is one way or another a new – and I emphasise new here – question one, which is as I understand it whether on the basis of all the relevant and admissible evidence adduced at the trial, the Judge was right to find that the price of \$45 million dollars for the licence was grossly inflated. If the answer to that question is no, that may well be the end of the case and it would not be necessary for Your Honours to consider the two questions in the leave judgment. The new question

Elias CJ How Mr White though can you separate out whether the transaction was void, that's the question that's posed, from the value?

White We have concurrent findings from the High Court and the Court of Appeal that the price or value was grossly inflated – the \$45 million dollars – and we had proceeded on the basis that this Court was not going to review that High Court finding upheld by the Court of Appeal.

Elias CJ Well I can understand that because that was certainly our impression too, but what is being put is that there aren't concurrent findings of fact, but rather the Court of Appeal didn't itself consider the question of value as perhaps it should have, and if that's so and there aren't

concurrent findings of fact, don't you have to address the question of value?

White I'm not disputing that if Your Honours accept that the question that I have formulated is the first question, we most certainly need to address it, but I'm not prepared to address it and I needed to explain why, and the reasons are first it was not a question included in this Court's leave judgment, notwithstanding the fact that as my learned friend has drawn to Your Honours' attention the question of whether that finding should be accepted was raised in the application for leave, and one document that Your Honours have not yet been referred to is of course the Commissioner's opposition to the grant of leave where on page 9

Elias CJ I'm not sure that I have it.

White Well I don't think it's in the bundle, but it is before the Court in the general sense, where the Commissioner submitted under the heading *a substantial miscarriage?* that there was in responding on this very point, and the Commissioner said there is nothing in this point that raises an issue of sufficient importance or principle so as to allow facts to be reviewed on a third occasion by a Court. So the Commissioner was directly taking issue on the granted leave with this very point, and absent such a question approved by the Court, in my submission the Commissioner's counsel were perfectly entitled to proceed, as indeed we have, that the two issues approved did not entitle the appellants to challenge in one way or another the finding in the High Court of grossly inflated value of price.

Blanchard J Well it may be that this Court was not sufficiently precise in the way in which it dealt with the drafting of the leave order, but the statute requires that if we are not allowing a particular ground to be advanced, we have to say so and give reasons, and we didn't.

White Well in that case Your Honour counsel is remiss and I accept responsibility for that – I must.

Blanchard J I'm not seeking to attribute any blame to counsel. It is something that perhaps we should have gone into a little more carefully at the time and spelled it out one way or another, so if there's any fault I think it's the fault of the Court.

White Well, perhaps both.

Elias CJ Well that's really the point I was making, that it seems to me that under the first ground as we drafted it, you can't really say that these

issues are not on the table, subject of course to the argument that you wish to advance, that there are concurrent findings of fact, although that's not a rule of law of course.

White No, which we have advanced. It's on the very first page of our written submissions, and the fact remains that while the appellants advanced the points that my learned friend Mr Harley advanced yesterday in the Court of Appeal, they are new here, and it would have been so easy if that was what the principal point was going to be for that material for instance to be included as a schedule to their submissions in exactly the way the Commissioner did in his Trinity appeal.

Elias CJ Well you say that you're embarrassed by it, and it may be that you'll need to be given an opportunity to put in further submissions on it, but are you saying that you're not able to respond to the suggestion that the Judge made the wrong calculation based on the evidence?

White I am in a position to respond at a certain level Your Honours, but not at the level of detail that I would wish to respond properly and fully to the arguments advanced yesterday, and if I can give you just by way of an example, the very last point that my learned friend Mr Carruthers referred to about what I think Justice Tipping has described as Dr Rabone's whopping mistake. No, just take that as by way of the example, because I too was interested to try and get to the bottom of it and I haven't yet, but the starting point, and I'll be able to do the first part of it, is to take Your Honours to the licence – a document that Your Honours might think is of some relevance to the case – and the land is described in the licence and there is a map, and it is the map and description in the licence which Dr Rabone relied on. Now some

Tipping J But does it matter why he got it wrong Mr White, is it not simply the fact that he got it wrong?

Elias CJ Did the Judge accept it.

Blanchard J Or did he get it wrong?

Elias CJ Well I thought the Judge accepted that he had got it wrong.

Tipping J Yes, yes.

White Well, this is where we're going Your Honours. If you're going to go behind the judgment

Elias CJ Well we're not on that point.

White Why not? He's been criticised. My learned friends are arguing that Dr Rabone got it wrong and the Judge shouldn't have relied on him. They're trying to undermine Dr Rabone's evidence, but you'll find in fact – well there were a raft of reasons

Elias CJ What are you saying the Judge got it wrong to – on a different error?

White Yes, certainly

Elias CJ Well then we don't have any sound findings of fact.

White Well Your Honour I don't want to run ahead of myself, which was the difficulty that this exchange is producing, but if I can just stick with Dr Rabone. There is an explanation, if I can just put it like that, for what he did, and if he's going to be criticised in the way he was then the Commissioner is entitled to place before Your Honours the explanation.

Elias CJ If it's relevant.

White Well certainly. The Judge found that it wasn't relevant because the question of how much rock there was on site was irrelevant; it was how much you could get out in three years.

Elias CJ Yes.

White And that certainly is the first, and we would say complete response, but Your Honours are left with a criticism of an egregious error about a Commissioner's witness who happens to be one of the very few expert witnesses, a further point that needs to be

Elias CJ This is a wholly collateral matter really Mr White. I wonder whether it wouldn't be better for us to get underway and you've reserved your position, if it proves necessary for you to give us additional material by way of further submission and you need more time for it, then we can accommodate that.

White Well I was certainly going to seek that Your Honours for the reasons that in my submission these matters should be answered properly and fully rather than in a scatter-gun approach, but if Your Honours require me to start I will and I may have to just indicate that there are matters that we'll need to provide Your Honours with further references and material later.

Elias CJ And you can do that as you go through.

White I may be able to.

Elias CJ Yes.

White I haven't had much of an opportunity to get to the position to do that.

Elias CJ No I understand that.

White We only got the material yesterday.

Elias CJ Justice Blanchard was saying it's probably best for you to address the rest of the case and it may be that the factual question might need to be deferred.

Tipping J On one hypothesis it won't be reached.

Elias CJ Yes.

White Yes, I'm perhaps old-fashioned, I'd always intended to start with the facts.

Elias CJ Start with the facts. I think we all have that impulse.

Tipping J Not in this Court.

Elias CJ Well I don't know. Present your argument as you wish to do it Mr White and you will have the ability to make further submissions if you want to.

White As Your Honour pleases.

Elias CJ It may not be necessary.

White We have got a small red folder which I'd asked if that could be handed out because it has materials in it that I will refer to as I move through the submissions. I'm not coming to that straight away. Your Honours I was proposing to follow our written submissions. The orange covered volume and I was going to, just so that Your Honours know what I was going to cover, and intending to cover is to start with the issues briefly on page 4; briefly the factual matrix; the statutory matrix; and the application of the section to the facts, and then the restructuring, and I've already noted in our introduction that we say there are concurrent findings

Elias CJ I must say that I have written beside that when I read it before hearing the argument yesterday, these are judgments, not findings of fact, so you will have to convince me that these are findings of fact which we should not go behind. You don't need to do it now.

White Well I will wish to submit Your Honour that the finding that the purchase price was grossly inflated was indeed a finding of fact based on the evidence adduced at the trial and summarised in the judgment.

Tipping J It's a finding that in the sense that in retrospect it was grossly inflated and it's not a finding that it was deliberately inflated is it?

White Objectively looked at in June 1997 at the time of the transfer it was objectively grossly inflated. That was the finding of the Judge.

Tipping J As a matter of external appreciation, but the Judge equally said that it was genuine as between the parties hasn't he?

White Subjectively yes.

Tipping J Alright, well leaving aside those rather slippery words.

White Yes, and

Tipping J But there was no intention or deliberation to wrought up the price to get an advantage. In a subjective sense the parties did not have that as a subjective purpose.

White So the Judge found.

Tipping J So the Judge found, and you're not seeking to go behind that?

White Well if the Court is going to go behind findings then we would seek to go behind that one.

Elias CJ Well that really is a finding of fact.

White Well no more or less than the finding that it was a grossly inflated price. What the difficulty is, is that Your Honours are having difficulty in reconciling the two, but I'm proposing to look at the only material available as to the calculation of that figure prior to the transfer in June 1997 which was a document described as a valuation prepared by Mr Michael Meates' cousin, Mr Mark Meates.

Tipping J But the Judge also found didn't he Mr White as a fact that the parties had not directed their minds to GST issues at the time they entered into the bargain?

White Subjectively.

Tipping J Subjectively.

White Yes, which leaves open of course for the Courts to draw the inference that objectively that was.

Tipping J You mean that any normal person should have or would have?

White Yes, certainly.

Tipping J Right. And is that really the foundation of your argument?

White No, no. The foundation is, which is why I raised it at the outset, is the finding that it was grossly inflated.

Tipping J And that's enough?

White Yes, as a factual starting point. Plus of course the factual matrix which hasn't been referred to in much detail yet, but which is addressed in our submissions in the surrounding circumstances, the fact that it was a hundred dollar company.

Tipping J So the proposition is that if a price is grossly inflated in objective terms, the Commissioner's not bound by it for input tax credit purposes?

White Depending on all the circumstances and I don't want it to be taken in isolation, but that's a critical starting point, yes Your Honour.

Tipping J No, no.

White Otherwise, and I know this was the matter of exchange yesterday, what price would do? Is it suggested that s.76 doesn't apply if parties genuinely subjectively agree on \$180 million dollars – a billion dollars?

Blanchard J They might have some difficulties of satisfying the Court that they were bona fide

Tipping J Yes, yes.

Blanchard J But if they were bona fide it may be the position in law.

White Our submission is that is exactly the situation that s.76 is designed to address.

Blanchard J I'm not sure about that, but anyway you develop your argument.

White Well I'm happy to

Tipping J It depends on what the intention of the Act is in this respect, so of course in order to defeat something you've got to find out what that something is first. What is the intention of the Act.

White Intention and application.

Tipping J Alright, and application, in respect of this issue of price and input tax credits.

White Yes that's right.

Tipping J That's the absolute kernel of the Court problem isn't it?

White Yes, and we address that. We have two

Tipping J I just wanted to make sure we were on the same wave-length Mr White.

White Yes, we certainly are.

Tipping J Right.

Anderson J Can I put the issue like this Mr White – what legislative intent and/or application was intended to be or was defeated? It seems to me to be the fundamental issue.

White Paragraph 67 of our written submissions, page 22, two points. Number 1, 'the intent that input tax payable under the Act is intended to be quantified by reference to the open market value of the supplies, not be reference to a grossly inflated price, and consequently the application of the s.2 definition of input tax was undermined; and Number 2, the intent that input tax claimable on the supply by an unregistered person of a second-hand good is to be limited be reference to payments actually made by the taxpayer in the relevant taxable period and consequently the application of s.20(3)(a)(ia) was undermined'.

Anderson J And these are the crucial foundation stones of your argument are they?

White Yes Your Honour.

Elias CJ Both of those are purely matters of interpretation aren't they?

White Yes, yes.

Elias CJ Yes.

Tipping J So there are two keys – price and payment?

White Yes.

Tipping J The case comes down to those two concepts.

White Yes.

Tipping J Yes, well I rather thought so. I'm glad to hear that we are now getting it sort of distilled.

White Well it's in our written submissions.

Tipping J Yes and I'm not criticising you.

White That's the argument. But you can see from the first one that of course a finding of grossly inflated price is rather important.

Tipping J Yes, but the two key signposts are price and payment.

White Yes.

Tipping J I agree.

White And I wasn't going to add anything more.

Tipping J I entirely agree Mr White.

Anderson J It stems from the fact doesn't it that the Act assumes that in the course of time more or less there will be a benefit to the revenue from transactions in the community?

White Yes, yes. And that's the mismatching point and it may not be immediate, but it ought to be over time.

Anderson J It's not a perfect symmetry but there is more or less a benefit through inputs and outputs in transactions.

White Yes Your Honour.

Tipping J But what use are you Mr White, and no doubt this is intensely irritating to have you sort of truncated in this way, but it's useful to know broadly where you're heading. Do you say the fact that the power expressly to examine for consistency with open market value with associated persons should not be construed as allowing people genuinely to fix price otherwise? So in other words as long as they're genuine, it's not a fraudulent exercise or a deliberate wrought. You see the statute seems to me to give an express power for associated persons and to leave the other.

White Yes, because normally the open market will take care of that situation.

Tipping J Yes, but the open market is what a willing buyer and a willing seller will pay genuinely if you like.

White Precisely, yes.

Tipping J As between themselves.

White Genuinely, but looked at

Tipping J Objectively.

White Yes, that's right.

Tipping J Well that's probably going to come to be the kernel of the case then, because you have to get away from that finding that they genuinely

White No we don't.

Tipping J Subjectively.

White Well we do because it was a subject matter.

Tipping J So you want to be able to substitute parties for whatever reason have fixed a different figure if the Commissioner says no sensible people could have agreed to that?

White The submission is one has to look at the factual matrix objectively, and I don't want to be taken away from when you were coming down to applying our approach to the factual matrix here, what actually did go on.

Tipping J Yes. I want to get the concept clear in my head before looking at the facts to apply.

White Well then if one or other or both of these intentions and applications are defeated – I'm sorry – if you accept that one or other of these are intentions or applications of the Act

Tipping J Are defeated.

White No, no, the first thing is you've accepted they are intentions for applications

Tipping J Oh yes.

White And the question whether they are defeated can only be determined by applying that to the facts of this case.

Blanchard J But what do you do in a case where the price is objectively too high; people ordinarily wouldn't pay that, but there's been a genuine bargain between a hard-nosed vendor and a naive purchaser, who has paid over the odds --that was their bargain. Are we going to have the Commissioner re-examining this on every occasion?

White No, because one of the matters I was going to take Your Honours to were the words in the section which say of course the Commissioner has to be satisfied that the arrangement was entered into to defeat the intent and application, and the reality is there have been three, this is the third, of three such cases. It's not a situation of floodgates, which I think was a concern, lying behind some questions for my friends yesterday.

Anderson J What would happen if the grossly inflated price is at the point of on sale from a GST registered person, so that the revenue got the benefit of the inflation?

Tipping J Well it would be self-cancelling if both parties were registered.

White Yes, if both were registered that's the second point, it would be okay.

Anderson J But what if the purchaser was not registered?

Blanchard J He would have to be if it was a business transaction.

White He'd have to be, yes, that's right.

Elias CJ Can I, sorry

Blanchard J Unless it was a very small amount.

White In which case

Elias CJ Can I just ask you

White I'm sorry.

Blanchard J Mr Harley is shaking his head. I've obviously got that wrong.

Elias CJ If this is just a matter of statutory interpretation, I'm just wondering why you pin it all on reference to open market value and the grossly inflated price, because I would have thought that if you had a case where there was no expectation of the outputs happening, you know, a wholly under-capitalised business, it seems to me that price may only be an indication of intent to defeat the application of the Act.

White I think Chief Justice you're correct and I think that that's the second of our two - 67.2.

Elias CJ Yes, but that's putting it very boldly really isn't it on the wording of the Act?

Tipping J I don't know precisely what the word 'actually' is intended to signify there.

Elias CJ But anyway you're going to take us to the scheme of the Act from which you infer these intents.

Anderson J Can't one infer from the overall terms of the Act that it assumes rationality in the market?

White Yes Your Honour.

Anderson J It must do.

White Yes.

Anderson J And if there is an arrangement which is so irrational as to be outside margins of error on that assumption, that might be the intent that's been defeated.

White Yes Your Honour.

Tipping J Well thank you Mr White, that's been most helpful. We're all building up now to price and payment.

White So you won't want me to go back to the facts then?

Elias CJ Well except you have to because price turns on the facts.

White I was going as I said in the introductory, just refer to the licence very briefly because it has got the conditions in it. It's in volume 8 at tab 104, starting at page 3016, and Your Honours will see that there is a legal description of the land under the heading *certified description of licence area*. I don't want to take Your Honours to it immediately, but if Your Honours like to note that the fourth Schedule which is referred to in that description, and the plan attached are not in this volume. They are apparently in volume 6, and I will in a moment just take Your Honours to those, but just finishing with the licence Your Honours will see that the term of the licence was ten years, commencing on the date hereof, which as Your Honours will see towards the bottom, was the 15th November 1990. And then after some royalty provision on 3017, the conditions appear on 3018, and that's where this restriction on mining operations by any method other than hand methods appears, and visual searching of ground etc, and then requirements of the Inspector of Mines. And hand methods is repeated in 5, and various other conditions about rehabilitation and no buildings, and I think those were the only matters I wished to draw to Your Honours

Tipping J Is hand method defined, or is it just a term known in the industry as that?

White I don't believe it's defined Your Honour. I would not be surprised, but I don't know, but to understand that it was something that was understood in the industry, one would expect so.

Tipping J Yes well one would think so.

White Yes, you would think so, yes. If Your Honours then perhaps just keep that for a moment and just note in volume 6, under tab 4 is Dr Rabone's report, and towards the back are some attachments which unfortunately don't have page numbers at the top, but down the bottom there are a whole lot of letters and numbers and if Your Honours go first of all to the page which is numbered down at the bottom, 183, you will find the Fourth Schedule to the licence.

Elias CJ Page 183?

White Yes, well it's got a whole lot of numbers Chief Justice. It's got GHLADJ002183.

Elias CJ Yes.

Anderson J It's actually under tab 3, not tab 4, I think that's the problem.

Elias CJ Is it?

Anderson J It's under tab 3 in mine. Anyway I've found it.

Elias CJ Yes.

White You have now?

Elias CJ Yes, the yellow page. Is it?

White No, not in my one. Volume 6 Your Honour Chief Justice.

Elias CJ Have you got it?

Tipping J Yes, I've got it. Fourth Schedule?

White Yes, it's the Fourth Schedule.

Blanchard J Is that actually the Schedule to the licence?

White Yes it is, indeed, and I think the licence is in the first few pages before that. It is, it's repeated.

Tipping J And this is where the legal description comes in.

White Yes.

Blanchard J Oh I see, yes.

White And there's a map somewhere. The map is back, no it's not I'm sorry, it's on at 201.

Tipping J Well this has got co-ordinates.

White Yes it has.

Tipping J Yes.

White But it's not – sorry Your Honours. Your Honours will see from that, that it is different to the plans that my learned friends have been taking you to. Now I was trying to get to the bottom of that because as I understand it, Dr Rabone relied in 2000 when he did his report, on the licence and the Fourth Schedule description and that map, which is hardly surprising and perhaps not an egregious error on his part. I haven't quite got the sequence right, but in a judgment of

Justice Chisholm, which is reported in the New Zealand Law Reports 2003, volume 1 [236], delivered in October 2002, it was held that the map was wrong and that subsequent survey pegs were right.

Tipping J That the map attached to the licence was wrong?

White Yes, yes.

Tipping J This must have been one of the most litigated pieces of land on the planet.

White Yes, it would appear to be, although I'm pleased to say this is the first time I've become involved. But one then needs to go on to look at what did Dr Rabone do in his evidence in chief; what did he do in his cross-examination; what did he do in the report that he wrote in response to the appellants' statements of position, and on one goes, as one often does when you get down into the factual nitty gritty. But it may be, and Your Honours I think have already grasped this, that this can act as a complete red herring and can be put to one side for precisely the reasons that Justice Chisholm did in the High Court, starting at para.193, under the heading *Volume*, where he says 'to a large extent this seems to be a red herring. There was broad agreement that the volume of rock within the licence could not govern the valuation and that the critical factor was the volume that could be extracted within the remaining term of the licence. Nevertheless' etc, etc. I don't need to read the whole of that, but just at the very end of 196, 'with the benefit of all the evidence I have no doubt that there are enormous volumes of Serpentinite within the area covered by the licence, indeed. As already mentioned Dr Rabone acknowledged that there was in the order of 250,000 tonnes. Other estimates indicate much larger volumes, but at the end of the day I do not think this has any direct bearing on the market value

Tipping J Well this is the point that we were discussing yesterday isn't it, it's not the raw figure, it's the amount you can get out in the remaining time?

White Yes, exactly.

Tipping J Plus any possible allowance for a contingency of renewal.

White Yes, well I'm going to come to those points certainly.

Tipping J Yes.

White But the reason for doing what I've just done Your Honours is to show that there is much more to it if Your Honours were going to start

querying Dr Rabone, and I haven't even taken Your Honours to the evidence in the cross-examination because I haven't had the chance to get on top of all that

Elias CJ Well but as you say, if it's a red herring, we don't need to

White No you don't.

Blanchard J It wouldn't be a red herring if the larger area that Rabone, I'm assuming, didn't appreciate was there, enabled work to be done simultaneously on an extra site or sites.

White Well that may be Your Honour, and that's at the next level, and that may be something that I need to respond to Your Honour separately.

Tipping J Well don't forget you also have to respond to this butchering point.

White Yes, butchering I may be able to say something about Your Honours, but the other one

Elias CJ While you're at the licence, what is the provision for renewal? Is there one?

White There wasn't one, and that's what the Court of Appeal and the Privy Council decided ultimately. I mean the very short answer on that point Your Honours is there was no basis for expectation, well subjectively people may have had an expectation, but the answer objectively is as plain as a pikestaff. The Court of Appeal upheld by the Privy Council, decided that there was no right to expect.

Tipping J It bears to hope that you might get

Anderson J A mere (inaudible) as it were.

White Exactly, so when you were looking at the value price back in 1997 objectively, that was it. It had 3.3 years to run.

Blanchard J Well the High Court of course did twice come to a different conclusion.

White And it was wrong twice.

Blanchard J It may have been wrong, but the question of what it was reasonable to think at the time

White Objectively.

Tipping J Well even objectively, but look I don't

McGrath J Objectively it was uncertainty as to the law though wasn't it at the time?

White Well no, because those judgments came after 1997.

Elias CJ No, but if the Judge

McGrath J Yes but whatever, there was litigation in train at the moment, never mind what stage it reached. Objectively there was uncertainty as to the state of the right of renewal.

Blanchard J But in any event, Justice Chisholm added on another six months.

White Yes.

Blanchard J Yes.

White And the Commissioner doesn't accept that. I mean the Commissioner cross-appealed against that and would wish to, if we're getting into the evidence, wish to challenge that again.

McGrath J Well you don't accept that we should proceed on the basis there was uncertainty. You're saying we should proceed on an objective test if that's the correct test, on the basis of what the correct legal position ultimately turned out to be

White Precisely Your Honour.

McGrath J I understand that. We'll have to be persuaded but I understand what you're saying.

White Yes.

Tipping J I was just wanting to save you from sort of getting in betwixt and between Mr White. You're sort of dabbling but not able to get to the nitty gritty so to speak and it must be rather difficult for you.

White I'm happy to continue, but it's because I knew I'd be like this Your Honour that I was suggesting that it would have been better to have gone away and started again, but I'm happy to keep going because I'm now going to move on to the valuation issue directly, and in the red bundle, if Your Honours turn to tab 2, Your Honours have that in front of you and also tab 8, I'm sorry, case on appeal volume 8 at page 122

Blanchard J You mean tab 122?

White Tab 122 Your Honour, yes, which should be a document described as the Mount Griffin Mining Licence valuation by MJW Meates. Now looking at – if I can just explain first – the valuation comparisons table which we thought might be of some assistance to Your Honours in just indicating on one page the differences between the witnesses and where the issues as we understand it that the appellants have now raised, come in. Now down the lefthand column are the factors that the Judge considered were relevant to the valuation. First of all the volume in tonnes that's extractable per year. Secondly the revenue per tonne for Bowenite and Serpentine. Next the costs – not an element that Your Honours have heard much about yet. Next the discount rate – another element that you haven't heard much about. Next the time period – that's the point we've just been talking about; and finally the valuation. Now if Your Honours just note that Mark Meates and Mr Davidson were GHL witnesses and Dr Rabone and Mr Frankham were the Commissioner's, and on the righthand column of course is what the trial Judge found. Going down first of all Mark Meates, and these figures are extracted from the document which I'll go through in a minute at tab 122. He assumed a volume each year of 15,000 and he divided the revenue at \$4,5000 for Bowenite and \$1,500 for Serpentine, and then he had a round figure of \$500 per tonne for all the costs, and he had some figures relating to discount rate, although they weren't actually ultimately taken into account in his valuation. He used three years only and he came up with \$45 million dollars to \$180 million dollars. Now Mr Davidson wasn't called as a witness. He wasn't called as a witness at all. There were some reports from Mr Davidson which were in evidence and which were the subject of an agreement between counsel at the trial as to their status, to which I will come. But just putting those double reservations to one side, particularly of course because he wasn't called, he wasn't cross-examined. But just putting that to one side, his figures for the items in respect of which he gave figures – he didn't do a valuation at all – were volume 9,461 and then revenue figures which varied; costs \$787 and of course because he didn't actually do a valuation beyond an initial one in 1991, he didn't do a discount rate or did deal with the time figures. He did do a valuation just as a matter of interest in 1991 when the licence had ten years to run of about \$11 million dollars. Next we have Dr Rabone, whose volume in tonnes was 4,860 and he gave his revenue figures of \$4,000 and \$1,000 and his costs were \$783, and of course he didn't do a valuation either. But the one expert valuer who was called, and the only expert valuer called was Mr Frankham for the Commissioner. The appellants, as Your Honours will recall yesterday from my learned friend Mr Harley's

submissions, relied principally on evidence from lay persons, and Mr Mark Meates, who was found we would submit, was not in fact either an independent or an experienced valuer, but the one who was was Mr Frankham, and he used as is obvious from this table, Dr Rabone's volume and revenue figures and cost figures, broadly his but also other items that he took into account. He then had a discount rate of 30%. He had a time period of 3.3 years and his valuation was \$3.769 million dollars. The trial Judge, as Your Honours will have seen, but I'll come back to that, on the volumes decided to go with Mr Davidson's figure, volumes and tonnes. That's one of the figures that is questioned by the appellants and also by the Commissioner. The Commissioner says it's too high. The revenue figure the Judge accepted Dr Rabone, which of course was the figures that Mr Frankham had used, and that's the figures that are challenged by the appellants because that's where the high quality comes in, and I'm going to come back to that but I was just identifying where that comes in.

Elias CJ Sorry, comes from Rabone?

White No, no, I'm sorry, the Judge accepted Dr Rabone.

Elias CJ Oh yes.

White As is apparent. The appellant challenges those figures because they say they should be much much higher when you include the high quality.

Elias CJ Yes.

White And I'm going to come back to that. And then just a note for completeness, that as far as the time period is concerned, the Commissioner challenged the Judge's six months addition. Now looking first at Mr Meates' valuation, which Your Honours have in volume 8, under tab 122, you will see that he has made a list of assumptions about the bottleneck in the operations will be lifting the stone from the hill; that a suitable landing site will be able to be located; helicopter turning time is about six minutes, and he's calculated it on the basis of a Hughes 500. Enough staff and equipment can be employed and that there is a world market and so he then assumes the following revenue figures which are given in 8. 'I have assumed with only limited knowledge, the costs of processing' etc 'to be \$500', that's per tonne, 'and have assumed it will be the same for both Bowenite and Serpentine, although I'm not sure to what degree Bowenite is harder than Serpentine thus requiring more time for processing'. And then he does some profitability per tonne figures

which are set out there and then over the page 'the valuation is not done on the basis of the stone resource that is present but on what can be extracted over the three remaining years of the licence'. So in other words that support for what the High Court Judge did as to the red herring. 'Once on the ground I assume that it can be suitably processed and transported to a seaport' etc. 'I have calculated that 45,000 tonnes of stone can be removed in three years. The value of the stone will be somewhere between \$1.00 per kg and \$4.00 per kg. That gives a range of \$45 million dollars to \$180 million dollars'. That's where those figures come from. 'The Bowenite is the valuable stone' etc. And then he's got another assumption. 'The best way to value this licence is on a discounted cashflow basis over its life. The extraction is limited to three years but the selling and processing could be completed over a longer timeframe. 'I have chosen to value the licence on a worst case scenario and confirm the value using a present value calculation of \$45 million dollars. If the average value of the stone recovered is \$3.00 as calculated then it would take the following number of years at the respective interest rates to be worth \$1.00 as valued'. And it gives the figures. 'Thus valuing the licence at \$45 million dollars give three years flat out quarrying and removing the stone, then an additional four to seven years to process and sell it. Therefore I conservatively value the licence at \$45 million dollars'. Dated significantly 3 June 1997. And then over the page there's some figures which relate to his future value discount rates. No independent expert evidence was called by Glenharrow on the valuation. All they adduced was the evidence from Mr Mark Meates, and this is the material that was used in respect of the price that was agreed between the parties, and just as a matter of interest, though it's the sort of point that may turn out to be quite some interest, amongst the people that were on the helicopter with Mr Mark Meates when he went up to do his inspection prior to his valuation was Mr Richard Fahey, the brother of Mr Gerard Fahey, and the inference can be drawn that quite clearly that Mr Fahey of Glenharrow knew perfectly well where the figures had come from.

Elias CJ Just thinking about this point that you make about only one expert witness. The key figures are the figures on the value of the tonnes that can be extracted, and the revenue, and on those Mr Frankham understandably is not an expert and has relied on Mr Rabone's figures, so in other words does it really matter that he's the only expert valuer? I'm not sure why you're stressing that point.

White Well we're seeking to uphold the finding of grossly inflated

Elias CJ Yes.

White Which we have.

Elias CJ Yes, well

White If the appellants had been going to seek to support their \$45 million dollar figure, one would have expected, indeed the onus was on them, to adduce independent expert valuation evidence supporting that.

Elias CJ So how many independent experts are there on the value of Serpentine and Bowenite and

White No I'm not

Elias CJ But those are the key figures.

White Yes, and they called no one Chief Justice. They didn't call Mr Davidson. They called no geologist, no expert. The Commissioner did.

Tipping J Once you've got the base figures established which requires a degree of expertise in the field in question

White Correct.

Tipping J Then the valuation exercise is one that takes those base figures as given doesn't it, and then the only variable from then on would presumably be the discount rate.

White Precisely, and I'm just about to draw to Your Honours' attention that that's one of the very significant differences between Mr Mark Meates, who didn't really have one at all and Mr Frankham's 30%.

Tipping J That's where it really bites.

White It does.

McGrath J But the Judge accepted Frankham on that point didn't he?

White Yes. All of this is to provide support for what the Judge did in reaching his finding but it was grossly inflated.

Anderson J It took Mr Davidson's expert figures on extraction potential and applied expert valuation evidence to that.

White Yes, that's exactly what he did, and he found grossly inflated. We're only doing this Your Honours because the issue has been raised. My

next point though was just to draw Your Honours' attention to the Judge's rejection of the Meates valuation, and Your Honours will find this in the judgment of the High Court, paras.130 through to 135, and I won't read it all out, but just highlight for instance in para.131 'the appointment of Mark Meates would appear to be questionable. Both his independence and competence were open to question'. And at 133, half-way down, 'in the particularly circumstances I accept that his decision genuine, though unwise. Plainly this was a difficult valuation. He had no experience in the estimation and assessment of mineral resources and I doubt that he was sufficiently experienced in valuation to do justice to the assignment'. And then there's reference to the three-page valuation, which I've taken Your Honours to, and then in 135 'the valuation and evidence in support were heavily attacked', particularly by Mr Frankham. 'For reasons that will be given later, I accept that Mr Meates' methodology was unorthodox and that the resulting valuation was heavily inflated'. So there's the beginning of findings in relation to the witness for Glenharrow as to the Judge's gross inflated valuation. And further down that paragraph 'having

Elias CJ Sorry, which paragraph are we at?

White 135. 'While for reasons that will be given later I accept that Mr Meates' methodology was unorthodox and that the resulting valuation was heavily inflated, in the present context the critical issue was genuine'. So he's actually dealing with this in the context of sham, the subjective question, and I acknowledge that but these findings still stand because they are relied on later. 'Having assessed his during a lengthy and penetrating cross-examination, I have reached the conclusion that he genuinely believed his valuation was within reasonable bounds. Put another way, despite strong reservations about his competence to value the licence, I do not think he was involved in any sham'.

Tipping J It's interesting that Michael said that Mark's valuation was above his, Michael's expectation. I don't know what one makes of that for present purposes.

White I don't know Your Honour.

Elias CJ There's a finding of, just thinking of the earlier conversation, there's a finding of a rational explanation for the purchase price of \$45 million dollars at 138.

Tipping J It was grossly inflated, but rationally explicable.

White Sorry, where was that Chief Justice?

Elias CJ 138. It's just the word 'rationality' was suggested by Justice Anderson.

Tipping J But it is a very curious case where a trial Judge says that a valuation was grossly inflated but rationally explicable.

Anderson J Well he's indicating that Michael Meates had something to base his belief on. He didn't just pluck it out of the air but nevertheless it was quite unrealistic.

White Well that's certainly our case.

Anderson J Especially if one had bought it for \$10,000.

White Exactly Your Honour. Now again just for completeness and looking at Mr Mark Meates brief which is in volume 4, under tab 14, just to draw Your Honours' attention first of all to challenges by the Commissioner's counsel to the admissibility of Mr Meates' evidence as an expert, and it's recorded on page 648, line 14. 'Mr Coleman has challenged the admissibility of Mr Meates' evidence as an expert on the basis that he does not possess the necessary expertise. It is accepted however that he is entitled to be a witness of fact to the extent that he provided a valuation before the purchase under consideration. I ruled against Mr Coleman's objection. This does not of course prevent Mr Coleman attacking his credibility and I leave open the ultimate weight if any that may be placed on Mr Meates' evidence'. And then he ruled a number of specific paragraphs inadmissible. Now in the cross-examination of Mr Meates in this same volume which starts at page 660, at the foot of that page, I'm just giving Your Honours some of the references that I have found at the time, but Your Honours will see that about line 32 'your cousin Michael Meates approached in May, early June', and there's a timing thing there to do the work on the so-called valuation, and then over the page, line 17, 18, 'it wasn't a long period of time involved'. At about line 24 -23, 24, 'your cousin Michael showed you around', and at line 29 there's reference to Richard Fahey being on the helicopter trip. And then there's some correspondence

McGrath J Sorry, what page are you on?

White Yes, that's 662 Your Honour. It's very difficult to read. Actually it's much easier to note that it's page 62 of the notes of evidence.

McGrath J Thank you.

White Yes, and that was line 29 to 30. And then just going on, on page 664, which is page 64 of the notes of evidence, just to note that he acknowledged in line 12 that he did a 'pretty rudimentary stepping off the areas', and what I really want to draw to Your Honours' attention is line 30. 'I have calculated present value in a funny way, but I have no doubt in my mind that the stone is worth \$1.00 a kg in 1997, or would have been. Even now I wouldn't change my assessment of that value'.

Tipping J What does he mean by a funny way? Is it the discount rate?

White Yes, yes, which is funny, and Your Honours

Tipping J And I haven't yet got to how he applied it to this current rate.

White Well no, I don't think he really did at all. I'm really just giving Your Honours a counter-picture as it were and I'm going to in a moment indicate that if Your Honours want to have the full-scale criticism of Mr Meates and his valuation, then Mr Frankham gives it. I mean this is a young man, who based on his New York Columbia University experience doing academic valuations, and there's no suggestion that he ever practised as a valuer, did this work. Oh and I should just continue on, on that page 664, at line 33 and 34. 'I'm not sure how I came to that average value but it's only bringing dollars back to \$1.00 so it might shorten the period in which they had to sell'. And I'll give Your Honours this reference now to save coming back to this, though this addresses the high grade point and on the next page, page 668 at line 27 – question; 'you also confirm that you had no idea of the existence of higher grade Bowenite on the site when you visited'. Answer: 'yes'. Question; 'you accept Dr Rabone's estimates that comprises .75% of what might be there'? Answer; 'sorry'? Question; 'are you aware that Dr Rabone estimates material of that quality would comprise only .75% of the total of all the stone that is there'? Answer; 'yes, I would agree with that'. And I'm sorry to be jumping it around Your Honours but that's very significant in the context of this high quality argument, and if Your Honours just note that that .75% figure is the figure that Dr Rabone used, or indicated, was the figure for the high grade quality

Tipping J I see he helpfully says that 2 million times .75 comes to a lot.

White He does, but the point that we'll be making Your Honours is that Dr Rabone in fact took that into account in his evidence and here is Mr Meates agreeing with Dr Rabone on that very point. Now that was all I was going to take Your Honours to in relation to Mr Meates, but can I give the references to Mr Frankham's brief of evidence, which is in

volume 3 at tab 10. Would Your Honours mind not putting away volume 4? I'm sorry Justice Blanchard

Blanchard J No, no, I haven't put it away, I'm behaving myself today.

White I apologise. If Your Honours just note that in volume 3 under tab 10 is Mr Frankham's brief, and it spends some time commenting on the brief of Mr Meates, and if I can just give Your Honours the references to that. Yes he starts on page 447 where under the heading *review of the Meates and Davidson valuations*, and he sets out the factors that he would consider to be relevant to that review in para.80, and then he sets out Mr Meates' valuation on page 448, and on 449 in 89 he opines that there are a number of aspects of the Meates valuation which render it invalid as an opinion of the market value of the licence valuation date, and he then spends paragraphs dealing with that. I do invite Your Honours to note this evidence in para.95, for instance in my second sentence 'in my opinion, the approach Mr Meates adopts', this is to the discounted cash-flow, 'is not based on a discounted cash-flow methodology as that methodology is commonly understood, nor is it based on any other recognised valuation approach that I am aware of for that matter. Mr Meates' valuation approach is highly unusual. In my opinion, it is questionable whether his approach actually represents a valuation of the licence at all'. And at the top of the next page 'there is no recognised approach to valuation involved in his calculation of value'. Paragraph 100 – 'in my opinion this is a very unusual application of the principles of present value analysis in a valuation context'. At the end of that one – 'in my opinion for this reason alone, Mr Meates' present value calculations are invalid as a basis of confirming his \$45 million dollar valuation'. Paragraph 103 – 'As I explain Mr Meates' calculation of his average price is mathematically incorrect'. Paragraph 11 at the end – 'In my opinion it is foolhardy to suggest that a required rate of return of this magnitude sufficiently allows for the risks of the venture'. Paragraph 112 – 'In my opinion Mr Meates' valuation is not a market valuation of the licence at 28 June 1997, not is it a reasonable valuation of the licence, nor is it a competent valuation of the licence'. And then on page he turns to deal with the question of whether Mr Meates was qualified to give the evidence and he said in para.127 'a significant question is whether Mr Meates has the necessary qualifications and level of expertise'. I do not consider he has', and he then spends some paragraphs dealing with that. Now he was cross-examined and Your Honours will find the cross-examination in volume 4 under tab 21, and I'm particularly going to take you to a paragraph or section of the cross-examination that's set out in my learned friends' submissions, and this is in their written submissions, for Your Honours, not the oral

ones yesterday, but the original written submissions at para.90 on page 29

Tipping J Would it be easier to find it there than in here?

White I'm going to ask Your Honours to look at both.

Elias CJ To compare.

Tipping J To compare, oh I see.

Elias CJ Sorry, this is the main submissions is it?

White Yes Chief Justice, yes.

Elias CJ Not the bigger submissions?

White No, the shorter main ones.

Anderson J What paragraph are those at?

White 90 Your Honour.

Elias CJ Go ahead, I'll catch up later.

White Your Honours will see that the passage where Mr Wilson QC as he then was for Glenharrow, says 'I want to get a ballpark figure as to how this hypothetical would flow through to a valuation – if you worked on 15,000 tonnes' which of course is the Mark Meates figure. You will see that starts at line 22 of the transcript.

Tipping J On page?

White I'm sorry, 767, which is 167, the easier numbers to read, and Your Honours will note that the questions go backwards and forwards. 'I want to put to you one hypothetical to get a ballpark figure as to how this hypothetical would flow through to a valuation. If you worked on 15,000 tonnes production per year for each of the three years. If you assumed a revenue of 4,000 dollars per tonne on the basis of that the extra, para.62, income from the high quality Bowenite would offset income from Serpentinite and if you used the figure of \$750 dollars per tonne what figure would you get, what discount rate? 30% - a number markedly north', and this is set out in the submissions, 'a number markedly north of my 3.7 million dollars, but absolutely nowhere near \$45 million dollars'. Question; 'Is that right'? Answer; 'yes'. Question; 'Help me with that. If you had 15,000 tonnes a year,

45,000 tonnes and a net revenue of 3,250, namely 4,000 less 750, what income would that produce – 15 times 3750 – 3750 times 3'. Question; 'say again'. Question; '15,000 times 3,250 times 3 – 1.6875 what does that mean. 168 million'. Question; 'even with the 30% discount rate it would be well north of \$45 million. On that basis yes' – and then he continues but this is not in the submissions. 'But let me just in broad terms, but there are issues like working capital, capital expenditure necessary to undertake the works and the discounting over a period of time'. And that's omitted from the submissions and we would submit, highly relevant to reading Mr Frankham's cross-examination.

Blanchard J What's the next line all about. The Court saying is the answer about 112?

White That's the order of it, yes.

Blanchard J What's that – \$112 thousand, \$112 million I mean?

White Million, yes.

Elias CJ That's the same answer.

White It's the same answer.

McGrath J Instead of 168.

White Yes.

Elias CJ But without the qualification.

White Without the qualification.

Tipping J Yes. What he's saying is that substituting Meates' figures for Rabone's you'd get a figure well in excess of?

White North, yes.

Tipping J But it's not the Meates' figure is it? You get a figure well in excess of his own figure.

White Yes.

Tipping J Because Meates' figure was the one he used for himself. I mean I'm having difficulty following this.

White Sorry, who used for himself?

Tipping J Meates used the 15,000 a year figure

White Yes, that's right.

Tipping J A total of 45 over three years. Now who is being asked to substitute?

White Mr Frankham.

Tipping J Mr Frankham. If Mr Frankham uses Meates' figures instead of Rabone's figures

White Correct.

Tipping J Then he will get to, according to the Judge, \$112 million, allowing for all the variables.

White Yes, that's right, yes.

Elias CJ Well it's Davidson's figures really isn't it?

White No, no

Elias CJ Oh it's not.

White The 15,000 is Meates, Davidson is 9,461.

Tipping J But I don't quite understand how this helps you Mr White. Mr Wilson was here trying to demonstrate that it all depends on the base figures against which you apply the arithmetical and discounting exercise.

White Yes it does, but Mr Frankham has qualified his answer significantly.

Tipping J But even with that qualification, it's \$112 million dollars as I understand it.

White No, no, he says in broad terms, but there are issues like working capital; capital expenditure necessary to undertake the works, and the discounting over a period of time.

Anderson J But you see there's a reference to \$168 million to be compared with \$112 million. So doesn't \$112 million make allowance for those exact factors?

Tipping J That's what I reckon.

White It may be. I was just concerned that the full section be included.

Tipping J But wait a moment, that may be a very proper thing to draw to our attention, but I'm more interested in the ultimate outcome of this colloquy which seems to be that Frankham is saying that if you work on Meates' figures as the base figures, not the discounting and so on, but as the base figures, that allowing for Frankham's reservations and things that you have to bring in, it's \$112 million dollars.

White Well that's just arithmetic.

Tipping J Yes, but doesn't it suggest that \$45 million dollars

White No, no, well that's if you take those figures.

Tipping j Yes, if you take them.

White Yes, which neither Mr Davidson nor Dr Rabone, nor the Judge did.

Tipping J Yet Mr Wilson was no doubt endeavouring to lay a platform here for something that didn't happen, i.e., the Judge wasn't prepared to accept the Meates' base figures.

White Yes, exactly.

Blanchard J Like Justice Tipping, I'm not quite sure why you are referring us to these figures.

White Well my learned friends have referred to them

Blanchard J Yes.

White But they referred to them

Blanchard J But they are pretty obvious.

White Yes, but, well I don't need to take it any further. The point simply was the extract is not complete and in fairness to Mr Frankham he qualified the answer and I wanted to make sure that the Court was aware of the qualification.

Blanchard J Well yes, but it's not much of a qualification given that the various valuations or reports have figures for establishment, capital operating and clean-up.

White Yes.

Anderson J The qualification is it's over \$50 million dollars difference.

White Yes, exactly, yes.

Blanchard J But you still end up on those figures something well over \$45 million dollars.

White Well you do arithmetically with Mr Meates' figures, yes, I mean the table that I've handed up shows that.

Anderson J Anyway this cross-examination was probably directed to the issue of the bona fides of the sham inspector.

White And there are other aspects of the cross-examination earlier on if one can go back to page 765 where at line 5 Mr Frankham said 'my principal point in that paragraph is that Mr Mark Meates is not independent of Mr Michael Meates and there is no actual independence, neither is there the perception of independence and that gives rise to an easy step to take that the assignment was not intended to and dealt with on an independent basis.

Elias CJ Why is this expert evidence?

White because you would expect if Mr Meates was being held up as an independent expert he would be independent.

Elias CJ But why is Mr Frankham saying that. That's a submission point.

White Well he is a well-established independent expert witness and he was asked to comment and he did.

Elias CJ Well I'm not sure why we're being taken to this.

Anderson J He can comment on the methodology used by someone based on his own expertise as a valuer.

White Yes, which is what he's done, and I've taken Your Honours to that. And his cross-examination didn't result in any movement on his part.

Elias CJ One wouldn't expect that it would.

White No, I'm still have difficulty with trying to establish that at the very least the Frankham approach was the right one, and it provides ample

support for the finding that figures based on Mr Mark Meates were grossly inflated.

Tipping J Has anyone done a calculation as to what would have been the result, or did the Judge do the calculation that he took the Davidson volume, he struck it was said, half-way between the Rabone volume and the Meates volume, if you'd substituted Davidson for Rabone and applied exactly the same arithmetic, I wonder what you'd get to?

White That's what the Judge did. That's the righthand column.

Elias CJ That's what the Judge did.

Anderson J That's how he got to 9,461.

Tipping J Oh I beg your pardon, sorry I've misled myself from the table, yes.

White Yes.

Anderson J So he took the valuer whom he felt he could rely on and he took the geologist we felt he could rely on

White That's exactly right Your Honour, and for completeness Justice Tipping, the figure at the bottom, that's the reason why there's the difference

Tipping J No, I've picked it up thank you.

White Yes, and if you wanted the evidence, Justice Chisholm gave two judgments – the main one, and then he asked Mr Frankham to go away and do those calculations

Tipping J Oh right.

White And he did that and that led to

Tipping J Yes, that explains how I misled myself. I hadn't seen that.

Blanchard J Did anyone – I imagine they did – but did anyone do a calculation factoring in things like the likely weather conditions, given that you can't fly helicopters on all days of the year.

Tipping J I'm told Your Honour, yes, it was Dr Rabone, and we'll find the references for you, because indeed when I saw precisely where Mount Griffin was in relation to such interesting places as Arthur's Pass and the Otira Gorge, and Mount Rolleston, where I have like others been,

one had some idea of the topography and the weather and the winter conditions, so I was interested in that and I haven't yet had a chance to find the answers so we'll find that.

Elias CJ And the tributaries of the Taramakau which is one of the most dangerous rivers in the country.

Tipping J Is it going to be possible Mr White for you to proceed from hereon on the hypothesis that this was objectively a grossly inflated valuation. Do you feel you've done enough now to as it were foreshadow the strength of the Commissioner's case to support that proposition, because?

White There are two matters that I wanted to focus on slightly more which one is the high grading point which I've only just touched on, which won't take very long and there's a tab which has got some material relating to that in our red volume.

Elias CJ Well we'll take the adjournment now.

White But that was the one area Ma'am.

Elias CJ Thank you.

11.34am Court Adjourned

11.51am Court Resumed

Elias CJ Thank you.

White Justice Blanchard and the weather, volume 4, tab 19, page 711, and the evidence in chief of Dr Rabone, 711 at line 21. Question; 'finally, have you got any comment about logistical factors that might affect mining on this licence'. Answer; 'well I think actually that the logistical factors have been very seriously under-estimated in what we have heard. There is no road access to this place and we have heard that it is a seven-hour walk to get in there. There is no prospect of making a road access because I simply cannot see that as being compatible with the Department of Conservation'.

Blanchard J It would take more than three years anyway.

White 'Mount Griffin is a very exposed mountain at approximately 4,500 feet and it is frequently in cloud and for a substantial period there is a significant amount of snow there. Perhaps I could illustrate this with

my own experience where when I came to visit Mount Griffin I was not able to fly in there until the third day after I had arrived. The two previous days we had to cancel because of cloud and on the third day when we did get in our visit had to be curtailed because we were at risk of being clagged in. I went to the top of Razorback Ridge and for a skate on the north side of the Razorback Ridge on the snow, but I didn't consider it advisable to step on the south side because I would have needed crampons and an ice axe. It would be a difficult place to work in the winter. I do think it's a place where it is possible to work and that is why I have put forward a realistic scenario and that takes account of the fact that there's some very big difficulties. The lack of road access is a huge problem in terms of supplying and maintaining supplies to personnel, and in coping with equipment breakdowns. In an operation of this type you would have significant equipment breakdown problems. If you couldn't rectify them because you couldn't fly in you would have big down time with personnel up there who had to be paid. In extreme cases personnel themselves could be at risk', and then there's some questions about water and other matters. Just dealing with Mr Frankham's methodology, which was accepted by the High Court Judge, and just to give Your Honours the references where he dealt with market value of the licence – that's at paragraph 189 to 191 – and in those paragraphs, particularly 191, where he said 'leaving aside minor differences, there is agreement between the parties in quite a few areas. They agree on the net average value of Serpentinite, Bowenite, and super Bowenite', and that's important on the high grading issue. 'While there are significant differences between Mark Meates and Dr Rabone about the costs that need to be taken into account when valuing the licence, the schedules prepared by Mark Meates indicate that Dr Rabone and Mr Davidson are relatively close. I adopt Dr Rabone's costs. I also proceed on the basis that Mr Frankham's discounted cash flow methodology was appropriate in all the circumstances', and he notes that Mark Meates seems to have acknowledged that. At the end of that paragraph 'I accept that Mr Frankham's methodology was appropriate to arrive at the market value of the licence'. And if Your Honours just note that in the succeeding paragraphs under the headings he deals with volume which he concludes is the red herring; and then the tenure of the licence, which we can come back to; and then on 204 following, 'extractable volume', and that's where he accepts –well Your Honours will note that he starts in 204 'this is another critical issue. Both Gerard Fahey and Mark Meates considered that 15,000 tonnes could be extracted and Mark Meates on the basis that more than one reef could be worked at the same time. He assumed that Mr Fahey's reasoning was the same lines. Dr Rabone rejected the possibility that more than one reef could be safely worked. He was extensively cross-examined and although I did not find his reasoning particularly

convincing, I acknowledge that he has expertise in this area which should not be lightly disregarded. His maximum annual extraction figure was 4,860 tonnes. A third figure appears in Mr Davidson's Interim Preliminary Mining Feasibility Study of 21 March 2003, which was produced with opposition, and that was 9,461 tonnes. It is recorded in the report that it had been critically reviewed' etc. 'Of the four persons who have suggested annual extraction figures, it would have to be said that Mr Davidson stands out as the person most likely to have provided an independent opinion with full knowledge of the site. Apart from his professional status', etc, and he contrasted that with Dr Rabone. And then 208, 'having reflected on the evidence I am satisfied that the 9,461 tonnes per annum used by Mr Davidson provides the best indicator of the annual volume that could be realistically extracted. Consequently the figure of 4,680 used in Mr Frankham's valuation will need to be replaced with the annual rate of 9,461'. 'Quality' – and I just pause to note that Your Honours might consider that that does constitute a careful evaluation by the trial Judge of the relevant evidence in which reaching a conclusion which was open to him on the evidence. 'Quality. This revolves around the mix between Serpentinite and Bowenite. Richard Fahey estimated 150,000 tonnes of Bowenite and Mark Meates 100,000, which represented about 22% of his total figure. Dr Rabone estimated that 85% would be Serpentinite and 15% Bowenite', and this is the important point Your Honours on the quality issue - 'of which .75% would be high quality Bowenite'. So that's that figure I took Your Honours too in Mr Meates' evidence and which I'll refer to again in a moment, but there it is in the judgement. 'Mr Davidson's report indicates that about 10-20% of the indicated resource would be Bowenite. Given the correlation between Dr Rabone and Mr Davidson, coupled with the fact that Mr Davidson's report had geological input, I think the safest course is to adopt Dr Rabone's figure of 15% Bowenite, of which .75% would be high quality Bowenite. A I understand it those figures were used by Mr Frankham and no adjustment is required'. So again we invite Your Honours to accept that the Judge has indeed carefully considered the relevant evidence and reached a finding which was open to him on that point. On that matter of high grading, if Your Honours just turn to tab 3 in our red folder, and I'm not proposing to read it, just simply to highlight aspects of it on the question of the .75% and the butchering matter that Justice Tipping asked me to respond to. This sets out the Glenharrow submission about the high grading point which Your Honours have heard about. I note in passing in para.3, there's the reference to Mr Davidson's valuation in 1991 of \$11 million dollars, and then the other evidence is summarised. Paragraph 7 I just note we recorded there that Mr Davidson was not called as a witness. It was agreed by counsel for the parties at the trial that his documents

could be referred to by Glenharrow's witnesses and produced not on the basis of the truth of their contents, but on the basis they existed and the witnesses had seen them and/or called for their creation, and I don't need to take Your Honour to it, but there's an exchange of correspondence on that point between the Crown Law and my learned friend Dr Harley, as to what it was understood had been agreed at the trial between my learned friend Mr Coleman and Mr Wilson QC as he was, because of course they were the counsel at the trial, and that sets out our understanding of that, and then paras. 8 and 9 refer to the reports that have been prepared by Dr Rabone and Mr Davidson, and then under the heading of Glenharrow's evidence, there's the references to what Mr Fahey said in relation to high grading, and significantly in para.16 is the reference to Mr Meates' acceptance of Dr Rabone's .75% which I took Your Honours to earlier today. Then in para.17, I would invite Your Honours to write in that Dr Rabone's evidence which Your Honours will find in the case on appeal, volume 3, tab 8, at page 382, paragraph 137, is where you find his evidence as to the high quality Bowenite at .75%. I don't think I need to take Your Honours to that, but that's the reference at volume 3, tab 8, page 382, para.137. And then in para.19 we note that oral evidence was led from him as to high grading and the practicality of it, and the reference is given. There were two problems – the amount and position of the very high value stone was so poorly recorded, it was difficult to assess and there was one very narrow bit of high grade stone visible but it was encased within lower grade stones and a lot of adjacent material would have to be moved to get at it. And then there's more references to his oral evidence through there – 20 to 23. In para.23 we note he was cross-examined on the related topic of high grading. He agreed with the rationale that it was best to attempt to mine the higher value rock as quickly as possible, but within the scope of what was realistically possible given the constraints, and I've taken Your Honours to some of those. Dr Rabone considered that high grading would present some significant difficulties if they're trying to achieve a return to pay back \$45 million dollars then talking about high grading seems to come into the realms of unreality. He explained in some detail the problem with the over-burden that would need to be removed to access high value rock on the assumption that the high value rock extends underground. And then over the page under the references to the High Court judgment which I've taken Your Honours to, para.31 notes that Dr Rabone's figures, including the .75%, were accepted, and in 32 we submit that while there was no explicit mention of high grading of such in this part of the judgment, when the Judge's findings as to the extractable volume and percentage quantities of each mineral are read together, then it follows by necessary implication that the high grading concept is a device to enhance dramatically, the licence value was rejected. This is because

by accepting Dr Rabone's estimates of the likely percentage of the various minerals, the Judge was accepting Dr Rabone's and Mr Frankham's approach, which was to treat each tonne extracted as comprising 85% Serpentine and 15% Bowenite of which .75% would be high quality Bowenite. And at the very end we note that the Court of Appeal considered there was ample evidence that the trial Judge was not wrong with his findings, and we would invite Your Honours to reach the same conclusion on the question of high grading, butchering, etc.

Anderson J What would you say Mr White about the Judge using the Davidson figures, when the Davidson report went on such a limited basis?

White Yes, well we say in fact in tab 4 which is the next point Your Honour, that the Judge was wrong to do so.

Anderson J I see, you're coming to it, yes.

White And that was the last factual matter to refer to, and I'll do that very quickly. We've got a note here under tab 4 which is that if Your Honours are going to be looking at these reviewing the figures, then the Commissioner's submission is as it was in the Court of Appeal, that indeed the Judge should have accepted Dr Rabone's volume figure of 4,860, rather than Mr Davidson's 9,461, and we address that in this note. Again I'll leave it to Your Honours to read but I'll just highlight some paragraphs. In para.4 it is the Commissioner's submission in the second line, that little or no weight ought to be placed on Mr Davidson's preliminary study, and certainly it ought not be preferred over Dr Rabone's evidence as to the annual tonnage that could be realistically extracted. This is because Mr Davidson was not made available for cross-examination. Dr Rabone expressly disagreed with his figures. Dr Rabone was not shaken in cross-examination as to the volume, and significantly over in 4.4 Mr Davidson's preliminary study ought to have had little or no weight attributed because it was out of date. It relied on a change to the work programme from the terms existing at purchase to allow use of a wheeled drilling rig called the Commando 110 to arrive at the figure of 9,461, yet at the time of writing the report, March 2003, permission to use the Commando 110 had been withdrawn, and we've given the references to the evidence and I won't take Your Honours to those. There are pictures of the Commando 110 if you are particularly interested in that. Page 15 refers to DOC approval for the modified work programme submitted in September 1998. The point of the modification was to allow the use of a hydraulic drilling rig called the Commando etc. The conditions to the licence existing at 28 June 1997 limited extraction to hand-held tools and it was wheeled etc. The modified work programme was

approved on 17 February 1999, and in November 1999 problems arose with the modified work programme and in January 2000 it was withdrawn.

Blanchard J Your point I suppose is that as at June 1997 it couldn't be assumed that the Commando would be allowed to be used.

White Yes, and to the extent that one can look at hindsight evidence that assumption was confirmed ultimately.

Blanchard J Well one would have to work on that assumption because of the existing licence conditions if one was doing a valuation.

White Exactly Your Honour, yes.

Blanchard J You might be able to factor in the possibility that there would be some departure allowed but you wouldn't I imagine attribute much value to that.

White No.

Tipping J Is your first point that the Judge used it for a purpose for which it was not admitted essentially?

White Yes it is. So those were the factual matters Your Honours that I wished to touch on. I'm sorry they've taken a little longer than anticipated, and I now can turn to page 6 of the written outline, dealing now with the – well that was all to do with the Commissioner's support of the findings in the Courts' below of grossly inflated value, and now turning to the factual matrix. I assume Your Honours have in fact read the Commissioner's submissions on this so what we have done here is just to note in para.12 that of course the surrounding circumstances are highly relevant to the issue and we've set those out in the succeeding paragraphs, and I don't think I need to highlight anything there, except just to note one small point in passing in relation to para.16 where we make the point that Mr Meates decided to be a non-registered person, even though he had a couple of companies which – sorry I'll start again. To sell the licence personally rather than to deal with his companies – to acquire and sell it through the companies, and there are two companies mentioned there which I think my learned friends suggested he was a minority shareholder in. In fact in Redmans Mining Ltd there were two Directors – Michael Meates and Patrick Meates – total shares 60,000 and both of them had 30,000 each, and in PF Sugrue Ltd there were two Directors – again Michael and Patrick Meates – total shares 3,000, and Michael and Patrick each had 1,000 and Christopher Meates had the other 1,000.

Tipping J It's probably a diversion Mr White, but is there any relevance in para.26, or is it just sort of a bit of gratuitous flavour?

White I accept the word 'flavour', but not necessarily 'gratuitous' Your Honour.

Tipping J But it can't have any relevance can it to the issues we have that it's in?

White No it doesn't Your Honour.

Blanchard J It might have relevance if Glenharrow wins.

Tipping J Yes.

White Your Honour's just gone a little quickly. In relation to para.19 which refers to GHL as a shelf company, can I take Your Honours to volume 9 of the case at tab 146. You will find on page 3177 and 3178 the profit and loss account for Glenharrow and the balance sheet for Glenharrow as at 31 March 1998 which confirms that the ordinary share capital was \$100 and that the main liabilities was the loan from Michael Meates.

Blanchard J That was a general debenture, is that correct?

White Your Honour has used the adjective 'general'

Blanchard J Over all the assets of the company.

White Oh, I'll have to check that Your Honour, yes I think that is right Your Honour.

Tipping J And did not Fahey also give a mortgage over his shares? No that would make him personal covenantor wouldn't it?

White Can we check that. There may be some suggestion there is. We think that's right, that he was as well.

Tipping J Yes, was that without a personal covenant, but non-recourse in that sense - just giving security but no personal liability. I think it would be useful if that could be clarified.

White Yes, we'll clarify that Sir. Yes, and again the background in 21 and 22 is relevant. Certainly 23, where initially the same solicitor was instructed. 27, just to note that the evidence to support the findings that it was accepted that the debt could only be repaid by working the

licence if Your Honours want to note that Mr Fahey was cross-examined on that, case on appeal, volume 12, sorry volume 4, tab 12, pages 36 to 37

Blanchard J It's not in dispute is it?

White I don't think it is, no, page 605 and 634. Then the next point I wanted to just mention in relation to the commerciality aspects – Justice Blanchard I think was asking about that – can I just give a reference there to the summary in the judgment of Justice Chisholm at paras.102 to 108

Tipping J What paragraph does this relate to Mr White?

White 29.

Tipping J 29, thank you.

White Well sort of generally the commerciality, but I was just bringing it in here.

Tipping J Right, and the judgment?

White And paragraphs 102 to 108 of the judgment, where the evidence of Mr Simon Mortlock is summarised, and Your Honours will note in 104 'with reference to the commerciality of the transaction Mr Mortlock considered that the initial letter of instruction suggested a close working relationship between the parties where they felt it was unnecessary to spell out comprehensive terms. The letter did not provide details as to when Glenharrow was to repay the principal sum'. 105; 'Mr Mortlock considered the formal documentation to be unusual. He would have expected certain things which is set out'. 106; 'the conclusion reached by Mr Mortlock was the actions of these parties suggested they did not seriously contemplate losing \$45 million dollars, no doubt on the basis they'd never had it in the first place. He was surprised at the absence of concern about tenure issues etc'. 107; 'defects in the security documents were discussed in detail. Mr Mortlock noted that under the debenture Glenharrow had given a charge over its shares which was not legally entitled to do'.

Tipping J But that's where I may have got my idea from Mr White.

White Yes.

Blanchard J Glenharrow had given a charge over its own shares, did it?

Tipping J It purported to.

White Apparently it did, it purported to.

Tipping J That's where I got the idea of a mortgage of shares from and I had immediately assumed it would be the shareholder.

Blanchard J Have we got the debenture? I don't know that anything hangs on this but

Elias CJ Yes it could.

White Yes, we'll find those.

Tipping J And the mortgage of shares did not include a personal guarantee by Mr Fahey. Ah ha, well of course a mortgage could only have been given by Mr Fahey.

White I have found the mortgage of the shares. Oh sorry, to be more precise it has been found for me, and the reference to that is in case on appeal, volume 7, tab C.

Elias CJ Sorry where were we?

White Volume 7 Chief Justice, tab C.

Blanchard J Well this is a mortgage given by as you'd expect by Fahey, not by Glenharrow.

Tipping J But did they whack its shares into the debenture just for good measure?

Blanchard J It strikes me as unlikely.

White We'll have to find the debenture for Your Honours.

Blanchard J And is there a exclusion of personal liability?

White Can we come back to Your Honour on this.

Anderson J No, the borrower observes all covenants conditions and agreements in the debenture. It's in clause 3.

Tipping J The borrower is Glenharrow. Fahey's the shareholder, so the shareholder has to do something.

Blanchard J Well the shareholder under 4 charges the shares

Anderson J So there's only recourse to the shares with no covenant?

Tipping J Can you charge your shares without becoming personally liable, if there no express non-recourse personally?

Blanchard J And the shareholder is giving personal guarantee. If you look at the end of para.1, the shareholder hereby covenants with the lender as follows. He's covenanting that the borrower will repay.

Tipping J Where was that – in 1.3?

Blanchard J At the end of para.1.

Anderson J Guaranteed.

Blanchard J So there is a personal guarantee, which makes the arrangements somewhat more commercial.

Tipping J Well there's no doubt about it.

White I'd like to reflect on that point Your Honour.

Blanchard J Well there's not much to reflect on.

White Well it depends on what he was worth.

Blanchard J One of the points being made against him or against Glenharrow is that a special purpose company was inserted and Fahey didn't have any personal obligations.

Tipping J This is a crucial point.

McGrath J Especially I would suggest on the payment part, your paragraph B that we'll get to. That's where I think it may have importance.

White I'd like to look at what Mr Mortlock had to say about that further.

Blanchard J It's a pity this point wasn't picked up at the trial because it makes a very interesting question about what's been done to enforce the guarantee - obviously nothing, which might have shared light on bona fides. It's too late now.

Tipping J So under the mortgage of shares there is clearly both a charge given and personal liability undertaken, that's the sum of it isn't it?

Elias CJ What did the Judge say about it.

Blanchard J Well he said the mortgage of shares did not include a personal guarantee by Mr Fahey.

White No he was quoting Mr Mortlock.

Blanchard J Alright, but he obviously accepts that.

White Yes, but I want to check what you know what Mr Mortlock's reasons were.

Blanchard J Yes.

White Yes, and that's the one thing I haven't done.

Blanchard J Well there may be other documentation, but I can't see it in this document.

White No. Perhaps I could have the opportunity of doing that in the luncheon adjournment.

Elias CJ It looks pretty significant to Mr Mortlock's evidence.

White Yes it does, yes, which is why we need to look at what he said. Can I just continue on with what the judge was saying about Mr Mortlock's other evidence at the top of the next column? He, that's Mr Mortlock, also considered that Glenharrow's acknowledgement in the deed of sale that it had conducted its own due diligence and placed no reliance on any warrantee or representation of the vendor was equally unusual. The fact that Mr Pengelly initially acted for both parties; the use of the solicitors trust accounts to effect payment rather than bank cheques, and the absence of undertakings etc. In the end result Mr Mortlock considered that both the legal documentation and the party's conduct in undertaking the transaction were un-commercial. Together those factors suggested that there was no belief that the sum of \$45 million dollars was at stake.

Tipping J I'd also be assisted Mr White while you're looking at Mr Mortlock's evidence as to what he said directly about a cheque exchange, never mind the mechanics, the trust account cheques – but the fact of a cheque exchange in a transaction of this kind – never mind whether it was Bank cheques or Trust account cheques, because I would have thought prima facie that was quite commercially straightforward and it wasn't indicative and indeed the Judge said that, admittedly in the

context of the sham issue, somewhere in his judgment. He said there was nothing sinister I think was the word he used about the exchange of cheques, because that really goes to the very heart of the payment issue as to whether it was a contrivance or an artificiality that should be revisited as it were.

White Or whether there was any real economic burden incurred.

Tipping J Well maybe so, but there was certainly a liability, but I don't want to anticipate what you're going to say about payment, but it would be useful while looking at Mortlock to see what he said about it.

White Yes certainly Your Honour. This all arose out of some comments that I was making beyond para.29 about the debenture not being registered and having to be re-executed etc. And then we've covered the GST, and a further debenture was entered into, and then the NOPAS and the SOPS. And 34, by the time of the expiry of the licence 36 tonnes had been removed, and again the reference to the SOPS and adjudication unit. And we note in para.38 that the further payments were made in December 03 and November 04, well after

Tipping J Just going back to 34 for a moment, was it ever part of the case that what happened afterwards was indicative of what was in the minds of the parties at the time they contracted for avoidance purposes – not for contractual purposes – but I know there's been some discussion about the inter-relation of contract and tax law in this area, but say they've done absolutely nothing, then there would be a pretty strong inference from that, that they never really intended this thing to be genuine, but of course the Judges found that they did intend it to be genuine.

White Subjectively.

Tipping J Well subject to your argument. So what happened afterwards surely has got nothing to do with it against that party.

White Well that raises the question for what extent subsequent events can be taken into account.

Tipping J But even if they can, against a finding that the parties went into this bona fide intending to mine, the fact that it was a disaster for whatever reason surely has got nothing to do with it.

White Well it would have if one looks at it objectively.

Tipping J But you look at it objectively at the time surely, they contract, not on account of some later happenings. Genuineness may be able to be illuminated by what happens later, but the objective purpose of the arrangement surely has to be looked at the time when the arrangement is entered into.

White But if it's accepted that the price is grossly inflated at that time

Tipping J Ah yes, but I'm wondering why we're being told that only 36 tonnes of rock ever came out of there.

White I was just going to link the two together Your Honour. If it's accepted that the price was grossly inflated at the time, and there objectively was never any prospect of anything approaching that being obtained from the mine, then the fact that subsequently it shows nothing approaching that was obtained, tends to be evidence confirming the inference.

Tipping J Yes, well I'm not sure about that, I think that's quite a tricky point.

White Well, is it?

Elias CJ Well also I suppose if they have taken on this huge debt, one would expect a lot of frantic activity, so the subsequent conduct, it's not about the effect of the arrangement that's entered into, it's about their intentions objectively ascertained for which perhaps subsequent conduct is quite relevant.

White That's exactly the point. Your Honour's made it more felicitously. But that is the point that if at the time, the original time, this was a grossly inflated figure, and they genuinely seriously were going to try and get it, they would be going hammer and tongs to get it.

Tipping J But their intentions objectively derived is really once the Judge has found what their intentions actually were then you're imputing an intention to them for fiscal purposes.

White The real one?

Tipping J No the Judges found what the real one was and you're now saying objectively you can impute a different one. It's the intention

Anderson J For different purposes though.

White Yes, yes.

Anderson J The Acts subjective intention is relevant to sham – the objective intention is relevant to s.74.

Tipping J Alright, well

White That is the Commissioner's position, yes.

Tipping J Yes, I understand that.

White Yes. I think I've got to the sections.

Tipping J Oh good.

White And I'm sorry to take Your Honours to yet another volume, but they are in our submissions, but in the Commissioner's orange bundle of additional authorities, the provisions are set out, and under tab 1 are the relevant definitions, and I'm not going to obviously repeat things my learned friends have already taken you to, but Your Honours will note the definition of goods, because that's the relevant one that brings in the licence here, and if Your Honours just note that that's addressed in para.66.1 of our submissions in footnote 25, which refers to a judgment of the Court of Appeal in a case called *McLean*, which is now under tab 1 of our red folder. I don't need to take you to it. It was an interesting case where my learned friend Mr Harley was arguing that wool off sheep was second-hand goods. But the point is that that's an indication of how second-hand goods gets brought in.

Tipping J Where does this nasty expression 'a second-hand good' come from Mr White? I'm not saying you're using it, but it's been used from time to time. Is it somewhere in the Act they use it

White Well two pages over there's a definition. It's called 'second-hand goods', which says what's not included, so there's no argument here that what we are dealing with is a second-hand good which is a combination of the definition of goods and *McLean*.

Elias CJ And?

White The decision in *McLean*. Now the next one to note is

Blanchard J Just a minute, that footnote 25, what does s.138 of the Mining Act say? Does it actually say that a licence is deemed to be a chattel interest in land?

White I think that's right Your Honour, yes it does.

Blanchard J Right, well that has relevance to the question I was asking Mr Carruthers yesterday about when you can exploit a licence, and he said you had to be a beneficial owner. Overnight I was thinking well you can't be a beneficial owner of anything except – other than either a Trust – which doesn't exist here, anything except an interest in land, but that might be the answer.

White So that was the first definition. The next one to mention is input tax and Your Honours have been taken through that definition. There's the other reference to second-hand goods in para.(c) of input tax. You will see at the end of second-hand goods. But it's the proviso that I just wanted to mention for a moment.

Tipping J Which tab of this supplementary bundle are you on Mr White?

White 1.

Tipping J Still on 1?

White Yes.

Tipping J Oh yes.

White And I looked at goods, input tax, and now the proviso to input tax. 'Provided that where, in relation to any supply to which para.(c) of this definition applies, the supplier and recipient are associated persons, or the supply is not the only matter to which the consideration relates, the consideration in money for that supply shall, for the purposes of this definition, be deemed to be the lesser of the purchase price or the open market value of that supply', and that's where open market value comes in, in that context. And just pausing there to note that open market value is defined in s.4 which is under tab 2.

Tipping J That of course is a point raised against you isn't it that they had made express provision there for adjustment to open market value in effect, whereas it's not so for our particular circumstances?

White Because, and we had that discussion at the beginning I think Your Honour

Tipping J But what are you referring us to the proviso for?

White Well to show you that it's there.

Tipping J Oh I see

White And to bring an open market value, and I'll be returning to this because it's in our submissions at para.60, this is fundamental, because what Parliament has indicated is that if the parties are associated then it's deemed to be the lesser of the purchase price or the open market value of that price.

Tipping J Yes. Well doesn't that suggest that if they're not associated it's the purchase price?

White On the assumption that that is also the open market value, because normally that will be the case.

Tipping J Oh that's a big assumption.

White Why?

Tipping J Well purchase price.

White No, no, unassociated persons will normally you would expect negotiate at arm's length on the open market.

Blanchard J But they might arrive for their own purposes unrelated to GST at a figure that others wouldn't place on the asset in question. It happens all the time.

White Well then it's a matter of looking at the application of s.76.

Tipping J It's notorious that valuers differ about what fair market value is.

White Yes.

Tipping J I mean, are we going to get involved in fine disputes? I mean where do you draw the line Mr White?

White Well, again we had this at the beginning. It's a matter of applying s.76.

Tipping J Yes I agree.

Elias CJ But I had thought that you were saying that s.76, the intent and application of the Act, requires open market standards to be imported because they are fundamental to the scheme and overall are intent of the Act, but are you relying for that only on this specific reference?

White No, no Your Honour we're relying on it broadly, but here it is in the Act itself in that particular situation.

Tipping J If that was the intention of the Act why doesn't it simply say that for all purposes input tax purposes or wider, but for the moment input tax purposes, consideration shall be deemed to be the lesser of the purchase price or open market value, and it would be very plain and simple, straightforward.

White Well it hasn't.

Tipping J No.

White And we have s.76 to take care of the situation.

Elias CJ No but we have a provision. We have a proviso which is very specific only for associated parties, and on normal statutory interpretation approaches, that would suggest that in all other cases, it's the prices that the parties have put to the transaction.

Tipping J Unless the price is a sham.

White Well no, it's whatever.

McGrath J You're really saying that the general principle of interpretation, the specific, excludes the general – doesn't apply because of the opening words of s.76?

White Yes, precisely Your Honour, yes.

Tipping J But you've got to get to the intention of the Act in relation to input tax credits. That's the fundamental thing that has to be defeated. You can't boot-strap up on a notwithstanding all other provisions in the Act. You've got to get to the intention of the Act, vis a vis, input tax credits, and I think it's a powerful point against you that Parliament has not chosen to do this deeming other than for associated persons.

White Well we don't accept that Your Honour, and really for the reasons that the Chief Justice and Justice McGrath have indicated, that it's

Tipping J And I'm not quite sure what they are.

Elias CJ And actually I thought I was really suggesting a difficulty, but I think it was Justice McGrath who threw you the life-line.

White Well that was in the opening words of s.76, and clearly they preclude an interpretation which is based on the idea that the specific mention in the proviso excludes taking into account what Parliament would

have expected is that normally unassociated persons would negotiate at arm's length and reach a figure that was not grossly inflated.

Blanchard J Yes, but the point that's being made against you is that the problem with that analysis is that yes you do have the words notwithstanding anything in this Act, but when you read on, you're back to the intent and application of the Act.

White Overall.

Elias CJ So where do you get an intent overall that market value is required?

White Common-sense, surely.

Elias CJ Well it's not a bad start I suppose.

Tipping J Necessary implication – that would be a politer way of putting it.

White Yes Your Honour.

Blanchard J It's a question of whose common-sense?

White It's what you would expect, surely.

Tipping J It has to be necessary implication doesn't it Mr White that it is so plain, that people can be taxed on that basis, because I don't like people being taxed or otherwise dealt with unless there is some fairly clear basis for dealing to them.

White Well certainly

Elias CJ Well what's the need for the proviso Act.

White Well that's dealing with the specific situation.

Tipping J But if it's a general proposition, is this just belt and braces. You've got it across the top by necessary implication, and you just bung in an express reference to it somewhere just so that you don't forget the necessary implication.

White It wouldn't have been the first time legislation has done that.

Tipping J No, but what bothers me is that this is getting, it is using s.76 for a purpose that I don't think can necessarily be correlated with the intention of the Act. Unless the price is a sham, isn't the Commissioner stuck with it?

- White Well I'm just wanting to find what I had a moment ago. The trial Judge said on this issue in para.186, when he turns to consider intent and application, and he concluded 'although market forces will generally set the value of the supply', second to last sentence, 'it is scarcely debatable that the intent and application of the provisions relating to input tax would be defeated, if input tax could be claimed on a grossly inflated consideration'. And that must be right surely. Parliament can't have intended that you could claim input tax on a grossly inflated consideration.
- Anderson J Well there are two issues here that are probably being conflated. One is that the question of open market value is invoked to determine the value of the supply. It's not invoked to determine whether there's been a s.76 breach on it, and the question whether there has been a s.76 breach may depend on the argument that it's so obvious it goes without saying that the whole scheme and structure of the Act because it assumes a degree of rationality in the market. And if there is a transaction which is not objectively rational, then it's not within the intent and application of the Act, and then you revert to something more rational which may be the actual market value. So it's a two-stage examination.
- White We'd agree with that Your Honour.
- Tipping J Well I have to say with respect that I find the proposition that it's scarcely debatable against the express reference to doing it this way when you have associated persons, a gross over-statement with respect of the Judge. The intent of the Act is clear that you go on the lesser with associated persons, and you go on the purchase price for others. The sham doctrine will protect you if they've jacked it up quite deliberately to get the benefit of the tax.
- Blanchard J It mightn't be a sham.
- Tipping J It mightn't be a sham, no, but there would have to be some good faith.
- Blanchard J It might be a device or one of those other pejorative words we were slinging around yesterday.
- Tipping J Fraudulent, dishonest.
- Blanchard J Contrivance. Yes it might be a genuine price in the sense that legally it's going to be payable, but it's been fixed at an extremely high value

which the parties know is more than open market value in order to produce an effect for GST purposes.

Tipping J I agree with that. I was using sham perhaps too loosely, but it's that connotation, but we were asked to read a lot into this Act against the fact that they thought it necessary to put in the proviso about associated persons. If it was so scarcely debatable, why would they put it in at all?

White Can I just pick up Justice Blanchard's point that we would agree with, and of course the next stage in s.76 is that if it is caught, what happens then is a separate issue. We're not relying on the proviso to say that what the price then is. It will then depend on the circumstances and on the appropriate adjustment question. That's a separate issue.

Tipping J Well I entirely agree.

White At this stage all that is being focused on and I haven't even got to s.76, but I'm about to, is notwithstanding anything in the Act, where the Commissioner is satisfied that the arrangement has been entered into between persons to defeat the intent and application, and if rationally, parties would not be expected in the ordinary course to agree on grossly inflated prices, and when they do

Tipping J Well that depends on the line between grossly inflated and inflated, that is the pejoraty of epithet, the test.

White Well

Elias CJ Are you effectively submitting that if it isn't an open market value, you're within s.76?

White What we're submitting is that it depends if Your Honour's meaning open market value in contra-distinction to a grossly inflated price because you wouldn't have a grossly inflated price in a rational open market, that's the point.

Elias CJ Well I'm really wondering whether Justice Tipping isn't exactly right that is there any difference between open market value, which you say is fundamental to the whole Act, and over-valuation, which is not according to open market, value.

White Well that's one way of approaching it.

Elias CJ That's taking in a heck of a lot.

| | |
|------------|---|
| White | Why? |
| Elias CJ | Well it may be where your submission takes you to, but that would mean that in all cases where the value objectively is not an open market value, you're into s.76. |
| White | Not in all cases, no. |
| Elias CJ | Well which cases wouldn't it be? |
| White | Well as always with avoidance the examination requires looking at the whole factual matrix of the particular case, and the usual tax avoidance indicia of matters like whether the economic burden has actually be born. Whether there's a pretence, contrivance, or artifice |
| Tipping J | Well economic burden relates to payment. |
| McGrath J | Yes. |
| Tipping J | We haven't got to payment yet and you may well have a good argument on payment – I don't know, but we're just looking at this awkwardness. The Chief Justice has got my point exactly. Once you're above open market value, you're open to this intervention. |
| Anderson J | It's a matter of degree I would have thought. In the normal market there will be people who will pay more or less than what is a reasonable market value. That's the normal incident of the market, but there may be occasions where the price agreed to be paid is so beyond the pale that it invokes s.76, and when it does it's then corrected by reference to the open market value. So the degree of aberration becomes important. |
| Tipping J | Well that's one of the ways one could look at it with respect but then you've got an extraordinary difficult exercise as to what degree of aberration. |
| Elias CJ | Or it might drive you to subjective intent. |
| White | Well we've run ahead a little Your Honours to other matters and we do address these matters in the submissions. |
| Elias CJ | Yes. |
| Tipping J | Well I'm guilty of cutting to the chase I suppose Mr White, because for me this has always been the central issue before we get to payment in |

this case. How do you determine whether it's sufficiently far from the mark to be on price alone capable of avoidance?

White Well it's page 19, running ahead, para.60, where we actually make our submissions in relation to the proviso that I was taking Your Honour to. And the first point is 'in cases involving a supply between two unassociated registered persons which insofar as input tax credits are concerned, will be the majority and are thus governed by para.(a). The input tax credit claimable by the purchaser will equal or match the output tax that is required to be returned on the supply by the vendor'.

Tipping J Yes, that's the self-policing.

White That's the first point. Secondly, 'the ordinary operation of the supply market and this fundamental matching necessarily ensures that the prospect of an input tax being claimed on the basis of an over-inflated price is minimal'.

Tipping J Well here we've got another concept – over inflation.

White And 'in cases involving a supply of second-hand goods – here the licence in respect of which it is possible that the vendor is unregistered as in this case, there will accordingly be no such prophylactic matching effect. In those cases Parliament has accordingly specified that (1), the consideration in money for the supply is to form the basis for the calculation of the input tax claimable by the purchaser, but where the vendor and purchaser are associated persons, the increased risk that an over-inflated value might be agreed in order to obtain a larger input tax credit is addressed by requiring an input tax credit to be claimed on the lesser of the consideration in money for the supply or the open market value'. And that with respect puts that proviso in its legislative context. And then we say 'consistent with this legislative focus on open market value in an input tax context, s.10(3) deems the value of a supply between associated persons to be at open market value and s.76 itself empowers the Commissioner where avoidance is established to deem a supply to be at open market value', and that's s.76(2)(d) itself. And then we submit, and this is crucial, 'a clear legislative concentration of limiting a taxpayer's ability to claim excessive input tax credits in circumstances where there is no matching output tax paid by the vendor can also be seen in the restrictions on registration on a payments basis contained in s.19A of the Act. It was the exploitation of that provision that was one of the central issues in the *Ch'elle Properties*' litigation and is discussed in the Court of Appeal judgment here'.

Elias CJ I don't have any problem with this being the overall intent of the legislation. I think really its the object of interpretation of s.76 in the light of that policy that I have difficulty with, because it seems to me perfectly comprehensible that if parties intend to obtain excessive input tax credits over what is reasonably expected to be the output tax, then that comes within s.76, but that's easy if you're taking it back to their intent.

White Well that of course would be evasion if they intent, this is avoidance, and that's why it's objective. That's the flaw. Your tipping in – I'm sorry.

Elias CJ Go on.

Tipping J I'm perfectly comfortable Mr White.

White Moving over into evasion.

McGrath J Mr White one difficulty I suppose I have in this area is it does seem to me that in relation to second-hand goods, as I suggested to Mr Carruthers yesterday, the legislation really is taking a punt and in the normal course as you describe it, the legislation is secure, that there's going to be a balancing out and the revenue is protected, but in relation to this particular, rather narrow area, it seems to me the legislation is really saying well we'll let them claim it and wait and see what happens, if you like on the basis of an attempt at simplicity and not trying to tie down all of these areas, the legislation has left it open. Now I wondered that doesn't necessarily preclude s.76 coming in but if the parties genuinely enter into transactions and they are genuine transactions in the sense that this is the supply which is paid for, it does seem to me that there may be little scope for s.76 to operate. I would just appreciate your views on that way of looking at the provision.

White Well the Commissioner wouldn't agree with that Your Honour because when Your Honour said it was left open, that's exactly the situation why s.76 is there in this context.

Blanchard J But the Commissioner clearly about ten years ago thought that the section wasn't satisfactory and gave his reasons for moving to change it. And the reasons seems to be that it wouldn't work in very many circumstances.

White Your Honour's referring to the paper that was

Blanchard J Yes, and the fact that they found it necessary to amend the section.

White Well the section is now broadly on all fours with s.BG1.

Blanchard J Yes.

Tipping J Could you after lunch Mr White just help me with this? I think it is dangerous to think of price and payment in isolation as in two sealed boxes, because it seems to me possible to consider that the two are inter-related. If there has in fact been a payment validating if you like the excessive price, then that's another control mechanism, so quite a lot may depend here on whether there's payment. I'm just saying that the two may have a sort of conceptual inter-relationship, because I would have thought that if there has truly been a payment, whatever that may mean for present purposes, then that rather takes away the malice if you like of it being an excessive price.

Blanchard J Your argument has been that the economic burden has not be borne by Glenharrow because effectively it's only a \$100 company.

White Yes.

Blanchard J That's where this question of whether there was a personal guarantee by Mr Fahey may have some significance, because if there's a personal guarantee he is bearing the economic burden. It may as I said earlier raise interesting questions about the issue of sham, but that's behind us now.

Tipping J I agree with that, but I think the question of payment are quite separate from what looks like

Blanchard J Yes, it's not the entire point.

Elias CJ Would it be helpful to take the adjournment now or do you want to reply to those

White No it would be helpful at this time. It seems to be the right time.

Elias CJ Yes thank you.

1.00pm Court Adjourned

2.15pm Court Resumed

White I first want to respond to the questions in relation to the mortgage of shares and the evidence of Mr Mortlock. The mortgages in volume 7

at tab C, and the evidence of Mr Mortlock, to which I will be referring is at volume 3 at tab 11 at page 525. It is with some trepidation that I venture to make a submission contra Justice Blanchard as to the interpretation of this document, but I do have the support of Mr Mortlock, for what that may or may not be worth.

Tipping J I'm looking forward to this Mr White.

White But looking at the document first, as Your Honours have noted, it does say in clause 1 that the shareholder, Mr Fahey, hereby covenants with the lender, Mr Meates, as follows, and then follow a series of clauses which begin in most cases with obligations imposed on one or other of the parties, e.g, 2 and 3 of the borrower then the shareholder, and we come over significantly to 8 which appears to a mere litigator to address the issue of default by the shareholder where it says 'in the event the shareholder defaults in observance of any covenant, condition or agreement herein expressed or implied, or if the borrower shall fail to observe the covenants, conditions or agreements expressed or implied in the debenture, the lender without notice to the shareholder may sell the shares to any party in any manner and on any terms acceptable in the sole opinion of the lender'. And that seems to be the provision that deals with the question of default by the shareholder, and indeed the only provision. And then

Tipping J That suggest though – forgive me for intervening at this point – that they're concurrent obligors?

White Well it's only to the extent of the sale of the shares. There's nothing else. There's no personal liability.

Elias CJ Well that's a power though isn't it?

White Yes, in the event of default. But basically can I take you to what Mr Mortlock says because he says it much better than I'm sure I would be able to.

Elias CJ What volume is he again?

White He's in volume 3, tab 11, at 525, and in para.80 he said 'Mr Fahey, a director and shareholder of Glenharrow, completed a mortgage of shares in favour of Mr Meates that did not include a person covenant acknowledging personal liability by way of guarantee. Mr Fahey's only obligation was to grant the mortgage of shares. Seen within this context the mortgage operates only as a control mechanism. If the debenture could not recover monies due to him under the debenture, it is unlikely that there would remain any value in the shares, the

subject of the mortgage. The only benefit in holding a mortgage of shares would be to provide Mr Meates the opportunity of selling the shares in the company rather than sell the licence. That would not have avoided the statutory consent process required on the transfer of the licence. The mortgage of shares normally offers little of commercial value or legal relevance. In the present instance however, the mortgage of shares plays an important role. Mr Meates, in his new capacity as lender can, in the event of a breach, effectively step into the shoes of Glenharrow and retake control of the licence, simply by way of transfer of shares and under such a structure have no requirement to account for Goods & Services Tax. The transaction becomes circular. Mr Fahey, if called upon under his personal covenant, returns Mr Meates to the same position as he was previously in, namely owning the licence, except in this instance holding the same through Glenharrow. Mr Fahey has no other obligation other than to accept the loss of the shares. On the other hand in order to maintain Glenharrow as a viable vehicle to hold the licence for Mr Meates' benefit, Mr Meates only needs to ensure that Glenharrow is placed in funds to meet any obligations of Glenharrow to its creditors, including Mr Fahey. The design of the security structure, including the mortgage of shares without personal covenant, suggests the parties gave far greater attention to this particular document than was given for instance to the agreement for sale and purchase and debenture, where the documents were either standard or inadequate'. And we would with the greatest of respect submit that that indeed is the correct interpretation of the

- Tipping J What then is the effect of the shareholder hereby covenants with the lender, but the borrower will repay?
- White Well it's as follows, and that's the borrower will repay and the only clause that deals with default of any sort, imposing an obligation on the shareholder, is 8, which I read.
- Blanchard J Well clause 2 is in sort of classic form for a covenant by a covenanting party in a mortgage, and there is no clause elsewhere excluding a personal guarantee which had that been intended, you most certainly would have expected to find.
- Tipping J It wouldn't be left to some rather, with great respect to Mr Mortlock, strained implication from the relationship between 2 and 8.
- White Well we would submit that it's not a strained interpretation. 8 deals with the question of any default.
- Blanchard J Yes but it doesn't deal with it exclusively.

Tipping J It's a power as the Chief Justice said, it's a power to do something on default. It doesn't exclude other remedies on default.

Anderson J Suppose that the borrower doesn't repay in terms of para.2, the shareholder can then be sued for that breach by the company.

White That's beyond clause 8 though?

Anderson J Yes.

White Well

Anderson J But this is just liable on a breach of covenant without recourse for power.

Tipping J If you fail to procure the payment by the other, you're liable yourself, it's very straightforward.

White Well it's not the view of Mr Mortlock.

Tipping J Well I'm sorry about that.

Elias CJ He doesn't specifically address it though does he in this evidence. He seems to assume that it's without personal guarantee without specifically saying why para.2 isn't a guarantee.

Tipping J There's no analysis at all.

Anderson J His evidence is directed to a different issue.

Elias CJ Yes.

Anderson J His evidence was directed to the artificiality of that arrangement.

Elias CJ Which the Judge didn't accept. I mean it does look amazingly convenient, but we have these findings of fact. You're going to take us to those.

White I'm going to come back in a moment, but at

Blanchard J Did Mr Fahey give evidence? Yes he did.

White Yes.

Blanchard J Was he asked about personal guarantee? Was anyone asked about personal guarantee, other than Mr Mortlock?

White I can't answer that question Your Honour.

Tipping J I find it very difficult Mr White. I only press on this because it's such an important point, but I find it very difficult to take the view that the covenant in 2 sounds only in the security and does not sound in money for breach of the covenant.

White Well I understand what Your Honour's putting to me, and I don't think I can take that any further.

Tipping J You can take it no further than that?

White No. There is an interpretation and obviously Mr Mortlock had a different view.

Tipping J Well he went quite a long way. I'm surprised in a way the Judge allowed him to do this because the question of commercial practice is quite different from the interpretation of the document which is for the Judge surely.

Blanchard J There's another element too. It says the shareholder – oh no, I won't pursue that.

White But I think the point that still stands even regardless of that of course is the circular nature of the arrangement that under clause 8, as Mr Mortlock has pointed out, it is open to Mr Meates to reacquire the licence.

Tipping J But that's a different point. The present point is whether or not there was a personal liability in Mr Fahey to pay the money if the company didn't.

White Well I don't think I can take that any further Your Honour.

Tipping J You can't take it any further, no.

White There's the Court's view and there has been another view which obviously it would appear Justice Chisholm referred to.

Elias CJ What's he saying here? Is he saying that the scheme here isn't an elaborate one to take the licence out of Mr Meates' hands and then back into his hands without

White Well it certainly gives Mr Meates the right to reacquire the licence if there's no payment, any default.

Tipping J But Mr Meates wasn't going to get the input tax credit, it was Glenharrow that was going to get the input tax credit.

Anderson J If he bought it back he'd have to pay tax on the \$45 million dollars but by acquiring the shares the licence is controlled but it's not transferred. I think that's the point.

Tipping J Yes, I think that was Mortlock's point yes.

Elias CJ Yes.

White Yes, that was Mr Mortlock's point. Well I'll check to see whether there is any more evidence on that point Your Honours. The next matter I wanted to return to was the relevance of open market value, just to clarify what I said this morning in response to questions from Your Honours, and our propositions are as follows. Open market value is of limited concern under the Act. The only time the Act is concerned with open market value is where there is a symmetry between the buyer and seller in terms of registration. The Act is not concerned with ensuring that all supplies are at open market value. There are two indications of the Act's limited concern about open market value. First, where the seller is unregistered and therefore not returning output tax on the sale, but the buyer is registered and claiming input tax, which is this case. And secondly where the seller is registered on a payments basis, but the buyer is registered on an invoice basis, so that the seller only pays output tax to the extent of the payment received, but the buyer claims input tax on the whole amount.

Blanchard J That's *Ch'elle* isn't it?

White That *Ch'elle*, that's exactly right.

Tipping J That all depends on what you mean by payment doesn't it?

White No, no, this is talking about provisions of the Act. I'm coming to that.

Tipping J Oh you're coming to that?

White Yes, and sections of the ones we looked at this morning Your Honours of the definition of input tax para.(c) in the proviso. And that, that's (c) deals with the area of greatest risk. In other words the Act assumes that the area of greatest risk is the situation of an associated parties transaction.

Tipping J So you're saying in the first two cases there's no express reference to open market, but in the third, where the greatest risk is perceived, there is? Am I understanding your point correctly? You've identified in effect three situations

White No, no, only two.

Tipping J Yes

White The two situations I identified are the two indication of the Act's limited concern about open market value; one and two.

Tipping J I see. They show limited concern?

White Yes.

McGrath J Sorry, what do you say? You say the Act assumes that associated parties

White No, I'm now dealing with a separate point. I was just picking up and elaborating on para.(c) of the definition of input tax – this is still part of the second point – which is that the Act there deals with the area of greatest risk. The Act assumes that that's the area of greatest risk, namely, the area of associated parties' transactions.

McGrath J Yes.

White There is no separate specific provision for non-associated persons because there is a reasonable commercial assumption that arm's length people will (1) agree a price that's not grossly inflated, and (2) actually pay it.

Elias CJ What do you mean by that – actually pay it?

White In a realistic sense looked at.

McGrath J Will pay the agreed price is that what you mean by that? Yes.

White Yes, pay the price.

Tipping J By pay you mean cash?

Elias CJ No, in terms of the Act.

- White No, no, can I keep going because this is the link. The link is the two, and the link is the arrangement. It's both together frustrate the intent and application of the Act, and we're talking about an arrangement, and if I may please go on, it's important to emphasise that if there is a grossly inflated price which is paid, the Commissioner won't be concerned. There won't be an arrangement caught by s.76 because the price would have been paid and the burden, the economic burden, suffered. So that's the analysis that I wanted to present in response to a number of questions, but I next want to distinguish, because I've been asked a series of questions focusing on the Judge's findings in the context of sham, and while I'm sure this will all be elementary, it is our submission that it is essential to distinguish carefully and at all times, particularly in this case, four different situations. One is sham; two is black letter; three is avoidance; and four is evasion. Now sham is concerned with the subject of intentions of the parties, and there are findings here
- Blanchard J Sham is really a species of evasion.
- White Well that might be another way of putting it Your Honour, yes, because one comes back to subjective intention to
- Blanchard J Well if you're putting up a sham, it's your intention to cheat.
- White Yes, but a finding of no sham does not preclude a finding of avoidance.
- Blanchard J Yes, well that's the criticism you made of Justice Chambers.
- White Yes. And equally though black letter compliance – that's the technical compliance through the contractual in legal terms with the specific provisions of the Act, does not preclude avoidance. It's exactly the argument in the context of the GST Act that arose in *Trinity*. And indeed my learned friends used the word 'threshold'. Their argument here as there is that technical compliance precludes avoidance.
- Blanchard J Well *Ch'elle* was presumably black letter but avoidance.
- White Precisely. So that when you come to avoidance
- McGrath J Just before leaving black letter compliance, is that a consequence of the opening words of s.76?
- White I think the opening words recognise that.
- McGrath J Recognise, thank you.

White I think it's a recognition that you will have compliance. So that before you get to avoidance you will have assumed a genuine transaction, a legally enforceable transaction and compliance with the black letter, and what needs to be looked at in the avoidance situation is the arrangement and the – we'll come to purpose effect etc – but the consequences in terms of s.76 of the arrangement looked at in substance in real terms, not being diverted by the legal form.

Elias CJ What is this submission – because I don't have any trouble with any of those propositions, but clearly something that we have said makes you think it's necessary to say that very firmly, so I'm just wondering where

White Well it's all the questions that keep getting put to me about the findings by the Judge as to the intentions of the parties that he found; the genuineness of them. I'm inviting the Court to put all that to one side.

Elias CJ Well you see the questions that I have been posing about the intention of the parties is directed to the subject of objective argument which you're still to come to.

White Yes.

Elias CJ And the intention that I'm talking about is the intention to avoid the application or intent of the Act.

White Yes, but that's exactly the point Your Honour, because Your Honour's putting that to me as the intentions of the parties and we're not actually interested in that under s.76.

Elias CJ Well that's the argument we've still to have from you about the interpretation of s.76.

White Yes, yes. Well that's where I'm coming to right now.

Elias CJ Yes.

White It's in our submissions but is also under tab 8 of our bundle. Now I apologise Your Honours, I'm not sure that I've answered all of the questions, and certainly Justice McGrath left me with a question about second-hand goods that I haven't come back to. I'd like to come back to that later.

McGrath J You are still aren't you. You've dealt with sham and black letter. You are now moving to avoidance are you as the third of your four items to be distinguished?

White Yes, yes.

McGrath J Good.

White I'm sorry to go backwards, but seeing that I was just pausing I have now been given a reference to the evidence of Mr Fahey on personal guarantees. This is going to be one of those topics that comes up on a number of occasions, but if Your Honours look at the case on appeal, volume 4, at page 632, which is more easily read as page 32 of the notes of evidence, at line 14 'you gave no personal guarantee to repay the \$44 million dollars did you? - no, I didn't'.

Elias CJ He might be in for a nasty surprise.

Tipping When you talk about subjective objective Mr White, I think you're flirting with fire here.

White Well no, because Your Honour will recall that as we argued in *Trinity* statements contra interest by a party may well be relevant.'

Tipping J He can't

Blanchard J Well it may be a statement in his interest actually.

McGrath J Just seeing you've found one line in Fahey, I take it that Mr Michael Meates

White We'll have to look for him too Your Honour.

McGrath J Sorry?

White I said we'll have to look for him too Your Honour.

McGrath J That's fine.

Elias CJ The question of course is you gave no personal guarantee to repay \$44.920 million dollars did you, I mean I can understand.

(Laughter)

Anderson J But likely to say yes.

White If Your Honours would have at the same time as looking at the section, our submissions at page 12, where we comment on the various parts of the provision, and we start at the beginning with 'notwithstanding anything in this Act', and we submit in para.42 that that means that the section is 'stated to be a general provision with overriding effect. It applies notwithstanding the fact that a taxpayer has complied with any other provision' contra appellant. This means there's no statutory basis for the threshold argument which I've already made that point. The next words are where the Commissioner is satisfied and that is at least an element of gate-keeping in respect of floodgate concerns. That the Commissioner must be satisfied that an arrangement, and there's obviously the basis for the argument that I was making before, that the focus is on the arrangement, has been entered into between persons to defeat the intent and application of this Act or of any provisions of this Act, the Commissioner shall treat the arrangement as void, etc. Now the first point I would wish to make is that the provision should be given a purpose for interpretation as required, and Parliament obviously intended it to apply in appropriate cases in terms of the wording. And now focusing directly on the question whether the words an arrangement has been entered into between persons to defeat the intent and application of this Act require the determination of subjective intentions, or what do they mean, and I hope this might be of assistance, but Your Honours may not think it is because there seem to be a number of different options. The first one is that it is concerned with the subjective intentions of the parties to the arrangements, and we submit that that's wrong and in support of that we adopt what the Court of Appeal said in *Ch'elle* which is in our bundle at tab 12 at para.25.

Elias CJ Sorry which bundle is it?

White It's the same bundle as our statutory provisions, tab 12, para.25, where precisely this point was raised, and at para.25 under the heading *did the arrangement defeat the intent and application of the GST Act* the Court said Mr Hayes' for the appellant contended that s.76 required a subject of intent. 'This cannot be the case. This would lead to the anomalous situation where an identical transaction might in one case be sustainable, but in another, struck down as tax avoidance because in the first instance the operator mistakenly, naively, unrealistically, or opportunistically was of the view that what was being done was unassailable. The second however, which involved a more confident person who thought it was worth having a go would be struck down. It is the objective assessment of the arrangement which will provide the answer as to whether it defeats the intention and application of the Act and is therefore void'. And we would submit that that is correct.

Elias CJ So it's the dissonance between what would happen if you were stupid and what would happen if you were not, that's the only reason?

White That can't be the reason, yes.

Anderson J The economic consequences couldn't depend on that.

White Couldn't depend on that, yes.

McGrath J The Act contemplate that the Commissioner has to go into the mind of every person?

White Precisely.

Blanchard J What did they mean by unassailable? That suggests circumstance in which they thought about GST. What was being assailed?

White Yes, well it may have been

Tipping J I find this passage really quite difficult Mr White and you'll just have to for my benefit expand on this.

White Well we've touched on it in our para.43 and following. This is in our written submissions, and we've set out the paragraph I've just read, and in 45, 's.76 is not and cannot be concerned with fine judgements as to what subjectively a taxpayer may have had in mind' – that's His Honour's Justice McGrath's point. 'The section is not concerned with the subjective motives, intentions, goals or objectives of the parties'.

Elias CJ Well it's not though necessarily motives or anything like that, it's whether the section is to be construed as meaning 'in order to' which is the usual sense of entering into a transaction to do something. You say it's entering into a transaction with that effect?

White Yes, yes. Well I'm sorry I've only dealt with one.

Elias CJ Oh yes, you've only got one.

Tipping J Yes well let's have them all on the table and then

White Well shall I put them on the table first?

Elias CJ Yes.

McGrath J At some stage with *Ch'elle*, if Justice Rodney Hansen dealt with that point of reference to that I would find helpful.

White Justice McGrath, Justice Rodney Hansen's decision in is the appellant's bundle of materials at tab 5

McGrath J Yes.

White And the issues addressed at page 284 under the heading *subjective or objective test*, and His Honour said 'the second issue is whether proof of an intent to defeat the intent and application of the Act is required. The authority found it was. He said– that's the TRA – 'I do not accept counsel for the Commissioner's submission that the test is objective, and that to hold it to be subjective would emasculate s.76. In all avoidance cases actions speak louder than words and the state of a disputant's mind will be judged having regard to what is done as well as what is said. It is the intentions of the parties at the time the arrangement is entered into which is crucial. This is a wholly subjective matter. I do not accept counsel's submission that tax avoidance, unlike evasion, is inadvertent. To the contrary, most of the avoidance schemes which come before the Court are advertent. The purpose is always to reduce or eliminate one's liability for tax'. And the Judge said in 45 'I respectfully disagree. I do not read s.76 as requiring proof of an intention. I think it more likely that the section is directed to the effect or purpose of the arrangement. Whether or not a particular arrangement constitutes tax avoidance should not depend on fine judgments as to what the taxpayer had in mind. If it did a scheme which was void if devised and implemented by one taxpayer could be permitted if developed by another in different circumstances. That could not be the intended outcome of a section which carries no penal consequences and should be applied even-handedly. In my opinion the question is whether the arrangement is one which objectively defeats the intent and application of the Act'.

Elias CJ Is that the case that there are no penalty consequences?

White Penalties but not criminal. Civil penalties.

Tipping J That's a bit

McGrath J Sounds familiar?

Elias CJ Yes.

White And there were none in this case.

| | |
|-----------|---|
| Elias CJ | Anyway we have to be quiet till you've gone through your list, but there are a few buts. |
| White | Well those are the two judgments in <i>Ch'elle</i> which support the first point. |
| Elias CJ | Yes. |
| White | The second option is whether the arrangement objectively assessed defeats the intent and application of the Act. The third is to read in purpose and/or effect – i.e. arrangement entered into with the purpose and/or the effect of defeating, and that's what Justice Chisholm did here in paras.182 to 183 of his judgment, where he said 'in terms of its text, s.76 applies when an arrangement has been entered into. According to the Shorter Oxford Dictionary the word 'to' indicates a result, effect, or consequence, and the word 'defeat' means cause to fail, frustrate. On this basis it would seem that the words 'to defeat' are wide enough to enable the effect as well as the purpose of the arrangement to be examined to determine whether it has been entered into to defeat the intent and application, which I interpret as a reference to the scheme and purpose of the Act or of a particular component. Like Justice Rodney Hansen in <i>Ch'elle</i> I have difficulty in accepting that the legislature intended s.76 to be governed by the personal motives of the taxpayer when entering into the arrangement. Apart from producing an erratic application of the section as noted by Justice Rodney Hansen, such an interpretation would almost certainly render the section virtually useless and destroy its anti-avoidance purpose' etc. So that was option three. The fourth, is the subjective purpose of the taxpayer objectively determined. |
| Tipping J | How is that different from one? |
| White | Because that is not whether the taxpayer intended to make taxable supplies. The focus is on getting the grossly inflated input tax credit up front contrary to the intention of the Act. I'm putting that as an option. |
| Tipping J | But isn't subjective intention always derived |
| White | No |
| Tipping J | Objectively. |
| White | No, one was the subjective intentions or motives. |
| Elias CJ | It's mens rea you're talking about really. |

White Yes, yes, well criminal. Four is determining objectively what you would say the purpose of the taxpayer must have been.

Blanchard J This is *Ashton*? Your effect is deemed to be your purpose.

White To be your purpose. That's another way of putting it.

Blanchard J Yes.

White Though that may overlap slightly with three. And five

Elias CJ It's amazing.

White Is Lord Hoffmann in *Auckland Harbour Board*, as set out in para.53 of our submissions. Talking there of course about the section

Tipping J But wasn't the word 'effect' actually in the statute in that case?

White Yes, yes.

Tipping J So it really isn't of any great general assistance.

White Well perhaps it's more of general assistance but not of the specific, because if the wording makes a difference.

Tipping J Well

White But what he said was 'generally speaking it's aimed at transactions which' – it's the contrast that he's making 'which in commercial terms fall within the charged tax, but have been intentionally or otherwise structured in such a way that on a purely juristic analysis they do not. That is what is meant by defeating the intention and application of the statute'. So he was there focusing on the parallel words.

Tipping J Yes.

Blanchard J What does he mean by 'in commercial terms'? What if the transaction makes commercial sense and as structured falls outside the purely juristic analysis?

White So that they are or are not liable to tax?

Blanchard J Well you've got a transaction which makes commercial sense from the point of view of both sides, and that the way in which the transaction

has been structured, means that the provisions of the GST Act, other possibly than s.76, don't catch it.

White Don't catch it?

Blanchard J Well it leads to an advantage in tax terms. Because he's positing something that in commercial terms you would do in a way which would be caught by the Act, so I'm saying well what if it's a transaction that makes sense commercially and isn't caught by the Act, unless you get to s.76?

White I'm just having difficulty in (a) thinking about that in this context, because if you're not within a black letter provision at all the question wouldn't arise.

Blanchard J Well, take a transaction that makes commercial sense, complies with black letter, happens to produce a very favourable tax result.

White And where does the juristic part of that Lord Hoffmann dichotomy

Blanchard J Well I'm just asking you the significance of the words 'in commercial terms' in that quotation.

White Well as I understand

Blanchard J Because arguably the present case is one that makes perfect commercial sense from the point of view of both parties. It's set up in a way that you might well have structured the transaction if you were a commercial lawyer, told to disregard tax completely. It protects the interests of both parties. That's assuming that there's no personal guarantee. It is within the black letter terms of the statute.

White Or rather without.

Blanchard J Well, yes, it meets the requirements of the statute to generate a refund of tax.

White Yes.

Blanchard J Now on Lord Hoffmann's statement I would have said it escapes tax.

Tipping J I always understood Lord Hoffmann, in case this might help, to be saying in short, if you're black letter compliant, you're okay unless you're commercially unreal.

White That's what I thought he meant too, yes.

- Elias CJ But if you're commercially real, and it still has the effect that you don't – I mean you're arguing that it's the objective effect
- White Looked at substantively and commercially - I mean that's one of the factors, yes. I mean His Honour Justice Blanchard sort of
- Blanchard J Well I just don't think Lord Hoffmann's statement helps you.
- White I was trying to be helpful to the Court in giving a number of alternative options.
- Blanchard J Yes. This section has a number of ways it could be read. Acknowledging that, the Commissioner's position is first as I've said before, that it's not the subjective intentions of the parties. I mean that's plain. Which of the other ones and perhaps putting aside Lord Hoffmann, the Court adopted, it may not matter much from the Commissioner's point of view at the end of the day, as long as one does look at the arrangement and does it objectively.
- Elias CJ I don't understand that the main argument you put up against a subjective interpretation is that it will lead to uneven results with taxpayers according to whether that actually formed the intention or not. But there's not going to be exact symmetry in effect because of this gap between input and output tax - it's input credit, and so that you could have as I suggested yesterday, you could have an arrangement which has the effect that GST is not paid because the business fails. So you're not going to have the same result, so why is whether the arrangement was in order to defeat the intent and application of the Act, why is that simply a question of looking at the effect? I mean the effect is very important because it's probably the best evidence of what the arrangement was to achieve.
- White Well the difficulty with the example that Your Honour the Chief Justice has given is that one doesn't actually know what was the arrangement there if the business failed – the one that you gave.
- Elias CJ Well a transfer of a licence in this case at an over-value as opposed to a gross over-value.
- Blanchard J Whatever that is.
- Elias CJ Whatever that is, yes. There is some sort of margin for them being profligate I suppose. But suppose they had paid a very full price?

White Well we get back into the facts here and the finding of a grossly inflated price. In a situation where it's the combination of the points that there is a symmetry between registration and the unregistered party and the arrangement where there was no economic burden.

Elias CJ But we're in that area where that Justice McGrath put to you about the Commissioner having to take a punt with the way the sections are drafted. If you're looking at effect, you catch everything after the event, whereas the section seems to be looking at tying the transactions entered into.

White Well the starting point certainly is the time it's been entered into, but it's the arrangement which has to be looked at in the context of the whole factual matrix. It's all the points that are made in the submissions on that.

Elias CJ But that's true if you're determining the intent of the parties in entering into the transaction, you will look at all the factual matrix. Anyway, so there's no further argument that you want to put to us apart from the inconsistency and application?

White Or subjective.

Elias CJ Yes.

Tipping J The *Ch'elle* argument.

White The *Ch'elle* argument – both in the Court of Appeal and in the High Court. Well it's the same argument that we had in *Trinity*.

Elias CJ A different provision though, quite a different provision.

White Yes, but the same wider policy reason for not adopting the subjective interpretation.

Tipping J Well it's all very well but we do have to actually interpret the language of Parliament here.

White Yes.

Tipping J The word 'to' is the problem - to defeat. It could mean either intending to defeat or having the effect of defeat and I have to say that the more natural reasoning is having the intending to defeat rather than having the effect of defeating and with all the other sophistications that seems to me to be the dichotomy. Intending to defeat or having the effect of defeat – now I would read that unaided

by all this learning as meaning intending to defeat, not having the effect of defeating.

White So Your Honour is reading in intending as immediately after persons?

Tipping J Yes, instead of having the effect of.

White Or not reading in either.

Tipping J Well that's not going to help me.

White Well

Tipping J Not reading in either, I'm trying to work out what 'to' means.

White Well it's the arrangement.

Elias CJ In order to.

Tipping J Yes.

White It's the arrangement that has been entered into between persons. It's to defeat the intent and application that's the subject. Your Honours are reading that as the persons, and we are submitting that it's the arrangement.

Elias CJ No, the arrangement has been entered into in order to defeat etc.

White Oh well that's different. That's quite different.

Elias CJ Well that's just putting it into the passive.

White And one determines the passive objectively.

Elias CJ But it's still the people who enter into the arrangement. Arrangements don't happen without people.

White Yes, in order to determine one looks at the arrangement objectively.

McGrath J Mr White if you read the section as essentially looking subjectively at whether there was an intention by persons to defeat the Act, how is that to be distinguished from evasion?

White Well that's the point I made before the luncheon adjournment. I don't know because it's

- Blanchard J Well there's an obvious distinction I think with respect that if you conceal something you're evading. If you set it up with the intention of defeating the Act, but do it quite openly, then you're not evading tax. You may be avoiding it, or trying to.
- White If you have the mens rea for avoiding tax in that way, surely that's evasion.
- Blanchard J I don't think so. I think there has to be an intention to cheat, in other words to fool the Commissioner into thinking that you've done one thing when you're doing another. That's why I said sham seems to me to be an evasion because that's a form of concealment.
- Tipping J Is there any precedent or background to this wording that can assist us elsewhere? Did this come fully born out of the drafts person's mind rather than from some more standard tax avoidance provision?
- White Evasion is defined in s.143(b), as a person commits an offence against this Act, if the person knowingly does not keep the books and documents required to be kept; knowingly does not provide information; knowingly provides altered false incomplete or misleading information. (d), Knowingly does not make a deduction or withholding of tax required to be made by a Tax Law, or pretends to be another person for any purpose or reason, and does so intending to evade the assessment or payment of tax by the person or any other person under a tax law. (g), To obtain a refund or payment of tax in the knowledge that the person is not lawfully entitled to the refund or payment, or to enable another person to obtain a refund or payment of tax in the knowledge that the other person is not lawfully entitled to the refund or payment under a tax law.
- Elias CJ What was the section number again?
- White 143(b) Your Honour.
- Blanchard J I doubt that would catch mere avoidance
- White Of the Tax Administration Act.
- Tipping J Which applies to this Act does it as well?
- White Yes.
- Blanchard J I doubt that would catch mere avoidance where the Commissioner was given the whole scheme and it's not a sham.

White But when's the Commissioner given the whole scheme?

Blanchard J He is shown all the components. It's over to him what he makes of it.

White After the event.

Blanchard J Yes, well he could hardly be given it before unless they were seeking a ruling.

White Well I'm not sure that I can take that much further except to say that

Elias CJ Just on the avoidance evasion point. Your argument it seems to me would be a lot more powerful if the evasion provision provided for an arrangement to be avoided, but am I right in thinking that s.76 is the only provision in the GST Act which enables an arrangement to be avoided?

White Yes, I believe so.

Elias CJ What about the heading – *agreement to defeat*?

Tipping J I've been looking for the heading. Is this what it says.

Elias CJ Yes, agreement to defeat.

White Well the word 'agreement' of course is taken out of the definition of arrangement which is in s.76(4). The definition of arrangement is parallel to the one in the Income Tax Act, means any contract agreement, plan or understanding, whether enforceable or unenforceable, including all steps and transactions by which it is carried into effect.

Blanchard J And it is one of those headings that was devised in the days when headings were ignored, so they possibly were not written with the care that is given now days and is given to the text itself.

White And it would be strange would it not to read too much into it when that is but one of the words used in arrangement.

Elias CJ No, but

White It would be better for it to have read arrangement to defeat.

Elias CJ Well if it read arrangement to defeat, it would be more helpful to you, but agreement to defeat seems to be quite contrary to the meaning that you're arguing for.

White Yes but Chief Justice, the word 'agreement' is one of the four principal words used in the definition of arrangement, and merely by putting agreement in the

Elias CJ No, no, it's not so much, well I read 'an agreement to defeat' as one which defeats – oh I see, alright, I'm getting confused now.

Tipping J You said earlier that the two really had to be looked at together. Is it time perhaps to look at the payment aspect of this, because I understand the force of that, because I think I was suggesting much the same thing just before lunch that one can't view these price and payment issues in isolation of each other. I'm not trying to truncate you Mr White for a moment but we seem to be spending quite a lot of time on the section which is not an easy one. It's part of your case isn't it that this wasn't a what you might you call a commercial payment? It might have passed mustard in black letter terms, but in commercial terms parche Lord Goldsmith it wasn't.

White Yes it is.

Tipping J Is it a convenient moment to look at that?

McGrath J Just before you go though I think Justice Tipping asked a question earlier as to whether you know anything about the history of this language in 1985? Everybody's been silent on that. Mr Harley hasn't volunteered that he drafted it on this occasion.

Harley I'd be ashamed of myself but it's original so far as I know.

White I've added that to the list of matters that I need to come back to Your Honour.

McGrath J Thank you.

Tipping J Because I think this payment point is quite important though. I mean if it's really an off the wall arrangement then that might be quite a strong indicator in your favour, but if it's commercially straightforward that perhaps doesn't help you so much, whatever the correct interpretation of the section is.

White Picking up our written submissions, we've done overriding effect objective test. On page 14 we address intent and application, and I think I've covered those matters there and the *Auckland Harbour Board*. It is important on the way through just to note that on page 17 there's one typographical error at line 2, the reference to s.76(4)

should of course be to subsection 2(d) and in 56 we repeat the arguments that we made in *Trinity* in relation to the decisions in *Cecil Brothers* and *Europa*. Might I enquire Justice Blanchard were arrangements made for Your Honour to receive copies of the Commissioner's submissions in *Trinity*? There are quite a number of references in our

Blanchard J Yes. I don't know how much I've been given. I actually extracted some of your *Trinity* submissions last week in preparation that the general portion

White Yes.

Blanchard J Whether I've got everything you are now wanting me to look at I'm not sure.

Elias CJ No, the Registrar told me that he'd given you the main submissions and also the little green folder.

Blanchard J I've got them but I haven't looked at them.

White Just to note Your Honour that in some places here there are references made to the *Trinity* submissions which we haven't elaborated on but they are contained in the materials that have been provided to Your Honour.

Blanchard J Yes.

White In para.57 there is further reference to the judgment of the Court of Appeal in *Ch'elle*, including in our submission important passages relating to the operation of the GST Act and the scheme of the legislation, and in particular in para.41 of that quote on page 18, we note 'the wider the temporal gap between the taxpayer's eligibility for an input tax credit and its liability for output tax, the less likely the arrangement conforms with the intent of the Act. We do not suggest the Act intends that there be no delay but that significant delay can indicate a crossing of the line into tax avoidance'. And I've already covered all of pages 19 through to 21

Tipping J I can't let that go by without some comment. Surely it's artificial delay that will be an indicator of avoidance, not delay per se. I only mention it just seeing as how you were emphasising it yourself, but with respect that seems to me to be a rather loose and potentially quite dangerous observation. I can understand contrived delay being a clear indicator, but just delay in the ordinary course can't surely bite according to its length.

White No and we're not suggesting it does, or that it's relevant here, it's just simply the point that it is a factor

Tipping J No, it's the statement 'the wider the temporal gap'. That can't be right surely, per se.

White In the circumstances of a particular case it could be a factor.

Tipping J It could be a factor?

White Yes.

Tipping J Right, well we'll let it go at that.

Blanchard J Mr White, the thing that's still troubling me is that the tension between a transaction which makes commercial sense for each of the parties to enter into, here, to use the current cases and illustration, on the factual findings below, the parties genuinely believe that there's so much stone there, sufficiently easily extractable in the short-term that it's worth \$45 million dollars. Neither of them of course is all that wealthy and in particular the purchaser isn't. The purchaser wants to protect himself against insolvency so he wants to use a special purpose vehicle lest the project fail; the helicopters crash, or the weather is bad for 365 days times three years. The vendor wants to protect his ability to get back the licence should it still have any remaining value in the event that the purchaser's product crashes and burns. The structure they've devised makes perfect commercial sense from both sides; again assuming there's no personal guarantee. So if you're looking at effect, and if you say their purpose is to be found from the effect the commercial effect makes sense. Sitting along side that effect is a tax effect. Now are we able to factor that in regardless of the fact that the transaction is – assume for a moment – commercial?

White And assuming on Your Honour's hypothesis, no, the economic burden is born; no contrivance and artificiality and no pretence. None of the ordinary indicia are there for the arrangement.

Blanchard J Well certainly no pretence on my assumption. It might be a question about economic burden being born, but that's where I was interested whether or not there was a guarantee.

White Well it will depend because you have to look at the whole arrangement, and we don't accept of course Your Honour the

commerciality analysis, but Your Honour's asking me to assume that. On that assumption one still

Blanchard J Well I mightn't accept it sitting at first instance, but I'm not.

White Well that gets us back – we go around in a circle again, because Your Honour is with respect bewitched or seduced by the Judge's findings in the sham context which is why I wanted to at the outset this afternoon tried to emphasise

Blanchard J No, I was really bewitched by his finding that the parties genuinely believed that it was worth \$45 million dollars.

White Yes, very strange Your Honour.

Blanchard J If they didn't then it's an obvious device.

White Yes.

Elias CJ I wondered

White But

Elias CJ Sorry.

White No I'm sorry Chief Justice.

Elias CJ Well I just wondered whether you are selling the section a bit short though by the emphasis on commerciality, because although that may be a relevant consideration, I can't see why the arrangement shouldn't be able to be avoided vis a vis the Commissioner if it is entered into between persons to defeat the intent and application of the Act even if it makes commercial sense.

White Well that's why I was reluctant to answer Justice Blanchard's question with a simple yes or no. I was saying it would depend, and yes we would agree Chief Justice with you.

Tipping J It all depends on what the intention of the Act is in this respect.

Blanchard J I agree with what the Chief Justice has just said. If there was a purpose then that is the effect.

White Yes.

Blanchard J But whether if there's an effect but no actual purpose, you can deem one when the transaction is commercial, but just happens to have a good tax effect from the point of view of the taxpayer, that's what I'm pondering.

White And that was Your Honour's question about *Ashton* too wasn't it yesterday?

Blanchard J Yes, I find that a very difficult question.

White Well it's quite a philosophical one because as I recall the Privy Council following on from *Newton* says that the effect will tell you what the purpose was and the purpose will always tell you what the effect was.

Elias CJ But it's not always so, I think that's really what you're saying isn't it, that the effect may not, but purpose will

White Won't it always be Chief Justice if it's – I sound like a broken record – if it's looked at objectively and it's the arrangement?

Elias CJ Well yes I keep sliding back into thinking of it as subjectively. I'm not sure, I'm not sure about that anyway.

White But if it's the effect, which is what it's called, the effect, then isn't the inference that can be drawn, regardless of what the motive or the finding of genuine intention was, that the purpose was the same as the effect - it must have been?

Tipping J The only way it would then defeat actually is on this open market value being the over-arching principle behind the whole set up. Because that has to be established doesn't it before you make any progress?

White Not as high as that Your Honour. I thought the propositions I put after lunch were directed to show how that fitted in.

Tipping J Yes I understand that, but the intention of the Act in some respect has got to be defeated.

White Yes, yes.

Tipping J That's all I'm saying

White Yes.

Tipping J And you have to identify what that intention is.

White Yes, and we say it is in the context of open market value in the limited context because we don't want to overplay that card in the context of the indicators I gave after lunchtime – the first one.

Tipping J Yes, yes, you've got to cross that bridge.

White Well that's one aspect, then there's the payment one too.

Tipping J Yes. I've been anxious to get on to payment.

Elias CJ The open market value though is not everything in this because in a way it is evidence from which you infer that the scheme of the Act in matching your input and outputs or whatever is defeated.

White Yes.

Elias CJ Yes so objectively you could, yes I've forgotten what I was going to say.

Tipping J It's a conundrum.

White I did want to come back Justice Tipping as I did after lunch to put the Commissioner's position in relation to open market value in the limited context that we see it under the Act, and that's what I did.

Tipping J I understand that.

White Yes. I had intended before leaving the subjective objective points just to note the Australian provision, which is different, but there is an Australian case which does touch on this and I'm bound to draw it to Your Honours' attention and I meant to do that earlier, but under tab 9 of the Commissioner's bundle Your Honours will find the equivalent provision in the Australian legislation in relation to GST, and I acknowledge immediately that it's

Blanchard J Is this your supplementary bundle or the blue bundle?

White No, our supplementary bundle.

Elias CJ It's 165 is it?

White Yes that's right. It's in the Commissioner's bundle of additional authorities. And of course the language is different and Your Honours may well consider that it avoids some of the construction difficulties that we've been grappling with, but it's got a description of what it's

about. It actually says it's aimed at artificial or contrived schemes, and it defines what a scheme is and matters to be considered in determining purpose or effect, so it's more like BG1 and the replacement section, but the issue of subjective objective is touched on in a decision which is attached at tab 21, and although I hesitate to cite a decision of the Administrative Appeals Tribunal, it does refer to the High Court of Australia and Federal Court decisions on this question of subjective objective, certainly in the context of that Act. But over at page 204 to 205, at just two paragraphs I wanted to draw to Your Honours' attention. First of all was para.81 which Your Honours will recall the *Spotless* case is a tax avoidance case rather than a GST one – sorry it's an income tax one – where the majority said 'a reasonable person would conclude that the taxpayers in entering into and carrying out the particular scheme had, as their most influential and prevailing or ruling purpose, and thus their dominant purpose, the obtaining thereby of a tax benefit'. Para.86 the question is postulated 'is an entity's subjective opinion entirely irrelevant?' In *Macquarie Finance* Justice Hely said 'the part IVA enquiry is driven by objective considerations. Evidence of the subjective motives of persons who entered into or carried out the scheme is irrelevant, nor is it material to enquire whether or not the participants in the scheme would have proceeded with it had they appreciated that a deduction for the interest payments was not available. The conclusion as to purpose is to be drawn from the eight objective matters listed. In his judgment in *Macquarie*, Justice French did not consider it necessary to consider the application of Part IVA. Had he considered it necessary, continued, he would have decided that Part IV would not have applied for the reasons set out in the judgment of Justice Hely. Three months later, Justice French set out his own analysis of the requirements of s.117(D)(b) without reference to *Macquarie Bank* and concluded', and it's the next passage Your Honours. 'It does not follow from the irrelevance of the subjective state of mind of the taxpayer that objective factors, tending to indicate that a particular purpose was subjectively held by a person, may not also be relevant to the determination of the objective purpose which could be inferred by a reasonable person'. Now that, if one looks at footnote 108, is a decision of *Calder v Federal Commissioner of Taxation*, and we have provided that, the whole decision to Your Honours in our red volume under tab 8.

- | | |
|----------|---|
| Elias CJ | Is that under the provision you took us to or is this now – this is income? |
| White | No, this is still tax avoidance but it's the wider issue and I feel obliged to draw that to Your Honours' attention because it may be of assistance in one sense in dealing with the subjective objective |

dichotomy, and I just wanted to note that *Calder* was in fact a decision of the full Federal Court comprising Justices French, Stone and Siopis and that paragraph that I've read appears on page 5072, para.96, 'after a citation from Justices Gummow and Hayne in *Hart*. And in a way that's encapsulated one way of looking at it, which is that if you're looking at the objective purpose, that while the irrelevance of the subject state of mind of the taxpayers is irrelevant, it may not also be relevant to the determination of the objective purpose, which I think in a curious way might at times

Elias CJ Well if people intend some purpose that may help the Court in drawing the inference that objectively it was held if reasonable people can form that view I suppose.

White Yes, and I suppose the classic example of that was the CSI business plan in the *Trinity* case. But coming back to the point here is that if the effect is to defeat the intent and application of the Act, then applying *Ashton*, that must be the purpose, and either way the requirements are met.

Blanchard J So I think you're saying that even if the transaction makes commercial sense, if it has the effect of defeating the purpose of the Act, sorry, the intent of the Act, then the taxpayer is to be taken to have had that purpose?

White Yes Your Honour.

Elias CJ It's not putting it quite accurately though, because it's if at the time the arrangement was entered into it had the effect

Blanchard J Yes.

Elias CJ So it's very important not to reason backwards from result.

White I'd just like to reflect on that because of course there is

Elias CJ It may be evidence.

White Yes, well that's why I was hesitating. There may be subsequent evidence from which the effect can be inferred or

Blanchard J But the Chief Justice has to be right, because of the word

White Oh the time, yes the time, but I'm

Blanchard J Has been entered into.

White Yes, but you don't put on blinkers as to what subsequently happened.

Tipping J But you don't drive off result though; you drive off conduct surely. You don't drive off result per se. You must drive off something that's happened or what someone has done or not done in the course of getting to that result.

White Well that will be evidence

Tipping J Yes.

White To support the effect and the purpose.

Tipping J But I like the Chief Justice am very weary of simply saying well the result was a disaster so they must have, you know, they must have known it was a jack-up from the start, putting it very colloquially.

White The result was disastrous you mean from the Commissioner's point of view?

Tipping J No, no, from their point of view.

White Oh I see, I'm sorry.

Tipping J Anyway

Elias CJ If at the time it was entered into it had the effect of defeating the tax arrangement, then I would have thought that you could infer that it was entered into with that purpose.

White Exactly Your Honour, yes, we agree with that.

Elias CJ But it has to be absolutely clear, which is why I suppose you say the gross valuation, there was no hope that the output tax would ever be collected?

White Correct, and that was certainly known at the time.

Tipping J Not so much that it was known at the time but that was objectively the effect at the time from which the inference could be drawn.

White Yes.

Elias CJ Or if it's subjective, then it could only have been appreciated.

White Precisely Your Honour. Moving on then to the submissions, page 21, where we apply s.76, the arrangement which we covered. I've covered 67m the two respects. I think we've covered the open market value and I wanted to come now to the payment question which is the issue at para.75, and as we've noted 'there's a clear legislative intent that any input credit claimed in respect of a supply by an unregistered person of a second-hand good, is to be limited to the tax fraction of the payments actually made. In the present case this intention has been defeated by GHL

Blanchard J Sorry, where are you reading from?

White I'm sorry Your Honour, para.72, on page 25.

Blanchard J Thank you.

White I'll start again. 'As noted above there is a clear legislative intent that any input credit claimed in respect of a supply by an unregistered person of a second-hand good is to be limited to the tax fraction of the payments actually made. In the present case this intention has been defeated by GHL making in juristic terms a \$44.92 million dollar payment by the provision of a loan and exchange of cheques in circumstance where in commercial terms there was no payment at all. It was of course this payment that ensured that again in juristic terms GHL was entitled to claim a \$5 million dollar input credit under s.20(3)(a)(ai). However GHL suffered none of the economic burden that Parliament intended to be a pre-condition of its ability to claim this input credit for the reasons that follow. First, as a matter of objective fact the \$44.9 million dollars could only be truly paid or more accurately repaid by GHL if it worked the mine. Thus the liability was conditional on the success of the project. In turn it is well-established that conditional obligations do not meet the definitive commitment required by income tax law to constitute a deductible expense' – and the authority is given. 'There is no cogent point of distinction to be made in the context of the GST Act. The evidential support for the proposition that the payment in the present case was conditional is as follows. 1, GHL was a shelf company with no other assets beside the licence, no guarantees provided by Mr Fahey, and entirely dependent on the success of a speculative operation for the ability to reply', and we've given the references to the Court of Appeal. 2, 'the company was insolvent in 1998 and subsequent income tax years. There was no guarantee by Mr Fahey and no asset beyond the licence itself. The mortgage over the shares allowed Mr Meates to take back control of the licence. GHL assumed no obligation to work the licence. Mr Michael Meates confirmed that he understood he would be repaid once GHL started to work the licence', and the references are given. 'Mr

Fahey confirmed in cross-examination that GHL's ability to pay was dependent on its ability to work the licence. Secondly the exchange of cheques added nothing if there was not in economic terms the suffering of a definitive commitment to repay irrespective of the success or failure of the venture. In this regard the quality of the commitment is to be judged by the surrounding circumstances not by the terms of the contractual documents alone. The two cheques were written by solicitors and banked into the solicitors' trust accounts. The trust account entries were made with respect to Mr Meates and GHL, but no cheque was drawn by Mr Meates on his account or deposited in GHL's account. Nor was a cheque then drawn by GHL and paid back to Mr Meates. Mr Mortlock gave unchallenged evidence that in transactions of this size it was very unusual to settle with trust account cheques. Further the solicitor would expect to receive cleared funds from the client before drawing a cheque on the firm's trust account. Here the obligation to pay the purchase price was replaced in commercial terms by a conditional commitment to repay a loan. The loan and swapping of cheques in the context of the facts in this case considered as a whole were insufficient to constitute the economic sacrifice that Parliament intended when limiting the second-hand goods refund to the extent that payment is made in the period in question'.

Tipping J I wonder if I could raise with you Mr White a slight variation of that theme. On the premise that the licence was worth \$45 million dollars, Glenharrow received an asset worth \$45 million dollars. The asset that was received in exchange was a loan, an obligation to pay \$45 million dollars which could never have remotely I would have thought have been sold on the market for anything like \$45 million dollars. I mean any purchaser of that loan would have discounted hugely against its face value as a matter of commercial reality. Hence there was no payment, at least of \$45 million dollars. I don't know how much the loan would have been worth on the market. It just strikes me that that is one rather troublesome aspect of this that there wasn't an equal exchange of values. I don't know whether that has anything to do with the concept of payment in this field.

White In this field, where one is looking at it in reality and substantively, I think Your Honour's analysis is helpful.

Tipping J Because never mind all this you know conveyancing who-ha about whether you swap cheques for this sort of money, but the reality of this was that there was never remotely an equal exchange of values. I think one could say that without fear of contradiction. There was no way they were going to get \$45 million dollars if they'd tried to sell the loan, so that troubles me but I can't quite see where it all fits in.

White Well I would have thought Your Honour that it's particularly helpful to indicate that the purpose effect was to defeat the intent and application of the Act.

Tipping J To some extent. Quite how much of course is not an immediate question is it?

White I haven't got to that stage yet.

Tipping J You haven't got to that stage?

White No.

Elias CJ It's just another way of saying that the asset was grossly over-valued though isn't it?

Blanchard J Yes, I don't think Justice Tipping's analysis with respect works though, because they thought it was worth more than it actually was worth, making that assumption. The value that was actually got was a great deal less than the price and was equivalent to the value of what went back on the mortgage.

Tipping J My point is a bit more subtle than that.

Elias CJ Yes.

Tipping J They sought to get an input tax credit on the basis of \$45 million dollars, but they haven't actually been paid \$45 million dollars. I may be completely wrong

Blanchard J This was Justice Chambers' analysis I think.

Tipping J Well is it, well I don't mind if it's his

Elias CJ Nobody is supporting it.

White Oh yes, I'm really sorry we didn't get to this point earlier.

Tipping J Well I'm not saying I'm a convert Mr White, but it is a point that strikes me as being peculiar if you can do this yet get your input tax credit, and it's more in this payment area.

White Yes, I wanted to pick up because Justice Blanchard's response to Your Honour was interesting because Your Honour Justice Blanchard

immediately went back to what the parties thought and that's not what this is about we would say. That's the point there.

Tipping J Objectively?

White Yes, exactly.

Tipping J The payment did not match the figure on which they based their input tax credit performance.

White Yes, that's right.

Tipping J So there's a huge dissonance between the figure they used for the input tax credit and the true value of what they got in return for the licence?

White Yes.

Tipping J I don't quite know where it fits, but that's the point that I put on the table.

White Yes, I think objectively and looking at the effect, that's right at the heart of the matter Your Honour. I'm not sure that I can say anything more than that. I think Your Honour's analysis is right

Tipping J Well it's very simplistic I dare say, but maybe too simplistic.

White Well not necessarily. That simple analysis may get to the heart of the matter here.

McGrath J Are you able to express in positive descriptive terms what the arrangement was? I mean you've highlighted a number of features of it, but was it a long-term agreement for sale and purchase, but I'm talking now about economic substance terms, at least on your view of the matter.

White Yes Your Honour it is touched on but perhaps not as adequately as Your Honour is seeking in para.65 of our submissions, which I passed over quite quickly, but I would like to accept Your Honour's invitation to have a better go at the arrangement in the context of the exchanges which have taken place. I'm not sure what time Your Honour was contemplating

Elias CJ We can take the adjournment now. We'll take the evening adjournment now thank you. How much longer do you think you'll want to be Mr White? You may be slightly delayed because some of

us are involved in a leave hearing at 9am, but we'll try and start at 10am.

White We should be here at 10am certainly Your Honours yes.

Blanchard J Yes.

Elias CJ Thank you.

White And I think we'll certainly finish tomorrow without any difficulty.

Elias CJ Yes, thank you.

White I really wanted to be in a position to answer all the various questions that have been raised.

Carruthers Your Honours can I just raise the issue as to my learned friend's position on these factual questions because there is an issue of what I'm replying on and I wondered whether the intention was that he should deal with any factual matters tomorrow before he completes? I haven't had an opportunity to discuss it with him.

Elias CJ Well he might not have had an opportunity to think it through following the day's hearing, but what I envisage is that if Mr White feels that he needs to trawl through the evidence and send us in some more references, he'd be able to do that by way of memorandum, unless he has some other, and of course you'd be able to put in any others, in response, but he may feel that that's unnecessary when he has a chance to think about it.

Carruthers Thank you Your Honour.

Elias CJ Thank you.

3.58pm Court Adjourned

Glenharrow - Part 3 – Wednesday 10 July 2008

10.09am

White If Your Honours please, there should be a one page note of responses principally to questions raised by Justice McGrath

- Elias CJ Before you go to that we've just been discussing we think it would be helpful, given the state that the argument has got to, if you could take us back to the findings made before we get into this – the findings made by Justice Chisholm, both as to belief in the value, the paragraph, and also as to whether GST had been in contemplation. Can you just remind us of those? Sorry, we would have done it before hand but didn't have the volumes with us.
- White I think the first one Your Honours may be under para.163, conclusion. 'I find that Mr Meates and Mr Fahey gave truthful evidence about their intentions when they entered into the agreement to purchase the licence. Mr Meates sold the licence with the intention that the price of \$45 million dollars would be paid in full. Mr Fahey purchased the licence with the intention of mining it and meeting the payments due to Mr Meates from the revenue. As it turned out both were much too optimistic, but that does not detract from the fact that the agreement was genuine and the parties intended to implement it according to its terms. There was no sham'. Is that the
- Elias CJ That's one, yes. So that was directed at sham?
- White Yes, yes. And then going backwards I think on the GST point, Your Honours I think it's in para.39. 'In response to supplementary questions, Mr Meates refuted any suggestion the agreement was set up for GST purposes. He said that he always expected to receive the payment due under the agreement'.
- Elias CJ And what's the Judge's finding on that?
- White And in 51 Mr Fahey is saying much the same thing where that's just a summary of the evidence. I think it may be para.214 where His Honour said 'I should add that had the defendant's argument as to the interpretation of s.76 been upheld' - which must mean the subjective argument – 'I would have concluded that the section had no application. I would have also decided that s.76 did not apply if I had been confined to an objective assessment'. If Your Honours please that must be a typographical error for subjective. It simply doesn't make sense otherwise. It must be subjective. 'Of the purpose of the transaction which, in my view, was not to obtain a GST refund but was to obtain the licence so that it could be mined'. And that paragraph has another error. The reference to defendant must be plaintiff.
- Elias CJ Yes.

White So that paragraph should be corrected with respect to read 'I should add that had the plaintiff's argument as to the interpretation of s.76 been upheld, I would have concluded that the section had no application. I would have also decided that s.76

Elias CJ It may not be, because if you read defendant as is written then objective is correct isn't it, that he's talking about the Commissioner's argument as

White No, because he found in favour of the Commissioner.

Elias CJ Yes.

White There are various ways to correct the paragraph by putting different 'nots' in places, but I think what we've suggested, and it's not an uncommon error to think of the Commissioner as the plaintiff. And equally one might add it's not an uncommon error to think that the Commissioner is the plaintiff with an onus of proof, which is a double error as it were. But that's the paragraph.

Elias CJ But does the Judge ever address the question whether if the transaction being the mining licence operation is not sham, it's genuine, there may nevertheless be an arrangement to defeat the intent and application of the Act?

White Yes certainly, that's the whole of the section that starts in para.171 which is the interpretation of s.76, and working through that through to particularly 176 where he refers to the High Court judgment in *Ch'elle*, and in 178, and then notes in 179 that the counsel for the defendant, correctly the Commissioner, submitted that *Ch'elle* was correctly decided. At 180, 'in terms of its underlying purpose there cannot be much doubt that s.76 was intended to be an anti-avoidance provision'. And then he refers in s.181 to the 'what must exist – the arrangement', and then he notes after that 'as already mentioned it is already mentioned it is common ground that the first requirement has been met. To a large extent the competing interpretations revolve around the second requirement which I now consider', and then I think Your Honours yesterday to 182 when I was talking about the interpretation of s.76, this was his approach. There it is in 182, and 183 he put himself alongside Justice Rodney Hansen that it couldn't be the personal motives. That's an important paragraph. 'Apart from producing an erratic application of the section as noted by Justice Rodney Hansen, such an interpretation would almost certainly render the section virtually useless and destroy its anti-avoidance purpose'. And I think I read that yesterday. And then he recognised the argument against that

Elias CJ Sorry, I'm being reminded of it. I'm just trying to link the evidence again, the findings of fact, but it's because he takes the view that the dominant purpose is all he's concerned with.

White Yes, and then he goes on in 186 to interpret intent and application, and he refers to s.20(3)(a), and he says

Elias CJ You don't accept that it has to be the dominant purpose that is the correct approach do you?

White No, no Your Honour. But we do agree with the approach that he's adopted there in 186 and 187.

Elias CJ Yes.

Tipping J You agree with it without the word 'dominant' I take it?

White May I just have one moment.

Elias CJ 185 I think is the critical passage.

White I think we discussed that yesterday Your Honour. If the effect is to defeat the intent and application then that's the purpose objectively.

Tipping J But do we need in this case, as opposed to in cases under the Income Tax regime, to concern ourselves with dominance and merely incidental and all that stuff?

White No, no.

Tipping J No.

Elias CJ Or sole or dominant? On sole?

White No, which is why the subjective

Tipping J I mean it must be in effect more than sort of *de minimis* or more than just trivial

White Real.

Tipping J Yes.

White Yes Sir, that might be a better word - in real practical terms. And the other paragraph which I think my learned friends referred to is 213,

which is the other part of the conclusions that start at 212 and 213 'it follows that the consideration of \$45 million dollars is grossly inflated. It also follows that the arrangement had the effect of grossly inflating the input tax thereby defeating the intent and application of the statutory regime. In the overall context this was plainly' and we leave out the word 'dominant', 'the effect, giving rise to a tax advantage'. Those were the

Elias CJ Yes, thank you, that's helpful recapitulation.

Blanchard J Can I just ask about Mark Meates' valuation. His figure of \$45 million dollars, is that \$45 million dollars as a cash price or is it \$45 million on deferred basis?

White I think he intended it to be the cash price.

Tipping J The point wasn't directly addressed I don't think.

White No.

Tipping J But surely if you're valuing, you'd normally value on a cash basis.

White Yes you would.

McGrath J Well you're obviously not valuing contingencies are you?

White No, no.

Blanchard J So we have a valuation for cash and a deal which in economic effect is a deferred payment structure.

Tipping J With no interest.

McGrath J I'm sorry why do you say with no interest?

Tipping J Well there wasn't any provision for interest.

Blanchard J And can I just add another element, and then that deal is structured as for a cash deal with an economic effect which is different. It seems to me that that possibly is the artifice.

White And that's Your Honours I think the very first answer on this paper that's handed out is exactly what we're addressing.

Blanchard J I haven't read that.

McGrath J The transaction as documented did provide for interest at 10% did it not?

White As always in this case, I'm told that it started with interest, then they changed it and took it out and then they put it back in again. Now I'll have to get the references for all of that.

McGrath J I think the key thing for us will be the transaction as concluded, unless there were variations which I had not understood.

Tipping J Well I may have got the interest thing wrong then.

White I'll check that.

Tipping J Of course the rate in interest and so on could become relevant too.

Anderson J I think your other counsel may have mentioned this but I can't find my note Mr White. Was there any evidence or finding about where the \$80,000 dollars came from?

White Yes there is and it was asked of my learned friend.

Anderson J Yes that's right it was.

White But the answer is as I recall it, it was provided by Mr Fahey - \$20,000 dollars in cash, and he borrowed the \$60,000 dollars and then he subsequently repaid the \$60,000 from a matrimonial property settlement.

Anderson J Yes I recall some of that now, thank you.

Tipping J Was there any examination at the trial though I expect the answer to this is no, of the financial position of Mr Fahey outside this transaction?

White Beyond the questions relating to the answers I've just given, I don't believe so.

Blanchard J Well as he hadn't given a guarantee it might not be pertinent anyway.

Tipping J Well that's a point of some delicacy.

White Well I thought yesterday he had given a guarantee, but I'm going to address that too, because that's in this note, coming back to that.

Blanchard J Yes.

- White Might I go through the note – Your Honours have it. We were asked to provide a positive description of the arrangement in economic substance terms, and our effort involved the purchase of a mining licence subject to conditions for a grossly inflated price, \$80,000 dollars which was paid in cash, with the payment of the \$44.9 million dollars balance being structured juristically in a way that triggered the GST refund of input tax on the whole amount under s.20(3)(a)(ia), notwithstanding that in commercial terms the economic worth of that payment – that's the loan – was nowhere near \$44.9 million dollars, and secondly the payment loan was economically meaningless as it could not be enforced in a way that would realise anything like the \$44.9 million dollars owed. And can I go straight to point 4 before coming back to 2 and 3, because we were asked about Mr Meates' evidence in relation to the personal guarantee and he gave similar evidence to Mr Fahey, namely he didn't think there was one. Now if the mortgage over the shares is read to the contrary of their evidence, namely that there was a personal guarantee by Mr Fahey, then that must be meaningless in substance because the parties objectively had no intention to enforce it. Now it may be too late as Your Honour Justice Blanchard said yesterday, to pursue sham, but it's not too late to draw this inference from the fact that it was not enforced.
- Tipping J Well if neither side thought there was one, it would be a bit odd if you ever got an enforcement.
- White Yes.
- Blanchard J Well it would be a fairly good case for rectification.
- Tipping J Yes.
- White Yes, but from a substance point of view it all goes to the contrived nature of the arrangement in substance.
- Tipping J Because they can hardly turn around now and say that there was one in order to make it look more economically realistic.
- White Precisely, and it has to be borne in mind in all of this with respect that the onus was always in respect of these matters on the appellant, so that these inferences can properly be drawn.
- Tipping J So you're saying whether their's most practically is, assuming this economic substance exercise is relevant, then they have the onus of showing that it was of economic substance?

White Yes.

Tipping J You don't actually have to show that it wasn't?

White Precisely. I was going to go back and deal with the interest point by reference to the judgment. If Your Honours go to Justice Chisholm at paragraph 23, you will see set out at below that paragraph the partly typed written and partly hand-written letter from Messrs Meates and Fahey to their joint solicitor, Mr Pengelly, and at the end of the second paragraph it states 'it will take two years for the mining operation to get organised and no interest is payable for the first two years. No repayment of capital for three years'. Then in para.24, there's reference to the mortgage of the licence, and the second sentence reads 'it also provides for penalty interest at the rate of 20% per annum.

Tipping J The primary rate was 10 wasn't it. That's what was in the previous one that up to two years the interest was to be 10%.

Blanchard J Did the mortgage have a rate of interest in it, other than a penalty rate? Where do we find the mortgage?

White I'm just getting it found. The mortgage is in volume 7 at tab C. I'm sorry Your Honours, that's the mortgage of the shares.

Blanchard J No it doesn't.

Elias CJ Where are you looking?

Blanchard J At page 1135. Ordinary interest rates are crossed out, and unless there's a replacement paragraph somewhere, the mortgage is without interest.

Tipping J Where does one find that? I'm not as familiar with it.

Blanchard J At page 1135.

Tipping J 1135, thank you. Mine goes backwards.

White Yes, so does mine Your Honour.

Blanchard J Well you have to cater for different types of

Tipping J Brother Blanchard and I have disparate minds.

Blanchard J Disparate or desperate. I don't think there's an interest provision in the debenture either.

Carruthers Page 1094, at clause 3.3.

Blanchard J Sorry?

Carruthers Page 1094, at clause 3.3.

Tipping J Interest if demanded, but how much? Nominated rate, bank rate and default less more frequent than monthly.

Elias CJ Sorry what page is that?

Tipping J 1094.

White 1094. It's under tab D Chief Justice.

Elias CJ Yes thank you.

Tipping J Did anyone purport to value what an ordinary commercial financier would pay for this loan Mr White – I presume not?

White No.

Blanchard J The mortgage would have to override the debenture though because the debenture is giving a right to demand the principal sum at any time under clause 3.2, whereas the mortgage makes it quite clear that the principal payments are to be paid over three years.

Tipping J So the specific charge would prevail over them.

Blanchard J Well I would have thought so if you had that kind of contradiction.

Tipping J Yes.

White And the position under the debenture is in fact referred to the judgment Your Honours at para. 26, so the Judge was aware of that. At the end of para.26 – 'if demanded interest is to be paid at such rates as are nominated by Mr Meates not to exceed'.

Blanchard J Is there any evidence about these differences in the documentation? I'm not thinking of Mr Mortlock's evidence, but is there any explanation given in evidence by the parties to the documents?

White It's not recalled that there is Your Honour.

- Tipping J Well if Mr Frankham thought a discount rate of 30% was relevant for his present value calculation on a yield basis, this loan back would have been even more heavily discounted I would have thought.
- White Yes. All supporting of course the description in para.1 of our note.
- Tipping J Yes. Well maybe ironically this is a case that turns not as much on the value of the licence, as on the value of the loan, or the value of the payment.
- White Yes. I'm not if it's necessary for me to go any further on those points. I think that they are encapsulated in the note and unless there are any other questions on that.
- McGrath J Thank you.
- White The other two points Justice McGrath were first of all the history of s.76, and we've confirmed there was none, but I can read unhelpfully as it happens from the explanatory note to the Bill which reads in relation to the clause that became s.76. 'It is an anti-avoidance provision. It provides that where the Commissioner is satisfied that an arrangement has been entered into to defeat the intent and application of the Bill, the Commissioner shall treat the arrangement as void and may adjust the tax liabilities of any person effected by the arrangement accordingly'. So you can see why we said that there wasn't much in the history that was of assistance. That perhaps was written before some of the more modern notes. And then on evasion we've given the reference to the provision in the Tax Avoidance Act, s.143(b), and just given as an example that if a taxpayer knows an arrangement is ineffective for GST purposes because it's caught by s.76, then there's the risk of guilt of evasion, and one would suggest that if Mr Russell's template schemes were being entered into now, the law on all of that too would be considered to be evasion'.
- Blanchard J But by someone who knew that law.
- White Yes, it's the knowing, yes certainly.
- Blanchard J Yes.
- White So Your Honours that brings me back to our written submissions at page 27 – an area that I can move through with considerable rapidity because that's been covered really before in relation to *Cecil Bros* and *Europa* and the reference to the *Trinity* submissions. There's just one matter though really for Justice Blanchard. With the *Trinity*

submissions there was a green folder and in the green folder under tab 5 there are some notes for the Commissioner about the judgment of the Privy Council in *Peterson*. I wasn't going to go through those again unless Your Honour wished, but just to draw Your Honour's attention to the existence of those notes in that folder.

Blanchard J Yes thank you. Well I trust that when I read this I will understand the *Peterson* decision for the first time.

White Well I'm not sure whether that comment requires a response from counsel, but perhaps there is an explanation as distinct from an understanding that may emerge from those notes. Perhaps I could leave it like that. And then unless Your Honours had any questions about anything on pages 27, 28 and 29, we would move straight through then to the second issue, the *reconstruction: the appropriate adjustment*, and the approved issue in the leave judgment is did the Court of Appeal correctly determine the amount of the adjustment, and we note – and I'll come back to that to support that approach, but if the Court decides the Court of Appeal is wrong, then in the Commissioner's submission, the Court will need to consider whether Justice Chisholm's decision, which on this issue is challenged by the Commissioner, is right and what you would then need to do in relation to what Justice Chisholm did, or what alternative might need to be done, and that's why we've suggested it might well in that circumstance need to be referred back to the High Court, but hopefully one would not need to get to that position. So our first point is as set out in paras.83, following on page 29 that on the assumption here of course that 'avoidance is bound to exist under s.76, subsection 1 requires the Commissioner to treat the arrangement as void and to adjust the amount of tax refundable so as to counteract the tax advantage. Section 76(4) defines tax advantage as including any increased entitlement to a refund', and in 85 we make the important point that 'while it is mandatory to reconstruct, how he does so is a matter for discretion. In exercising that discretion, he is permitted, but not required, to do what is prescribed in ss.(2). The statutory test centres on the Commissioner's assessment of what is appropriate. Thus although for example he may reconstruct by reference to the open market value of the supply, it is not mandatory for him to do so and in some cases it will not be appropriate to do so'. And we would submit that 'in the manifest unreasonableness, considerable weight should be accorded to the Commissioner's exercise of discretion in this respect'. And 'in the present case, the Court of Appeal held that the Commissioner was right to limit the amount of input tax payable to the tax fraction of the amount actually paid by the company for the supply

Tipping J That means paid in cash I take it?

White Yes, yes. And we refer to the Privy Council in *Miller*, and in 88 we would emphasise 'in the present case there is an objective and indeed obvious inference to be drawn that absent the tax advantage that was sought to be effected by the arrangement GHL would not have purchased the licence at all. Absent the input credit GHL had no assets and no money to fund the purchase of the licence, let alone the working of it. Objectively, it cannot reasonably be supposed that GHL would have purchased the licence for any of the values assigned to it by the experts called by the Commissioner at trial, the purpose of whose evidence was not reconstruction but to demonstrate the gross over-inflation of the purchase price. Moreover in the face of conflicting evidence as to the market value, it is not reasonable to expect the Commissioner, or indeed the Court, we would add to hypothesise in this respect. In light of these factors, and also the clear intent of the relevant provisions of the Act, it is submitted that it is in any event right that GHL's input credit be limited to the tax fraction of the cash payments actually made'. And then we refer to the alternative arguments which I will come back to in a minute. But just elaborating on that Your Honours, the cash payments actually made were first of all the \$80,000 thousand dollars to which has been made which was at the time of the transaction in June 1997, and then a further payment – and these figures are given in para.38 of our submissions – \$100,030.53 on the 23 December 2002, and then \$110,000 on 29 November 2004, and that gives the total of \$290,030.53 and the Court of Appeal held that the fact that there'd already been the GST refund in respect of the \$80,000 thousand dollar deposit, the further amount that should be taken to account was the \$210,000 thousand dollars, that's the subsequent payments in 2003 and 2004. Now the next point to note Your Honours is that neither the Commissioner nor Glenharrow supports Justice Chisholm's adjustment based on the \$9.57 million dollar figure that's set out in our red folder in tab 2. Glenharrow says it's \$45 million dollars, well the adjustment on \$45 million dollars or nothing, and Glenharrow called no evidence to suggest any other figure, and we would submit in that context that the approach of the Courts in tax avoidance cases on that - that's in *Buckley v Young* which Your Honours in *Trinity* will recall, which is in the Commissioner's bundle at tab 11, where the onus is on the taxpayer to call evidence to suggest what the figure should have been.

Tipping J And that's they're both wrong and by how much?

White Precisely, that's the point Your Honour, yes, and the relevant pages I've read them to you in *Trinity*, they're at pages 4989, it's *Buckley v Young* in our volume of cases, tab 11.

Tipping J Can a party piggyback on evidence called by the other party, i.e., the taxpayer piggyback on the Commissioner's evidence? I know you say they're not trying to do this, but as a matter of law could they and say well we haven't called any evidence, but if all else fails we adopt the evidence of the Commissioner that it actually was worth \$9 million dollars or whatever.

White I suppose in theory they could. They haven't.

Tipping J No.

White They certainly have never suggested that.

Tipping J I mean that's better for them than

White Well curiously though their argument at the moment is that the Court of Appeal had no jurisdiction to do what it did and give them some more.

Tipping J More than nothing?

White Yes.

Tipping J Is the corollary of that that

Blanchard J They want a reduction.

White Can I just deal with that particular question of jurisdiction? Well first of all I should say that if that argument is right, and Your Honours are persuaded by it, the Commissioner doesn't object. We'd be perfectly happy to go back. The only payment is the refund on the \$80,000.

Blanchard J Well you didn't cross-appeal in relation to that?

White No we didn't, no.

Blanchard J So I don't think we can reduce the figure.

White No, but

Blanchard J Unless asked to do so of course.

White Yes, all I'm simply making the point Your Honours is if you were persuaded by my learned friends that the Court of Appeal had no jurisdiction to do what they did, then you might be forced to go back.

Tipping J And we'd say that Justice Chisholm had no business to do what he did because both sides agree with that.

White Yes.

Tipping J And again we're left with the \$80,000.

White Yes.

Elias CJ Well we'd have to send it back.

White Well if you accept that s.76 applies, and the Commissioner has a discretion, you would have to be satisfied that the Commissioner's exercise of that discretion was unreasonable.

Blanchard J All the Commissioner has done is to say I'm reconstructing this in the way that I see it in reality which was deferred payment. These were the deferred payments actually made, therefore there's a deduction in relation to those.

White That's the practical position. May I though just in defence of the Court of Appeal just make three short points in response to my learned friend's suggestion that the Court of Appeal couldn't do what it did, and the first is that the Court of Appeal's reconstruction is consistent with the Commissioner's reconstruction in his statement of position, with the addition that the Court of Appeal takes into account subsequent events – that's the later payments – for the reasons given in the judgment. So that's exactly what you've said Justice Blanchard. That's the first point. The second point is, there is no time bar because Glenharrow's tax liability reduces, not increases, in other words they get a bigger refund than payable under the original assessment, which of course was the \$80,000, and I don't need to take Your Honours to it, but the section is s.108A of the Tax Administration Act.

Blanchard J Sorry, section?

White 108, capital A of the Tax Administration Act, which makes it clear that the time bar relates to increases as one might expect. And the third point is that in the event under s.138(p) of the Tax Administration Act

Blanchard Sorry s.100 and?

White 38(p)

Blanchard J Yes.

White Is technically regarded as a problem. That's the provision which governs all of these challenge proceedings Your Honour, which is that the Court has the power to correct assessments made by the Commissioner. That's technically regarded as a problem because the reconstruction is not one that was open to the Commissioner at the time the assessment was made, because of course it was only the \$80,000, which is a debatable point, then the only solution consistent with the Court of Appeal's wider reasoning is to revert to the Commissioner's original assessment. But we're not pressing that. The Commissioner in adopting a realistic approach, accepts what the Court of Appeal did.

Tipping J Well it's entirely consistent.

White Yes it is. Now

McGrath J Is the Commissioner's statement of position in the record?

White No it's not.

McGrath J No, don't worry then. I'm not asking for it, no.

White No, and you wouldn't want it. What is in the record though, and I do need to just make one very brief response on this, is the Commissioner's adjudication report, which makes references to the statement of position, and I think there was a submission by my learned friend so I am just replying to this, that the Commissioner is now being inconsistent with his adjudication report, and the response to that is that the Commissioner is bound by his statement of position – that's s.138(g) – but that the adjudication report has no status in law, and for that proposition there is another judgment in *Ch'elle* of the Court of Appeal upholding judgments of Justice Rodney Hansen and Keane in the High Court, and that's reported in 2007, volume 23 of the New Zealand Tax Cases at page 21488, paras.48 to 50, and I'm simply responding to a matter raised. And then the final matter Your Honours is that this is the alternative that if one was going to look at Justice Chisholm's adjustment which was based on his valuation of \$9.757 million dollars carried out in effect subsequently by Mr Frankham making the two adjustments that the Judge required – you can see it very clearly on our tab at tab 2 in the red folder – where the Judge as we noted yesterday took Mr Davidson's figure for volume

rather than Dr Rabone's figure, and then also added on the six months for the tenure and asked Mr Frankham to go away, which he did, and he came back and that produced the \$9.757 million dollars which was the figure that the Judge used. The Commissioner of course appealed against that and was successful in the Court of Appeal and we've just touched on that. If Your Honours reject the submissions I've just been making, which is to support the Court of Appeal, and then wanted to look at Justice Chisholm, it would need to be recognised that the Commissioner's cross-appeal, or the Commissioner's appeal, challenges the figures used by the trial Judge as to volume, because we say the evidence of Dr Rabone should have been accepted – not Mr Davidson – and also challenges the finding on tenure. And I took Your Honours yesterday to the reasons why we say that Dr Davidson's figure was wrong, and that's all set out under tab 4, and I certainly won't do that again, and on tenure there are two points. The first is in response to Justice McGrath yesterday – I said as a matter of law the decisions of the Court of Appeal and the Privy Council in Glenharrow said there was no extension. The evidence is also set out and summarised on that issue in our tab 5, and we submit that there was no basis for the Judge to add on the six months. In other words if you were going to go down that track, those are matters that are an issue, but as I say we would submit that you simply don't need to get there if you accept the Commissioner's submissions and follow the approach of the Court of Appeal. Unless there are any matters I can assist Your Honours. I'm sorry, there may be one. Just one final point Your Honours, which is that if it's suggested that the payment of the loan is an exempt supply for GST purposes, which of course is correct, and that that somehow saves the arrangement, we would submit that that ignores the central point that the payment is part of the wider arrangement that we say operates to defeat the Act.

- Tipping J It's not a question of whether it's liable as an exempt supply, it's a question of what it's worth.
- White Yes, exactly and unless there are any other matters I can assist Your Honours with that's the submissions for the Commissioner.
- Elias CJ No, thank you Mr White.
- Carruthers Yes may it please Your Honours. Your Honours I have prepared a note for reply and I propose to hand it in but I propose to speak to it because it draws together what we say in answer to the Commissioner. The starting point for me to meet the Commissioner's argument is to just clear away what the case is not about and to focus on what Glenharrow's contention is. It's not our contention that because we complied with the specific provisions that in law s.76

cannot apply, and it's not contended that because there's no sham that the section cannot apply, and we've recognised that the cases are squarely against that and we accept that, but where the case gets to is that s.76 has its own place in the scheme and it can apply to those transactions which despite the fact they comply specifically not being shams and as a matter of statutory construction they defeat the intent and application of the Act. Now my submission is that it's not over-arching in the sense contended for by the Commissioner, and Justice McGrath I'm not locking horns with you on that for a moment, but I think that what we say is that the provisions must be looked in parallel because they're both part of the scheme of the Act and it's really a standard approach to anti-avoidance legislation. The distinction that you rightly drew my attention to was that makes that purpose very clear when it says notwithstanding other provisions of the Act. But if you take it as an over-arching provision, you could well finish up with the first enquiry being whether s.76 applies as opposed to whether the transaction actually falls within the specific provisions anyway. So I'm not suggesting we're indifference on that but I think the use of the word over-arching needs to be used with some care. And it's no part of our case that we focus on the taxpayer's subjective intention. We agree with the reasons of Justice Chisholm and of course because he follows the reasoning of Justice Rodney Hansen in *Ch'elle* and we agree with that too, but the proper statutory focus is on the arrangement itself as defined being the contract's agreement plan, understanding themselves and their purpose when entered into. Now I'll come back to this as I recapitulate on the scheme in just a moment. I want to deal with symmetry because that's another concept that requires some care. I've submitted that it's an unreliable notion and reliance on it for matching inputs and outputs is unsound and will often be misleading. I've submitted there's no necessary connection and when one's considering symmetry, one needs to have regard to the two factors I've noted – the businesses fail, or a particular business transaction may itself fail to achieve its overall profitability. The wrong choice made – asset doesn't achieve its purpose; the price was too high in considerations like that, and the second factor is both zero rating of exports and the supply of exempt financial services will in many cases determine what the outcome is and will upset the symmetry because there won't be a match. I gave you the example when I addressed earlier of Fontera and the mismatch that there will always be there, but in looking at this case, if the proposed venture that substantially founded Glenharrow's purchase decision had actually been achieved; namely the quarrying of the stone for cutting into slabs and export to Indonesia for final finishing, it would have been in the same position as Fontera and also substantial exporters. The inputs would usually exceed the outputs because of the zero rating, and this really when one thinks about it is

a similar concept. In income tax many transactions in the income tax regime are affairs of capital and they're conducted on capital account, business factory or plant. They're not re-characterised simply because we have an income tax system based on revenue, and can I in this connection just deal with that decision in *Ch'elle*. It's in the Commissioner's orange bundle under tab 12. It's the Court of Appeal decision, and it's para.41, talking about the temporal gap and with respect to the Court of Appeal in *Ch'elle* that simply can't be right because when one analyses the factors that I've taken you to, in any export case you're going to finish up with an infinite temporal gap. That can't be the test.

Elias CJ Sorry, where were you referring to then?

Carruthers I was under tab 12 in the case of *Ch'elle* in the Court of Appeal and I was at para.41.

Elias CJ Thank you.

Carruthers And the submission is that that simply can't be right. It can't simply be a matter of temporal gap. Now I want to just pause at this point and pick up the argument on the valuation approach that Your Honours' have been discussing with my learned friend this morning. Like *Income Tax v Lowe* in the Privy Council is support for this, the GST Act works entirely on nominal dollars. The second point is that there is no economic or real money approach without express statutory provision or statutory scheme like the accruals regime. So in GST, even if a sale is on deferred terms – that is a conditional sale or a hire purchase – the value is accrued to the business taxpayer on its invoice basis, and equally the business taxpayer or registered person who buys, gets the whole input on the GST price. There is no valuation and that" regardless of whether any interest is being charged. So the approach to valuation is fundamentally opposed to the GST scheme. Now just before I move away from that question of interest that I've raised, can I just identify for you the relevant documents? You've been taken to the mortgage and to the '97 debenture. There was a second debenture executed in '98, July '98, and that is under tab F

Elias CJ Volume 5 is it, or 7?

Carruthers I'm sorry Your Honour, yes it's volume 7

Elias CJ 7

Carruthers Yes, under tab F. It begins at what should be page 1146 but my copy is un-numbered, so 1147, but I can take you through to 1163, which requires the borrower to observe the obligations as purchaser under the deed of sale, and at 1166 under para.(g) to keep the obligations of the borrower to the lender, and then go to 1168 under A.02 and if you go to 1169 you will find that the interest rate is 20% from the date of which the money should be paid until the date of payment.

Tipping J That's a default rate?

Carruthers It's not a default rate, it is a non-demand rate.

Tipping J Well once interest is demanded, the borrower hereby undertakes and agrees to pay the lender upon demand any monies at any time expended for costs together with interest thereon at the rate of 20%. This is dealing with costs isn't it? It's dealing with payments including costs

Carruthers It's dealing with all payments. If you go back to A.02, that's why I took you there.

Tipping J If and when the borrower fails to observe, so it arises on failure.

Blanchard J This doesn't have anything to do with the payment of the principal sum.

Tipping J This is paying back what the lender has to spend to remedy breaches of covenant isn't it?

Blanchard J Is this the only interest provision in this debenture?

Carruthers In the debenture, yes it is.

Blanchard J And this debenture replaced the previous debenture?

Carruthers Yes it did.

Blanchard J Well this doesn't have anything to do with the principal sum.

Carruthers Well

Blanchard J Duly observed perform and keep the obligations of the borrower to the lender under any agreement etc. Oh sorry that's an earlier one.

Carruthers 1163 is the borrower will observe all of its obligations as purchaser under the deed of sale

Blanchard J Yes.

Carruthers And then 1166, duly and punctually observe perform and keep the obligations of the borrower.

Tipping J What's the deed of sale? Not that hand-written document is it?

Blanchard J By that time it had been replaced by a mortgage. These documents are a shambles.

Carruthers Well Your Honour it's very difficult to visit that on Mr Fahey and Mr Meates. They were each separately advised

Blanchard J Well we're trying to work out what their deal was in relation to interest, and we've got to go to the documents. Sorry, which was the page we were looking at before - I've lost it now?

Tipping J 1168, clause A.02 was supposed to be a general interest of 20%, but it isn't anything of the sort.

Anderson J It's interest on costs incurred and enforcing obligations.

Tipping J Exactly.

Blanchard J If A.02 gives the lender an entitlement to pay money which the borrower should have paid, that's hardly referable to the principal sum.

Tipping J It's to remedy default. If this was intended to be interest on principal, the drafter ought to be locked up. I don't think it was intended to be anything of the sort.

Blanchard J To me this document looks as though it's replaced the earlier debenture and is more consistent with the interest-free mortgage than the earlier debenture, which was totally inconsistent with it.

Carruthers Well Your Honours I can't actually take that interest question any further, but what I do hold to is that whole issue of the valuation exercise is not an exercise that is within the Act, but I want to go further than that because I want to put these facts into context as I tried to do the other day and if you'll just bear with me I'll come to that, but I want to go through the question of the scheme, so I'm going back to my note please.

Tipping J Just before you move to the scheme, I think your essential argument Mr Carruthers is this as I've noted it. The GST Act works on nominal dollars.

Carruthers Yes that's right.

Tipping J And you can't undermine the nominality of the payment.

Carruthers That's exactly the point

Tipping J That's it isn't it?

Carruthers Yes it is. The taxable supply was the licence, and that's it.

Tipping J That's it.

Carruthers Yes it is.

Tipping J The question is can you go behind that under s.76? You say of course, no you can't. Mr White says yes you can.

Carruthers Well let me just come to examine that because where I'm headed to is looking at what the word 'to' means.

Tipping J Yes.

Carruthers And, I'll deal with it now. With respect Chief Justice I agree with your analysis that one looks at in order to – that is the logical way to read the section – and if one looks at other expressions of it, 'end in view' is an expression that comes from *Newton's* case, but some care needs to be exercised because you've got purporting to have purpose or respect. But even although I'm probably going to be challenged on this by Justice Blanchard, if one looks at *Ashton* and looks at purpose, and let me take it out of that. I cited from *Ashton* earlier, but let me give you an example. If I am going to rob a bank, my purpose is intended to have the effect of robbing the bank, so if I rob the bank I have achieved both purpose and effect, but if I fail to rob the bank, I have the purpose which it is intended to have the effect of robbing the bank, but I don't have the effect of robbing the bank. And that I think is the best way to draw the distinction that I think *Ashton* draws. Now if you look at that analysis you've then got to say in this case that what 'to' means is it's got to be substituted completely by the words 'having the effect of', whereas without substitution and without any abuse of language at all one can read to as being 'in order to' or 'for the purpose of', and that's the logical way to read the section in my submission.

Tipping J I think the simplest way of catching the dichotomy is in order to or so as to.

Carruthers Yes.

Tipping J Now in order to suggests a design. So as to suggests a result, and you could read 'to' as in order to or you could equally read it as 'so as to', and the question is what is the policy? What policy drivers are there are there as to which you should adopt.

Carruthers Policy drivers in the tax generally are that where taxpayers have choices, they are entitled to make choices, so if as here there was a bona fide genuine agreement as the Judge found, that was designed to buy the mining licence for the purpose of mining, and there was no suggestion or no thought in either parties mind of GST, that must be in order to purposive not effect driven.

Anderson J Unless one says notwithstanding their own private intention, the objective inference from all of the circumstances and the arrangement is that there was such an intention, so it doesn't matter if they protest albeit wholly truthfully 'I had no such intention' if objectively one infers an intention that's it.

Carruthers Well bear in mind though Your Honour that part of the objective assessment is in fact what the party said and did, now I'm not

Anderson J Oh it can be, I accept that

Carruthers Yes.

Anderson J But not when they say this was my intention, this wasn't my intention.

Carruthers No, and I'm not submitting that, but in order to get to an objective intention, regard must be had to what the party said and did. That's an integral part.

Anderson J The selection of evidence upon which the inference is based becomes quite important doesn't it?

Carruthers Well, yes Your Honour it does. I come actually to the evidence because my underlying submission is that what you have been told about value and the evidence of value is really not complete. It is quite incomplete and it's not in accordance with the Judge's findings on credibility. One can't rely on Dr Rabone for the reasons that the Judge said and for the reasons that I'll come to. So I'm content in

looking at the whole of the arrangement and what was being done at the time the arrangement is entered into because an integral part of that is value.

Elias CJ Before you go on to that though, I would have thought that what Justice Tipping put to you about 'so as to' fits with your para.4, and the disavowal of subjective intent.

Carruthers That it does sit with my para.4?

Elias CJ Yes, yes.

Blanchard J Yes.

Carruthers Yes.

Elias CJ I mean the thrust of your submissions is don't go to what actually happened - what was the effect – look at what the intent of the arrangement was; the effect of the arrangement as opposed to the effect of what happened.

Carruthers Yes, that's right and it's my para.1 of my note - it's the purpose, that's right.

Elias CJ Yes, so so as to – I'm not sure that you've entirely answered the point that was put to you by Justice Tipping whether you would accept that formula.

Carruthers Oh I'm sorry, I thought I had.

Elias CJ Well it may be that you have, it's just there was quite a lot of explanation.

Carruthers Yes, so did Your Honour Justice Tipping put to me that 'so as to' means having the effect of?

Tipping J I put it to you that 'so as to' better captured what I was toying with the proper construction of the section than 'in order to', which has subjective overtones which 'so as to' does not. 'So as to' suggests that you're not looking at what they subjectively intended, but what is the objective effect of the arrangement.

Carruthers Well my analysis is that one would look at the objective purpose of the arrangement - what objectively the arrangement intended to achieve.

Blanchard J And how do you judge that. Surely you judge it by the effect. Come back to *Ashton*.

Carruthers Well

Blanchard J If a purpose doesn't achieve anything, it's almost irrelevant.

Carruthers But the analysis in *Ashton* is that the purpose is that which is intended to have the effect – that is the effect of the purpose – that's the way it's put.

Blanchard J So you look at the effect to see what the purpose was? That's what *Ashton* says.

Carruthers Well.

Blanchard J If you're going to look at things objectively I can't see any other way of doing it.

Elias CJ Isn't your hesitation because of the fact that there are different effects. There's the consequence and there's the effect of the arrangement, but really what's being put to you is simply about the effect of the arrangement viewed at the time, not what actually transpired.

Blanchard J If you have something which is entirely commercial when you look at it then you'd say well if it was affecting the purpose of achieving that commercial result.

Carruthers Yes, I'm sorry for the delay and the hesitation, but the way in which Your Honour the Chief Justice put it as moment ago has explained it to me and I do accept that approach which

Elias CJ Consequences aren't the effect.

Carruthers No, and that is really what was stopping me and I also accept that it doesn't for a moment affect the analysis that I make of the section.

Elias CJ No, unless you know if you'd been arguing for a subjective intention, then it would be different.

Carruthers Yes, and we do not do that.

Elias CJ A shame.

Carruthers I've then gone on

Elias CJ Alright, perhaps we'll take the morning adjournment now.

11.28am Court Adjourned

11.48am Court Resumed

Carruthers Your Honours I want to really move through this quite quickly, because it is narrative form which I can leave Your Honours to read, if I can just explain what I've done. In para.7 I have dealt with the importance and the proper approach is to look at scheme and purpose. I've then drawn attention to the controls or gateways that the legislation itself has, and I have listed six – there are five on that page and over the page. In para.9 I have just drawn attention to the statutory control mechanism which the Commissioner has. Your Honour Justice Blanchard raised the question of my learned friend about the Commissioner had the ability to find out what the arrangement was, and I think Your Honour gave an instance of binding ruling as one, but there's actually the s.46 mechanism which I have just outlined in paras.10 to 12. It's just a feature of the legislation that the Commissioner has. I've given Your Honour the section of the Mining Act dealing with the chattel interest in land.

Blanchard J That's actually been repealed though.

Carruthers Yes that's right.

Blanchard J It had been repealed before this. It's replaced by a very peculiar section which says that a mining licence is neither real nor personal property.

Tipping J It's property is it, but neither real nor personal.

Anderson J It must be a chose in action then.

Carruthers No, no.

Blanchard J No, it's personal property. It's a section that at first blush I didn't comprehend, but it's in the Crown Minerals Act 1991.

Carruthers Well I'm sorry Your Honour, I didn't mean to mislead.

Elias CJ You would be in the company of everyone else in the Courtroom in not knowing that I would think.

Carruthers I did think I was being helpful, but I don't think it makes a difference to the goods

Blanchard J It probably doesn't.

Carruthers Or second-hand goods notion.

Blanchard J Yes. Well put it this way, if the Court comes to the conclusion that something really hangs off the Crown Minerals Act, we would no doubt seek further submissions.

Carruthers Yes, thank you Your Honour. I then dealt with the Commissioner's submissions concerning s.76, and I just draw attention to 16 and 17. There's no concept of being nearly or technical or anything of that notion. In the case of payment, it either is payment or it's not, and in the case of association, it either is associated or not, and in this instance in terms of the proper legal understanding an interpretation of payment has been made. I've drawn attention to the vendor finance issue in para.18, and then I've dealt with open market value and one can see if you look at barter transactions there is actually no basis for looking at consideration and money, which is why the concept of open market value applies. Now I've dealt with what I have described as the decisive steps that the Judge accepted that properly understood, the transaction had a rational basis, and then the participants were honest in their evidence as to the transactions true and on the facts only purpose, and that they were entirely genuine in the belief and this was a very valuable asset to be worked successfully over time to enable the vendor to become a wealthy man and Glenharrow's Mr Gerald Fahey to become a rich man in the result also. Now if I can just draw attention to para.186 in the judgment, only to say that by the time the Judge had got to that point, our argument is that he had actually determined the question that there was no grossly inflated price, which is as I've said a different concept from price that was too high, and that the proposition that he describes as scarcely debatable is unsound in our submission for the reasons that we've already submitted. We have argued that he got to the correct answer in his para.214, which we had already corrected in our materials. Now I want to deal with some factual matters, and there's only one that's going to take me any moment for pause. It won't be a fact decisive in the case but the Commissioner's assertion that Mr Richard Fahey accompanied Mark Meates on the 1997 journey is just simply wrong. The passage that the Commissioner referred to in the evidence was a later flight and Mr Richard Fahey had no involvement in the enterprise until he became the project manager in 1999. Mr Mark Meates, when he did the valuation, had no idea of the interest of Glenharrow, so

Elias CJ But why does that matter - he knew of the interest of Mr Meates?

Carruthers Oh yes, yes of course, he was asked by Mr Meates, but what my friend has been trying to suggest is that there was a connection between the Fahey's and the Meates and he draws on this that it really was an associated persons or it was a jack-up of some kind, but there is no connection prior to the transaction between

Blanchard J They weren't all mates.

(laughter)

Carruthers I thought it was a fey joke. So Your Honour there is a clear distance between the two transacting parties. One of Your Honour's commented that one would have expected some activity after this licence had been acquired and the comment of Your Honour Justice Tipping that it must be the most litigated piece of land in the country, may well be right, and I've just tabulated what happened in terms of litigation and said well really if these were not actions to best preserve an exploit the maximum value concerning the licence of themselves, there is a whole history of other matters that I don't need to go through but I invite Your Honours to just read through it and look at the obstacles that were put in the way of the mining operation, which on any view couldn't be laid at Glenharrow's door, and the Judge made appropriate findings on that. One of the issues – I'm now at para.28 dealing with the weather. One of the issues raised yesterday was what a terrible place this was and how it would be very very difficult to work, but the reality is this, that in terms of height it's the same height as the Desert Road, and on the evidence weather conditions permit flying 200 days of the year, and it would simply not be possible for Glenharrow to cut anything like enough stone to keep up that capacity. Dr Rabone used 300 tonnes a day based on a Hughes 500 helicopter - that's Dr Rabone's conservative figure. If we look at that, heavy-lift helicopters can shift 4 and a half tonnes at a time. The turn-around flying time is six minutes per load.

Anderson J Just on that point Mr Carruthers, where were they flying to and from? Mount Griffin is one destination obviously. What was six minutes away or three minutes away?

Carruthers It is three minutes. It's a turn-around time and the stone was being taken to Michael Meates' farm.

Anderson J Oh yes.

Carruthers To shift 8,000 tonnes of boulders in one year – and you will remember they were the boulders that were identified as being available – the heavy lift machine needed only eight trips a day, and we've given the references. Dr Rabone allowed for 500 tonnes of boulders without any full site inspection or count, and Mr Richard Fahey identified boulders of 600 tonnes each. No problems with helicopters. The weather conditions were raised by Dr Rabone. No reason why quarrying couldn't continue, and Mark Meates assumed the capacity was a bottleneck, but in fact that is not so against the other evidence of those who were experienced with helicopter work which Michael Meates was. Now I want to deal with Mr Davidson's report, because of the submissions that were made by my learned friend about it. The starting point is to go to the reasons for judgment at para.206, and this is Mr Davidson's interim preliminary mining feasibility study of 21 March 2003, which was produced by the plaintiff without opposition from the defendant. Now from there let me take you to my learned friend's red volume, and if I can take you first to tab 6, and the letter dated 4 July 2008 at para.4, and I want to read it. You will see that para.2 sets out the basis on which documents were to be admitted. Paragraph 3 deals with the status of other documents, and then 4, 'the agreement that was reached between counsel as to the documents in the bundles applied in particular to the various documents of Mr Davidson who was not called by Glenharrow as a witness at the trial'. Now this is the important sentence. 'In respect of Mr Davidson's interim preliminary feasibility study of 21 March 2003 however, it was agreed that it would be used in evidence subject to submissions as to weight in return for the evidence of Mr McPhail being adduced for the Commissioner'. Now if you go back to the way in which my learned friend put the arrangement in tab 3, at para.7, he submitted 'although Mr Davidson was not called as a witness by Glenharrow, it was agreed by counsel for the parties at trial that the above documents could be referred to by Glenharrow's witnesses and produce not on the basis of the truth of their contents, but on the basis that they existed and the witnesses had seen them and/or called for their creation'. Now of course if you look at the – oh my friend's drawn my attention to another paragraph that deals with the point, so if I can just come to deal with a comment that Your Honour Justice Anderson made where you were drawing the conclusion that the Judge had used Mr Davidson's report when it wasn't available to him as a matter of evidence, it is in fact not correct. It was available as a matter of evidence, subject to any question of weight.

Tipping J That was evidence both as to truth and existence?

Carruthers Yes that's right.

Tipping J Not just existence.

Carruthers No, no

Tipping J Right, that's the crunch.

Carruthers That's exactly the point, yes, so that report was available to the Judge to draw conclusions from and we submit that that's important. And then just dealing with Davidson, it's correct that the report assumes the use of a wheeled drilling unit. However, it is also correct that other types of drilling and cutting equipment did not have wheels and were available and compliant with the restricted licence terms. Now I'd invite Your Honours at some point to look at Richard Fahey in volume 12 under the tabs. They are the series of photographs that show the way in which this mining could have been undertaken in terms of the licence, and then I've just noted term. That reference is designed to help you but it may be just a little cryptic in the way in which it is. If I can just take you to volume 6 – and this is a point that my learned friend did explain to you. Under tab 4 is Dr Rabone's report, and the easiest way into his material is to look at the letters and numbers on the bottom righthand corner which are GHL.ADJ and then there is six digits. Now that 190 that I put in there is the last three digits, and I'd invite you to just look at those conditions which make it clear that hand-held doesn't mean pick and shovel or using some form of axe - it really does allow sophisticated equipment including helicopter removal. Now one important issue is to deal with why Dr Rabone's evidence was wrong. Why was he wrong? And staying in volume 6, let me take you to 123, yes I'll have to take you to it. If you go to those numbers at the bottom, and you'd better go to 126 I think.

Elias CJ Sorry I'm lost. Volume 6?

Carruthers Volume 6 and I'm in Dr Rabone's report in asking you to use that code at the bottom of the page.

Elias CJ Oh yes, sorry, yes thank you.

Carruthers And I'm starting you at 126 because it's the way to get to where I'm going. So if you turn over the next page there's a photograph, and then if you turn over the next page, this is the key to Dr Rabone's error, and this isn't a criticism of Dr Rabone. This is actually an error in the way in which the licence drawing was made, and I'll just come to that and explain it, but on that line, see the mining licence western boundary, Dr Rabone thought that the only material in the licence was on the right of that line. He concluded that everything on the left of

the line was out. Now, how that comes about, if I can now just take you back to one illustration of that licence, if you go back to 105 please. Now this is another copy of the chart that was attached to – oh it was an aerial photograph – attached to the mining licence purporting to show the area of the mining licence, and you'll see it's the same shape as you were shown on the big coloured drawing earlier which I'll come back to. Now to just give you some idea of where this should be, if you turn the volume this way so that you're looking sideways from the bottom of the page to the top

Anderson J What page is this?

Carruthers This is 105.

Tipping J What, so that the writing is actually the right way up, is that how we're looking at it?

Carruthers Yes that's right, yes. Now just move to the left of the licence area and you'll see a figure of 1509 metres – see that? – that's a trig and the relevant peg was adjacent to that. Now what happened and how this happened is that, and I think it was Dr Davidson's investigation, but what then happened was Mr Gerard Fahey contacted Mr Sweetman, who had put the pegs in and they went in and located the place of the pegs – located the actual pegs and at a later time there was a GPS survey done, and these leads up to Justice Chisholm's judgment. Just hold that open if you would please and I'll take you to volume 12, and the last tab, the last page in that volume. So you'll see just by superimposing, or having them alongside one another, the difference. Peg 1 is adjacent to that trig. Now the only reason for my doing this and taking time is to illustrate that Dr Rabone in the whole of his report took a very small and narrow section of the licence and that is why his evidence was regarded as unsatisfactory and not accepted by the Judge, and I do invite Your Honours to read his cross examination carefully because it will justify the Judge's findings which I identified at the top of page 9 – 127, 194 and 195. Now I think I can just invite you to look at that issue. I put in at para.38 the reference to open market value which requires the Commissioner – this is really relevant probably to a reconstruction issue, but requires the Commissioner to have regard to the qualities and characteristics of the goods, and I've just set out that there was nothing there, that Dr Rabone didn't make that analysis at all and he really couldn't have done that because of the error that he made. The boulder count must simply be a guess, and the significance of this is that Dr Rabone did not include what are called Julius, Speight, Razorback and Nephrite Creek outcrops, and this is why there is the argument that we make.

- Blanchard J The more significant point perhaps is the one that you make in your para.39.
- Carruthers Yes, that is the very significant point because that's what ties in to Mr Davidson, and I've dealt with the two-side issue and made the submission that well that's part of the reason for the Wellington Airport plan because it actually demonstrates just how much area was available for a two-side purpose, and our submission is that two sides would be logical to exploit the two best reef within the reef locations, being the Hut and Quarry areas, and Mr Davidson refers to both, but his one year conventional bench plan is predicated on location over the Quarry reef, expressly located directly over the reef within the reef of the Bowenites, and he illustrated his one year extraction with 9461 tonnes.
- Blanchard J Is that in the area that Dr Rabone thought was out of the licence - the reef within the reef locations?
- Carruthers If Your Honour has volume 12 still, you have the Quarry reef which is there, which is in Dr Rabone, and you have the Hut reef which is out.
- Blanchard J Okay, thank you.
- Carruthers Now I'll read this next section if I may. 'The Judge was satisfied by the comparative evidence of Mark Meates that the Rabone/Davidson extraction costs in methodology were substantially similar. He adopted Dr Rabone's costs approach. Mr Frankham incorporated a 30% discount factor, whereas Mr Davidson had included a cross-the-board 20% costs inflation contingency and the parties agreed to accept Dr Rabone's. The first figure should be .75% and those figures are taken from the judgment. There was an extraction cost at \$750 a tonne and I've given the references that deal with both the value. And it's clear from the passages that I put in that note that I addressed from earlier that Justice Chisholm – and I have actually recorded those again in this note – Justice Chisholm specifically rejected Dr Rabone's volume estimates. He did not refer at all to Mark Meates 15,000 tonnes or any evidence about carrying capacity, and he didn't discuss Mr Davidson's first year \$7.5 million dollar profit which was from just a conventional benching operation. He didn't discuss high grading and he didn't discuss the double-side recognition that Mr Davidson had, and that Mr Gerard Fahey had and Mr Richard Fahey had from his overseas travel. Now my submission is that if the Judge had recognised the conventional first year approach in that report he could not reasonably have accepted \$9.75 million dollars as the total value over three years. The only logical conclusions are as was submitted that high-grading in two sites should have been applied.

- Anderson J How do you reconcile that first year at \$7.5 million dollars net profits with the original arrangement that said it's going to take two years to get underway and there'll be no interest payable because of that?
- Carruthers Well in fact that what was said in the letter, but it was clear that as soon as the transaction was done they started work to get to mining, so I think the evidence rather points to the work being commenced well before the two-year period was up.
- Anderson J Well getting established they thought it would take a couple of year obviously to get into any sort of revenue which would allow them to pay interest. The anticipation from the letter is that there is not going to be any money to pay interest for two years. It's all going to go into the
- Blanchard J Could that relate to sales?
- Carruthers Well that must relate to sales because everyone has worked on the basis that there were three years available of work under the licence. That's the whole basis that each of the
- Anderson J Extraction rate.
- Carruthers Yes, so that's where Mr Davidson's figure comes from and of course Mr Frankham has done precisely the same thing in the sense of three years. So we submit that on any view of the evidence, on the approach that we have outlined, the licence was certainly worth \$45 million dollars, and then I've submitted that the cross-examination of Mr Frankham is instructive because of its parameters and the question was asked on the basis of \$3,250 net based on standard Bowenites and 15,000 per annum, and even with the costs already taken out and Mr Frankham's handsome discount rate, on those parameters the licence value was \$112 million dollars. Now one only has to reflect on adjustment of those factors if one says quantity was too high, by how much, by twice, so we get to \$55 million dollars, or quantity needed some adjustment, price was too high, a movement of those parameters will result on really narrow adjustments to a value \$45 million dollars or more, and so we've submitted that a reasoned approach to altering those parameters will establish value with a range of reasonableness to the price agreed. Now the next point
- Tipping J When that sort of question was put to Mr Frankham within those parameters Mr Carruthers, and I understand the force of what you're saying here, what did he say about that proposition, because I think in fairness we ought to explore that.

Carruthers Oh well I'm content to do that Your Honour because it's

Tipping J Because I understand what you're saying in 47.

Carruthers His answer is really quite instructive.

Tipping J Because if you were to halve the quantity, well you've already said it, so what volume is it in? Volume?

Carruthers It's in volume 4, oh no it may not be. Just pause Your Honour and I'll identify it.

Tipping J This is a very simple way of looking at it.

Elias CJ It is.

Tipping J Look let's assume the costs and the discount rate remain constant

Carruthers Yes.

Tipping J And the variables are on the other side of the ledger, what's coming in by way of the price you're able to get, and the amount of times you're able to produce. I presume the question was directed to him and you'd have to have some massive adjustments before \$45 million dollars was sort of outside the ballpark.

Carruthers Yes. Let me take you to it Your Honour because his reaction is very interesting. It's at page 767 in volume 4.

Tipping J I mean this is nice and simple, your paragraph 47. It has that huge attraction of simplicity.

Carruthers Well thank you Your Honour but I'm not going to divert you away from Mr Davidson.

Tipping J No, no.

Carruthers I understand.

Blanchard J Is this the passage we looked at?

Carruthers Yes it is, it is, but I want to go back to it because His Honour's correct

Tipping J I'm sorry, what page was it again?

Carruthers 767.

Tipping J Thank you.

Carruthers And it begins at line 21, right at the end of the line. Question; 'I want to put to you one hypothetical to get a ballpark figure as to how this hypothetical would flow through to a valuation. If you worked on 15,000 tonnes production per year for each of the three year, if you assumed a revenue of \$4,000 dollars per tonne on the basis that the extra income from the high quality Bowenite would offset income from Serpentinite, and if you used the figure of \$750 dollars per tonne extraction cost, what figure would you get?' And the answer was 'what discount rate'?

Tipping J Well that's Mr Frankham asking what the discount rate was.

Carruthers Yes, asking what the discount rate was.

Tipping J Yes.

Carruthers And the question is 30% so that's Mr Wilson saying the discount rate is 30%. Then this is the instructive part. 'A number markedly north of my \$3.7 million dollars but absolutely nowhere near \$45 million dollars'. Question; 'is that right'. Answer; 'yes'. Question; 'help me with that. If you had 15,000 tonnes a year; 45,000 tonnes and a net revenue of \$3,250 – namely 4,000 less 750 – what income would that produce? Fifteen times 3,750. Question; '3,750 times 3. Say again – 15,000 times 3,250 times 3.

Tipping J That's times 3 is for the three years.

Carruthers Yes. And then the answer is 1.6875. What does that mean? 168 million. Question; even with a 30% discount rate it would be well north of \$45 million dollars? On that basis, yes, but let me just – in broad terms but there are issues like working capital, capital expenditure necessary to undertake the works and the discounting over a period of time. And then the Judge had well and truly got on to it at this stage 'is the answer about \$112 million dollars...that's the order of it, yes.

Tipping J Where did the Judge get his \$112 million dollars? Is he a very quick mathematician?

Elias CJ He's taking a stab at working capital etc. is he?

Carruthers No, he's taking the 30% off.

Tipping J Taking 30% off.

Carruthers Yes, he's making the adjustment for contingencies.

Tipping J That just happens to be the same 30% as the discount rate.

Carruthers Yes that's right.

Tipping J But the two aren't related.

McGrath J He's taken off a third.

Carruthers Yes.

Tipping J He's taken off a third, yes but I don't quite understand why you take off a third. Why not take off a quarter? Why not take off two thirds, and where does that come from?

Carruthers Well Your Honour I don't mind what he does because he finishes up with \$112 million dollars, and even making some reasonable adjustments to those parameters, one finishes up well north of \$45 million dollars, and even if one finishes up less than \$45 million dollars, you are in an area where it was reasonable for these parties if this happens to be the test, to have struck their bargain.

Tipping J I think this is very important so can I just be tedious Mr Carruthers and walk through this with you again.

Carruthers Sure.

Tipping J You get to \$168 million dollars on the base figures that are put to him, applying a discount rate of 30% - \$168 million?

Carruthers That's right.

Tipping J Then he points out however that there are these further factors that need to be taken into account and then the Judge comes up with \$112

Carruthers I think what the Judge has done is said well alright we'll use 30% for contingencies

Tipping J As well as the discount rate.

Carruthers As well, yes.

Anderson J I think he's just applying the discount rate to \$168 million. You take 15,000 times 3250 over three years.

Carruthers Yes, I'm sorry, yes.

Tipping J Is that a further value of money discount rate? Is it time value discount rate?

Carruthers Well I think it's a risk as well.

Tipping J Well wherever it would have been extraordinarily helpful if this had been further explored, but

Blanchard J It's very hard to know what that figure is.

Tipping J But anyway the broad picture is that everybody's settling on about \$112 million dollars, however you get there.

Carruthers That's so.

Tipping J Well Mr Frankham is anyway.

Anderson J No Mr Frankham is not – he's applied a discount rate but he hasn't applied a further contingency allowance to it.

Carruthers He's applied a very high discount rate though Your Honour

Tipping J Yes.

Carruthers If you look at his

Anderson J It depends what he's applying it for.

Carruthers Well I understand that

Tipping J The risk, the risk.

Carruthers Yes. Well Your Honour I'm sure there is a risk factor in that 30% but I'll invite you

Anderson J I thought he was applying it for present value which is quite irrespective of risk.

Carruthers Yes I understand the distinction.

Tipping J No, it's the yield that an investor would expect to get for taking the risk of going into this venture. That's the first discount rate; the second one third, is presumably an amount to cope with contingencies of the kind which the witness speaks of.

Carruthers No, I think some care is necessary because the base figures are 15,000

Tipping J Yes.

Carruthers 3,250 being 4,000 less 750 times 3, so that doesn't have in it any discounting at all, so that gets to the – oh no I beg your pardon.

Tipping J But the care that needs to be taken is that the Judge won't necessarily when he comes to his ultimate assessment start at 15,000 tonnes.

Carruthers No, no

Tipping J This is just the hypothesis which is being put to the witness.

Carruthers That's right, which is why I invite you to go to Davidson because he actually got the right site, recognise

Tipping J The 15,000 comes from Mark Meates.

Carruthers Yes I understand that Your Honour, but if you're saying to me that it's a hypothetical, and it couldn't be achieved, what I'm responding is that you can reduce that figure

Tipping J Yes.

Carruthers You can then recognise that Davidson doesn't factor in high grading, although he recognised it, and that's getting at the reef within the reef, and there's actually more to high grading than just that, and Davidson's figure doesn't recognise two sites.

Tipping J Yes, I understand that, it's really just how much weight we can put on this \$112 million is what's vexing me - I don't think we can put much on it at all.

Carruthers Well to the contrary Your Honour, I

Tipping J It's simply an extrapolation of a premise that the Judge didn't accept.

Carruthers I'm sorry Your Honour?

Tipping J It's an extrapolation of a premise the Judge did not accept.

Carruthers Which is why I'm inviting you to look at the way in which you might adjust the parameters; adjust the premise. Now the Judge

Anderson J But the Judge did that you see, he took Mr Davidson's figures of 9461 and then applied Mr Frankham's figures to it and came up with 9.757.

Carruthers Your Honour that's right which is why, and looking at the parameters, I'm content for you to look at Mr Davidson's figures, but what you then find is two things. First you find an issue that that was a conventional way of mining – bench mining – that he recognised that it was possible to high grade in this area which would produce a much greater revenue, and you could mine two sites which would double rough figures Davidson's

Anderson J Suppose that's so, the Davidson evidence came in for what it was worth, for what weight might be placed upon it.

Carruthers Well the Judge plainly did place weight on it.

Anderson J And the weight he placed on it resulted in the figures he came up with.

Carruthers The Judge can't really cherry-pick factors

Anderson J Well that's the basis on which it went into him. Some parts of the evidence you accept, some you don't accept.

Carruthers No, it wasn't like that at all. It was subject to weight, but I mean these are factors that the Judge doesn't even refer to, and it does get to the point where on his 9461 figure, his analysis was that there was \$7.5 million dollars net profit in the first year, and it does command attention, and if you're looking at comparators, you've got Dr Rabone, who provided all of the base information to Mr Frankham. Mr Frankham doesn't have any skill in those areas, and Dr Rabone wasn't even in the right place.

Tipping J I think what you're saying as I understand you is the 9461 was fixed on a premise that does not take account of some variables which the Judge did not himself refer to

Carruthers That's right.

Tipping J So, if you're going to go on Davidson as your base starting point, you should adjust him upwards on account of the high grading double-site recognition etc issues.

Carruthers That's exactly the argument.

Tipping J So you should perhaps say, it's a matter for the trial Judge really, that the figure should have been \$12,500 or something like that to take account

Carruthers Yes.

Tipping J And then you do the Frankham exercise to that starting point instead of the Meates' starting point. And I suppose it's simply a matter of arithmetic then as to what result you get.

Carruthers Yes that's right. Now para.93 of the judgment – 'Mr Frankham approached his valuation on the basis that significant risks associated with the extraction and disposal of the stone had to be reflected in the required rate of return for a venture of this nature. He regarded the investment as speculative and considered that the appropriate post tags discount rate was 30%.

Tipping J Well that's the risk. That's what an investor would want to get a return on the money that they've invested on account of the risks being undertaken, just like an interest rate. It's as simple as that isn't it?

Carruthers Well Your Honour yes it is.

Tipping J That's not against you.

Carruthers No, no, I understand that, but although it's a hypothetical it does give you a very sound indication, particularly Mr Frankham's reaction, north of my \$3.7 million dollars but nowhere near \$45 million dollars, and it's his analysis. Let me quickly finish

Tipping J Well I don't think the nowhere near \$45 million helps you.

Carruthers No, of course it helps me. His initial impression was that it was north of \$3.7 million dollars, his figure, but it was nowhere near as high as \$45 million dollars, and when he's taken through the exercise, that's right, it's nowhere near \$45 million dollars, it's \$112 million dollars.

Tipping J Oh you mean he was grossly in excess of?

Carruthers Yes.

Tipping J Is that what he meant?

Carruthers No, no, he didn't mean that, he was surprised. I have had a very graphic description of this Your Honour. He was surprised. You can pick it up from the notes. He was surprised that the figure was more than \$45 million dollars.

Anderson J A bit like Mark Meates saying it's a lot isn't it?

(Laughter)

Tipping J Alright yes well thank you Mr Carruthers that's very helpful.

Carruthers Now I just want to clear away the Michael Meates, what he intended and the significance of this \$10,000 dollars price which I hope Your Honour Justice Anderson was just teasing me as being the most reliable evidence that was available, but Michael Meates was intending to do a tourist operation on that side and I've explained that from the evidence and he recognised the history of New Zealand Greenstone, and then he started his site visits and recognised the quality of it from the colour of light in the outcrops in the reef - as part of his helicopter work he recognised that. Then he had the prospectus, and if one's talking about the availability of evidence, the prospectus is full of geologists' reports on the quality of the material. I'll give you a reference to the prospectus, yes it's volume 8, tab 101. I don't need to take you there, but if you just note that that's where that material is. And then I dealt with the personal guarantee which involved some interesting after Court conversation. It's not been part of our case that the existence of a personal guarantee was necessary or relevant one way or the other. The contention made is that simply the obligation the company has to repay Mr Michael Meates is unconditional and absolute in its terms and the existence of it as a start-up shell company, does not alter the true legal effect of that obligation, and it's contended also that the fact it's a single-purpose venture does not in anyway qualify the legal obligation. What matters, and is fundamental, is that the parties established in evidence before the Judge that they were genuine and honest in their intentions to proceed with mining, and become wealthy entrepreneurs, and the Judge made that assessment on that basis. And I've just drawn attention to the nasty surprise and the delight that followed.

Blanchard J Well I imagine that the evidence would support an application to rectification if it was ever necessary.

- Tipping J Both sides saying on oath they didn't intend it, not a bad start.
- Carruthers Yes, shall we apply an objective test to that too? Can I just say a word about reconstruction, because if reconstruction is to be made it is fundamental that that requires a valuation, and it really is a matter for the Commissioner if reconstruction is required and if the revised Frankham position is the valuation – that's \$9.7 million dollars, we would say that Davidson was appropriate and just as a minimum figure we would be saying well if it's \$7.5 in the first year and there are three years, that gives us something around \$22 million dollars, but that is a matter for the Commissioner, and the difficulty with the Court of Appeal judgment is not that we're trying to do ourselves out of money, but the whole challenge process is being overtaken by the Court, which is not a proper exercise of the Court's jurisdiction, and that's really why the submission was made.
- Tipping J What about *Buckley & Young*? Does that apply at the reconstruction stage, the ruling that you've got to show both the Commissioner is wrong and by how much he was wrong, because you haven't shown anything to that effect, well subject to what findings we've made.
- Carruthers Well if you find that this contravenes s.76, then it's at the time I go to the reconstruction before the Commissioner and the valuation's been made that we can then enter into it. As far as you can go with respect Your Honour is to say this transaction is void against the Commissioner. It requires reconstruction by the Commissioner.
- Tipping J He has reconstructed it in a way that your client is most un-enamoured with.
- Carruthers Well he's had
- Blanchard J Haven't you challenged the reconstruction in your proceeding? You must have.
- Carruthers Yes we have challenged and yes we do meet *Buckley & Young* because we say that it's either Davidson times three or it's Frankham at 9.75.
- Tipping J Well does it need to go back for valuation if you asserting one or other of those, unless you persuade us that one or other of those is sound, doesn't *Buckley & Young* mean that you failed?
- Carruthers Yes it does, which is why we say we've satisfied the test one way or the other.

Tipping J Yes, your first step was it required a valuation. I'm not quite following that.

Carruthers Well that is if the Commissioner is to do a reconstruction, it requires a valuation.

Tipping J But don't you have to do the reconstruction for him and persuade us that is a better way of looking at it on the hypothesis that the transaction is void, contrary to your first hypothesis?

Carruthers Yes, yes.

Tipping J Isn't that *Buckley & Young*?

Carruthers Yes it is *Buckley & Young*, and what I'm submitting to you is that we satisfy *Buckley & Young* in two ways. We satisfy it by saying Davidson times three or if that is not accepted by the

Tipping J By the 7. whatever it was by three per Davidson?

Carruthers Yes, well in fact Your Honour that's a minimum figure for Davidson, but

Tipping J Alright, well that maybe so, but or Frankham's 9. whatever?

Carruthers Yes.

Tipping J Yes, well that's helpful, thank you.

Carruthers And Your Honour just on Davidson, why I say a minimum is while you may not be able to define from the evidence what high grading would do, you can certainly look at what two sites would do.

Tipping J I suppose there's a certain logic in that. The Commissioner can hardly say on the one hand I want it looked at commercially, but on the other hand I'm just going to stick with the payments literally made

Blanchard J Oh I think he can.

Tipping J Do you?

Blanchard J I think he can. It depends on the basis on which the transaction is voided.

Tipping J Yes.

- Blanchard J If it's voided on the basis for example, and I'm not saying this is my view, that payment wasn't really payment, then the Commissioner's approach seems to me to be absolutely correct, but if it's voided on some other basis, then the question of valuation might come into it.
- Tipping J Yes I think that must be right, yes would you agree with that Mr Carruthers that it will depend on the basis on which it's deemed to be voided or taken
- Carruthers I do agree with that, yes, but if we're going to have
- Tipping J But the problem with that is that one looks at the transaction as a whole, or the arrangement as a whole, and there may be individual features of it which in combination take you to the avoidance conclusion. I'm speaking hypothetically.
- Carruthers Yes I understand.
- Tipping J And then what do you do? Face that when you come to it as my brother suggests.
- Carruthers Yes, yes, I think that's right. Well perhaps I suppose then in political parlance we'd go and have a cup of tea.
- Tipping J Or something stronger I would say – a lot stronger.
- Carruthers It's not far away Your Honour. Can I just make one final submission? It's a point I thought I had put in the note and it's really to take up Your Honour Justice Anderson's discussion with me about the whole of the circumstances, and it is to pick up probably the underlying question of valuation. Bear in mind that Mr Fahey before he bought the licence, Mr Gerard Fahey, before he bought the licence, had that franchising experience; the franchising conference; the discussions and negotiations with Mr Lim, and behind all of this was the expectation that he not only had an export market immediately, but he also had finance which I think I can properly submit from the evidence was of an order that would meet the obligations that Glenharrow would have under the arrangements that were in place, and I really just invite you to look at what Mr Fahey's evidence is because that is part of that whole underlying issue of arrangements and valuations. Those are my submissions in reply may it please Your Honours.
- Elias CJ Yes thank you Mr Carruthers. Mr White do you want to say something?

- White I do very briefly. In order to avoid any need to provide post-hearing memoranda there was just one matter in relation to my learned friend's submissions on the cross-examination of Mr Frankham and the hypothetical, and I can deal with it if you go Your Honours to my learned friend's submissions that he's given today – the written ones, page 10, and at the top of the page he has correctly recorded that the parties agreed to adopt Dr Rabone's three figures there, and he quite correctly corrected the 75% to .75%, but Your Honours will note that the figure for Bowenite of \$4,000 tonnes, that is the figure that Mr Wilson QC put in cross-examination of Dr Frankham as one of the parameters – in other words 100% at 4,000, and I just thought it was important that Your Honours appreciated that that is the way in which that parameter was put, and for instance if the parameter had been put on the basis that when rounded up that one took the Serpentine as 100% - that's the 1,000 tonnes instead – just by way of parameters hypothetical, less costs of \$750, which was agreed – namely \$250, even taking the \$15,000 dollar figure you get to \$3.75 million dollars per annum without the 30% discount rate, so it does all depend on what hypothetical you use and what the parameters are. And the final matter Your Honours is just to note that if you are going to read the evidence of Mr Fahey relating to Mr Lim, then I would invite you also to read the cross-examination and to recognise that Mr Lim was not called as a witness. I'm sorry to take those matter further.
- Carruthers I don't want to prolong you for a moment, but can I just draw attention to the fact that in that question Mr Wilson deliberately took the Bowenite figure, recognising that there would likely be a contrast, or a balancing factor for the Super Bowenites above and Serpentine below, but it is one parameter.
- Tipping J A weighted average basis would suggest a significantly lower figure than \$4,000.
- Carruthers Well Your Honour I don't mind it being adjusted but just bare in mind that what was proposed was, as Mr Fahey said, we were going to butcher the expensive stuff.
- Tipping J I understand the point.
- Elias CJ Well thank you very much. A most interesting hearing. Thank you counsel for your efforts. We'll take time to consider our decision.

12.56pm Court Adjourned