SUPREME COURT OF QUEENSLAND

CITATION:	*Baldwin & Anor v Icon Energy Limited & Anor* [2018] QSC 233
PARTIES:	**RONALD WILLIAM BALDWIN** (first plaintiff) and **SOUTHERN FAIRWAY INVESTMENTS PTY LTD** ACN 115 060 378 (second plaintiff) **v** **ICON ENERGY LIMITED** ACN 058 454 569 (first defendant) and **JAKABAR PTY LTD** ACN 058 454 765 (second defendant)
FILE NO/S:	SC No 3667 of 2014
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	12 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	23-27 October 2017; 29 November 2017
JUDGE:	Bond J
ORDER:	**The orders of the Court are that:** **1. The first plaintiff's claims against the first defendant are dismissed, with costs.** **2. The second plaintiff's claims against the first defendant and the second defendant are dismissed, with costs.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the first plaintiff entered into an agency contract with the first defendant – where pursuant to the agency contract the first plaintiff would try to obtain contracts for the sale of gas (coal seam methane or "CSM") produced by the first defendant – where clause 2 of the agency contract provided that "when a contract of sale for

CSM is negotiated" the first plaintiff would earn part of his remuneration in the form of an option to purchase 10 million shares on particular terms – where the first plaintiff introduced the second plaintiff to the defendants – where as a result of the first plaintiff's efforts, the second plaintiff and the defendants entered into a memorandum of understanding for the development of a gas supply agreement – where no gas supply agreement or other agreement capable of being characterised as a "contract of sale for CSM" was ever concluded – where the first plaintiff argues that he nevertheless earned his remuneration under clause 2 of the agency contract – whether, on a proper construction, clause 2 meant that the first plaintiff could earn his fee by negotiating a contract to a stage which, in his opinion, was an appropriate first draft – whether, on a proper construction, clause 2 meant that the first plaintiff could earn his fee by securing a memorandum of understanding for the development of a gas supply agreement

TORTS – MISCELLANEOUS TORTS – OTHER CASES – DECEIT – where the second plaintiff and the defendants entered into a memorandum of understanding (MOU) for the development of a gas supply agreement – where the MOU provided for an exclusivity period during which the defendants promised to not participate in any negotiations or discussions in relation to a competing proposal or which may reasonable be expected to lead to a competing proposal – where the defendants promised to comply with certain confidentiality obligations regarding the disclosure and use of confidential information disclosed in connection with the development of a gas supply agreement – where the defendants engaged in communications with other companies who expressed an interest in entering into gas supply agreements with the defendants – where the promises in the MOU amounted to representations by the defendants that they would behave in the way so promised – where the second plaintiff alleges that the defendants' subsequent conduct revealed they never had the intention of behaving in the way they represented they would behave and had deceitfully induced the second plaintiff into entering into the MOU – whether the alleged deceitful intention was properly pleaded – whether the intention of the defendant companies could be established by reference to one of its directors – whether it could be inferred from a director's subsequent conduct that the alleged deceitful intention was held at the time of entering into the MOU

Uniform Civil Procedure Rules 1999 (Qld) r 150(1)(k), r 150(2)

Agricultural and Rural Finance Pty Limited v Gardiner (2008) 238 CLR 570, applied

Anderson v Densley (1953) 90 CLR 460, cited

Challenger Group Holdings Ltd v Concept Equity Pty Ltd [2008] NSWSC 801, cited

Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317, cited

Inghams Enterprises Pty Ltd v Kim Yen Tat [2018] QCA 182, cited

Johnston v Brightstars Holding Company Pty Ltd [2014] NSWCA 150, cited

Midgley Estates Ltd v Hand (1952) 2 QB 432, cited

Mushroom Composters Pty Ltd v IS and DE Robertson Pty Ltd [2015] NSWCA 1, cited

OneSteel Manufacturing Pty Ltd v BlueScope Steel (AIS) Pty Ltd (2013) 85 NSWLR 1, cited

Schwartz v Hadid [2013] NSWCA 89, cited

Stirling Resources NL v Capital Energy NL (1996) 14 ACLC 1,005, applied

COUNSEL:	P Dunning QC, with D A Skennar, for the plaintiffs S Couper QC, with A Nicholas, for the defendants
SOLICITORS:	Clayton Utz for the plaintiffs Hopgood Ganim for the defendants

Introduction

[1] In 2008 the first defendant, **Icon**, was a publicly listed company carrying on business as a prospector for oil and gas and a dealer in oil and gas tenements. The second defendant, **Jakabar**, was Icon's wholly owned subsidiary, and was the entity which owned a mining tenement known as ATP 626P. Icon and Jakabar were interested in commercially exploiting the rights to the gas thought to be contained within the area covered by ATP 626P. Within the industry in which they operated, such gas is referred to simply as "gas", but is also referred to as "coal seam gas" (or CSG) or "coal seam methane" (or CSM).

[2] With a view to obtaining assistance to find a buyer for the gas to be produced from ATP 626P, on 1 May 2008 Icon entered into an agency contract with the first plaintiff, **Mr Baldwin**. Mr Baldwin had relevant experience in capital raising for startup energy entities; gas and electricity markets and gas contract negotiations.

[3] Under the agency contract, Mr Baldwin agreed to try to obtain contracts for the sale of the Icon gas to be produced from ATP 626P. Clause 2 of the agency contract provided that "when a Contract of Sale for CSM is negotiated" Mr Baldwin would earn part of his remuneration under the agency contract, because Icon would be obliged to provide him with an option to purchase 10 million shares on particular terms. The agency contract also provided further remuneration in the form of a commission calculated by reference to a percentage of gas produced and sold in any one year under the Contract of Sale for CSM.

[4] The second plaintiff, which was then known as Babcock & Brown Australia Infrastructure, was a gas purchaser and trader, electricity generator, infrastructure developer and owner. For present purposes, it is appropriate to refer to the second plaintiff as **BBAI**. BBAI was one of a number of companies within a group of companies referred to as the Babcock & Brown group.

[5] Mr Baldwin introduced BBAI to Icon and Jakabar and was instrumental in bringing about the result that on 12 June 2008, Icon and Jakabar entered into a memorandum of understanding (**MOU**) with BBAI. The MOU was expressed to operate until 30 October 2008. It recorded that it had been entered into by the parties with a view to facilitating the development of a gas supply agreement (**GSA**) between them in relation to gas sourced from ATP 626P. It did not bind them to enter into such an agreement. As it transpired, no GSA or any other agreement capable of being characterized as a "Contract of Sale for CSM" was ever concluded between Icon and Jakabar and BBAI and the MOU expired on 30 October 2008. In fact, on 24 December 2008, Icon and Jakabar entered into an agreement with another entity, Stanwell Corporation Limited (**Stanwell**), in relation to gas sourced from ATP 626P.

[6] Mr Baldwin's pleaded case was that he had earned the right to the share purchase option under cl 2 of the agency contract when he delivered a draft GSA to Icon on 11 August 2008, even though the further negotiations which occurred thereafter between Icon and BBAI ultimately failed to result in a concluded Contract of Sale for CSM.[1] He says that but for Icon's wrongful denial that he had complied with cl 2 and earned that part of his remuneration, he would have exercised the option to purchase the Icon shares and would have sold the shares for a $4,000,000 profit. He claims damages for breach of contract from Icon, the measure of which is the profit which he would have made.

[7] The Babcock & Brown group of companies later fell into financial difficulties and many of them became insolvent. Eventually, in 2012, interests associated with Mr Baldwin purchased the shares in BBAI, although prior to so doing, they were interested to ensure (and did ensure) that BBAI had no extant liabilities consequent upon the failure of other companies in the Babcock & Brown group. The reason BBAI was acquired was so that it could serve as a vehicle for prosecuting claims against Icon and Jakabar. This proceeding was commenced after the interests associated with Mr Baldwin acquired their shares in BBAI.

[8] In this proceeding, BBAI seeks to recover damages for deceit (including exemplary damages) from Icon and Jakabar. Icon and Jakabar relevant acted together and by the same people, so in analysis of this cause of action it will usually suffice to refer simply to Icon. The broad elements of BBAI's claim were as follows:

(a) The terms of the MOU as proposed and as entered into, amongst other things, bound Icon to exclusive dealing obligations during a defined exclusivity period, including in relation to the manner in which they might deal with third parties and with confidential information.

(b) By evincing a willingness to enter into the MOU and by entering into the MOU, Icon made representations to BBAI as to the manner in which they would behave during the defined exclusivity period, including in relation to the manner in which they might deal with third parties and with confidential information,[2] namely that they would behave in the way they had promised to behave.

(c) In reliance on those representations BBAI entered into the MOU, negotiated with a view to entering into a GSA, and incurred various expenses in so doing totaling a little more than $500,000.

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[1] As will appear, during the course of argument he also advanced an alternative case that the proper construction of the agency contract might permit the conclusion that he had complied with cl 2 at an earlier time, perhaps even by bringing about the MOU.

[2] As will appear, the precise nature of the representation alleged to have been made in relation to confidential information requires further analysis. I will return to this.

(d) After entering into the MOU, Icon had particular dealings during (and in Stanwell's case after) the exclusivity period with Stanwell (with whom it eventually did conclude a contract) and with Australian Worldwide Exploration Limited **(AWE**), CS Energy Limited (**CS Energy**) and Sojitz Corporation (**Sojitz**).

(e) Critically, I should infer from the fact and nature of those dealings that Icon must in fact never have had the intention of behaving in the way it had represented it would behave during the exclusivity period and, accordingly, that it had deceitfully induced BBAI to enter into the MOU, and to incur the relevant expenses.

(f) Accordingly, BBAI could recover damages for deceit, the measure of which was the amount of the expenses which had been incurred.

[9] For reasons which follow, the claims advanced by Mr Baldwin against Icon, and by BBAI against Icon and Jakabar, must fail.

The principal actors.

[10] On the plaintiffs' side, the principal actor was Mr Baldwin. He had been admitted as a barrister in 1973, but since 1976 had been self-employed in a number of businesses which he and his wife had owned and developed. In the course of so doing he gained the experience in the gas industry to which reference has earlier been made. Mr Baldwin was the plaintiffs' principal witness.

[11] The plaintiffs also called:

(a) Warren Murphy, who is now and was in 2008 a director of BBAI. He had over 20 years' experience in investment banking with particular expertise in development of new projects in the power generation and infrastructure sectors.

(b) Peter Fennessy, who was the General Manager of Wholesale Energy Development for a Babcock & Brown Power Pty Ltd, which was a company related to BBAI within the Babcock & Brown group of companies.

(c) Massimo Scalia, who was a senior marketer within the Melbourne office of the Babcock & Brown group of companies.

[12] On the defendants' side, the relevant actors were the directors and officers of Icon and Jakabar in 2008.

[13] In 2008, the directors were:

(a) Stephen Barry, who was a director of Jakabar, and by training and occupation a solicitor.

(b) Raymond James, who was the managing director of Icon. In 2008 Mr James owned approximately 23.7 million shares which represented about 8.4% of Icon. He was also a director of Jakabar. He became chairman of Icon in November 2008.

(c) Raymond McNamara, who was the Executive Director, Company Secretary and Chief Financial Officer of Icon between 15 January 2007 and 9 August 2010, and by training an accountant.

(d) Martin Pyecroft, who was the chairman of Icon until 14 November 2008, and by training and occupation a geologist.

[14] Other people in the employ of Icon in 2008 were John Quayle (Director of Business Development), Harry Duerden (a geologist), Lynda Palmer, and Francois McGill (Commercial Executive).

[15] The defendants called Mr James, Mr Barry and also Mr Derek Hannigan. The latter had been the General Manager of Business Development at Stanwell in 2008.

General observations concerning the two principal witnesses

[16] Mr Baldwin obviously had an animus towards Icon and in particular Mr James. That derived from the fact that he regarded Icon and Mr James as having treated him badly in these respects:

(a) Mr James reneged on an oral deal regarding share subscription in Icon at a favourable price: see [24] below.

(b) Icon denied him of what he regarded as being his entitlement under cl 2 of the agency contract.

(c) In 2009, Icon made a complaint to ASIC that Mr Baldwin had engaged in market manipulation; ASIC conducted interviews with Mr James and Dr McNamara and subsequently charged Mr Baldwin with market manipulation; and the charges were dismissed by a Magistrate at the committal hearing.

[17] He was not entirely objective and I think that coloured his characterization of some events and led to a degree of reconstruction in his evidence. Nevertheless, I thought that Mr Baldwin was an honest witness, with a good memory of what had occurred and a solid grasp of detail, who tried to answer questions honestly.

[18] Mr James was an unsatisfactory witness. His testimony was riddled with occasions in which he evaded questions and gave unresponsive and defensive answers. I formed the view that he was motivated to characterize the conduct of Icon as compliant with its obligations under the MOU when, as will appear, in some cases concerning its compliance with the confidentiality provisions, it plainly was not. But, that did not mean that I found every proposition which he advanced was necessarily unworthy of credit or was unreliable. For the most part the best indication of his subjective state of mind was to be found in what he had said and done at the relevant time, or in other evidence which I did accept, as opposed to what his evidence was before me as to his state of mind.

[19] Notwithstanding my adverse view of his evidence, an important consideration, as will appear, is that I accept the argument advanced by the defendants that much of the criticism advanced by the plaintiffs of Mr James' evidence was based on unfounded premises concerning the operation of the MOU, namely that –

(a) it would necessarily be emblematic of breach of the exclusivity provisions that there were third party dealings which discussed the possibility of supply of gas to the third party; and

(b) it could never be legitimate to provide to a third party information concerning the MOU or the proposed GSA if the third party had a purpose other than the provision of finance to Icon, in particular if some part of that third party's purposes included acquisition of gas.

Events leading up to the MOU

First contact between Icon and Mr Baldwin

[20] Between October 2007 and 15 April 2008, a superannuation fund controlled by Mr Baldwin and his wife bought 3.6 million shares in Icon at a total cost of $223,200. At this time Icon had about 320 million shares on issue and had a market capitalisation of about $20 million.

[21] Because the Baldwins (by their superannuation fund) had taken a significant share position in Icon, Mr James made contact with them. He called at their home in March 2008, attended dinner with them in Brisbane on 25 March 2008, and ultimately made an arrangement for Mrs Baldwin to attend Icon's offices. That occurred on about 10 April 2008.

[22] Mrs Baldwin formed the view that Icon needed Mr Baldwin's expertise. There followed conversations between Mr Baldwin and Mr James which resulted in Mr Baldwin forwarding to Icon a draft of the agency contract, drawn by him on about 23 April 2008. Amongst other things, during these early conversations, Mr James communicated to both Mr and Mrs Baldwin Icon's need for an injection of funds to help develop the gas field on ATP 626P.

[23] Mr Baldwin and Icon's Dr McNamara and Mr James had a discussion concerning some aspects of the terms proposed by Mr Baldwin for the agency contract at a meeting at Mr Baldwin's home on 1 May 2008. Ultimately the agreement was executed on that day in the form proposed by Mr Baldwin. Mr James made the decision to enter into the agency contract as managing director of Icon.

[24] I interpolate that an oral agreement for the acquisition of further shares in Icon by Mr Baldwin was also struck on that day, the ultimate resolution of which reflected badly on Mr James, revealing him as someone prepared to renege on deals and to be complicit in the making of false public announcements to be issued to the Australian Stock Exchange (**ASX**). The relevant events were as follows:

(a) At Mr Baldwin's home on 1 May 2008, Mr James made Mr Baldwin an offer that he or an interest of his could subscribe for 5 million shares in Icon at 6 cents. Mr Baldwin initially refused but, after the agency contract had been executed, called Mr James and accepted the offer.

(b) By 7 May 2008, the price for the shares had risen, giving Mr Baldwin a substantial paper profit. He sought to have the shares issued to him at the price agreed, but Mr James reneged. Dr McNamara disagreed with Mr James, thinking that a deal was a deal. Mr Baldwin insisted that Icon should honour the deal.

(c) On 23 May 2008, Mr Baldwin pressed Mr James about honouring the deal to issue 5 million shares at 6 cents. By this time the share price had risen to 29 cents and Mr Baldwin's paper profit on 5 million shares at 6 cents was $1,150,000. At this discussion:

(i) Mr James refused to issue the shares for 6 cents.

(ii) Mr Baldwin offered to take 4 million shares at 7.5 cents and one million shares at 29 cents, a total of $590,000 for 5 million shares.

(iii) Mr James agreed to that proposal and said that the ASX could be told the shares were issued as part of the agency contract and the MOU.

(d) Notably, that last proposition was false. This share issue had nothing to do with the agency contract or the MOU. The terms of the agency contract had already been struck and the share issue under discussion was not part of its terms.

(e) On June 4 2008, Icon made an ASX announcement declaring that 5 million shares had been issued, 4 million at 7.5 cents per share and one million at 29 cents per share. Although the release was not under the hand of Mr James, that did not matter. It was the reflection of the agreement struck between Mr James and Mr Baldwin. Icon stated as part of the ASX announcement that the issue was "part of an agency agreement settlement to secure an MOU and Gas Sales Agreement to develop the gas reserves in ATP 626P". That was false.

[25] I should also observe that, although there was no indication during this evidence of his having this insight into his own behavior, Mr James' conduct also reflected badly on Mr Baldwin because there is no indication that he objected to Mr James' proposal to mislead the market.

The agency contract between Mr Baldwin and Icon

[26] The agency contract was dated 1 May 2008 and provided (emphasis added):

> Preamble.
>
> Icon Energy Limited (ICON) **is seeking a buyer** for prospective quantities of gas (CSM) to be produced by it, in a field identified as ATP 626P.
>
> Ronald William Baldwin (Baldwin) **has agreed to endeavour to obtain contracts for the sale of the ICON gas**.
>
> The terms and conditions of this Contract are:
>
> 1. **If Baldwin is able to introduce ICON to a buyer or Buyers for its CSM in the quantities and generally on the conditions set out in Item 1 hereof, ICON will pay to Baldwin**, at the end of each Calendar year of the sales contract, **a commission at the rate of 5% of the well-head sale price of all gas sold by ICON to the Buyer** or Buyers in that year.
> 2. **When a Contract of Sale for CSM is negotiated, ICON will immediately issue to Baldwin or his nominee an option to purchase** 10,000,000 shares in ICON at a price of 10 cents each with the option able to be exercised at any time from the date of issue to 31st December 2010.
> 3. This contract can be terminated by either party giving three months written notice to the other party at any time after 30th June 2009. In the event of termination, any commission payable on any sales contract will continue until the sales under that contract cease.

[27] Item 1 referred to in cl 1 of the agency contract was in these terms:

> ITEM 1 – Terms and Conditions for Sale of CSM.
>
> A. The CSM must conform to Pipeline Quality Gas Specifications.
>
> B. The Buyer must purchase not less than 5 PJ[3] per year (Tranche one) for a period of 15 years.
>
> C. ICON must have an Option to sell a further 5PJ of CSM per year (Tranche Two) at a price of 50 c per GJ less than the price of Tranche One. Buyer must have first option to purchase Tranche Two, or such part of Tranche Two as is available from time to time, at a price $1.00 cent per GJ higher than the Tranche One price.
>
> D. The price of Tranche One, in year one, shall be not less than $3.15 per GJ at the pipeline inlet at the gas field. The price will be subject to full Brisbane CPI.
>
> E. At the end of each five year period of the Contract, the price of the gas for Tranche One, shall be adjusted upward to the mid-point between the price at the end of that five year period and market. The price shall not be adjusted downward at any time. The prices for Tranche Two shall be 50 cents below and $1.00 above that of Tranche One in each five year period as the case may be.
>
> F. The Buyer shall build and own a pipeline from the 626P Field to Tipton or such other point as the Buyer shall decide. The Contract shall state the level of P1, P2 and P3 reserves required to be proved by ICON in a stated time as a condition precedent to the sales contract.
>
> G. In addition to the quantity of CSM that Buyer purchases from ICON, Buyer shall have the first right to transport an annual quantity of gas through the pipeline equal to the quantity purchased from ICON. Thereafter, ICON shall have the right to transport any gas produced by it and not purchased by Buyer through the pipeline for a transport cost limited to the recovery by Buyer of the marginal cost of shipment. There shall be no recovery of any capital cost, depreciation, interest or any other similar cost.

The MOU between Icon and BBAI

[28] Within a week of entering into the agency contract, Mr Baldwin had made some progress in discussions with BBAI as a potential buyer. On 8 May 2008, he reported to Dr McNamara the status of the discussions with BBAI. He told Dr McNamara that he would negotiate the MOU within two weeks and the GSA within a further four weeks. He recommended that as soon as the MOU was signed it should be announced to the market

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[3] A joule is a unit of energy. A gigajoule (or GJ) is equal to 1 billion (or 10^9) joules. A petajoule (or PJ) is equal to 1 quadrillion or (or 10^{15}) joules

because it would be material to Icon's share price and he thought doing so would be the trigger for Icon to commence its fund raising activities.

[29] By 22 May 2008, Mr Baldwin's dealings with BBAI had established that BBAI was willing to execute an MOU in the form which was substantially the same as that which was subsequently executed on 12 June 2008. He emailed a copy of the draft MOU and a suggested form of ASX release to Mr James at Icon, suggesting a meeting in the afternoon of 23 May 2008. At the meeting Mr James indicated agreement to the MOU without any changes.

[30] On 23 May 2008, there were several media reports to the effect that Babcock & Brown was suffering from financial problems. Mr Baldwin had spoken to Mr Murphy of BBAI about it and had been told that BBAI wanted to delay signing the MOU. On 26 May 2008, he reported to Mr James and Dr McNamara of Icon that BBAI regarded the MOU as agreed, but did not want to sign it yet, because one of the companies in the Babcock & Brown group had run into a major reporting problem. He conveyed to them that BBAI wanted the "dust" to settle in relation to that issue before making any announcement to the market concerning the MOU. On 30 May 2008, Icon's chair made some remarks at the Icon annual general meeting concerning the advanced state of their negotiations in relation to an MOU, but without identifying BBAI.

[31] On 12 June 2008, the MOU was executed and an announcement made to the ASX. The ASX announcement provided:

> Icon Energy Ltd (Icon) advises that it has agreed to enter into a non-binding Memorandum of Understanding (MOU) with Babcock & Brown (ASX:BNB) for the sale of coal seam methane gas from Icon's ATP 626P to Babcock & Brown from commencement of production expected to be in the first half of 2012.
>
> The Memorandum of Understanding foresees the supply of minimum of 10 PJ of gas to Babcock & Brown, per year from 2012 for a period of fifteen years, with an option for Babcock & Brown to purchase additional volume of gas as produced.
>
> It is intended to construct a 100 km of pipeline to transport the gas from ATP 626P to a suitable connection as part of the MOU. The price of the gas that is anticipated in the proposed Gas Supply Agreement is escalating in nature with both volume and time, and adequately recompenses both parties for their contribution and support associated with the successful delivery of gas under the Gas Supply Agreement.
>
> "This proposed agreement will underpin Icon's strategy to develop its gas prospect in ATP626P into a commercial gas field." said Mr Ray James Managing Director of Icon Energy Limited. He stated that he believes that this agreement will accelerate the timetable for Icon Energy Ltd achieving its long-term strategic objectives for its shareholders.
>
> Icon holds a working interest in ATP 626 of 100% and is in the process of evaluating the potential of its reserves. Independent expert evaluation of ATP626 prospective reserve indicates gas reserves in the range of 0.9 to 1.25 trillion cubic feet of gas. The company expects that establishing the initial 2P reserves will take up to twelve months and then establishing the production field a further minimum of two years.

[32] The MOU was comprised of three parts: the body of the MOU containing recitals and operative provisions; schedule 1 containing general terms and conditions; and, finally, schedule 2 which was said to express the principles which would be used for the purpose of the negotiation for a contemplated future GSA.

[33] The MOU provided as follows:

(a) (by cl 4 and cl 4.1 of schedule 1) that the MOU would commence on the date of its execution and continue until 30 October 2008 unless otherwise agreed by the parties and would be legally binding until it expired, was terminated or was replaced by more detailed agreements;

(b) (by its recitals and cll 1.1, 1.2 and 1.3) that the parties had entered into the MOU to facilitate the development of a GSA with gas sourced from ATP 626P for the supply

of a volume of up to 300PJ of gas over a period of 15 years on the basis of the principles contained in Schedule 2, with key factors as specified in cll 1.2 and 1.3;

(c) (by cl 1.3) that the parties would use their reasonable endeavours to negotiate the GSA by 30 August 2008, and in any event by no later than 30 October 2008, using the principles set out in schedule 2 and including specified key factors and (by cl 2(b)), the parties must work "in good faith" to progress the GSA in the manner contemplated;

(d) (by cl 4.2 of schedule 1) the parties were not bound to enter into any GSA and (by the last paragraph of schedule 2):

> These terms and conditions are indicative only and are submitted as a means of encouraging discussion. This is not an offer capable of acceptance and does not create or reflect any binding obligations between the parties or any of their respective affiliates or managed funds. It is understood for the avoidance of doubt that this document does not obligate any party to enter into any further agreement.

[34] I pause to observe that in an earlier decision in this proceeding – *Baldwin v Icon Energy Ltd* [2016] 1 Qd R 397 – McMurdo J (as his Honour then was) concluded that neither the agreement to the reasonable endeavours within cl 1.3, nor (if it be different) the agreement to work in good faith within cl 2(b), had a sufficiently certain legal content and, accordingly, were unenforceable. As the present proceeding is focussed on subjective intentions of the actors rather than the objective legal reality, it is not necessary to identify further his Honour's reasoning.

[35] Schedule 2 to the MOU expressed a preamble to this effect:

> ICON Energy Limited (Icon) is seeking a buyer for prospective quantities of coal seam gas (CSM) to be produced by it from an area identified as ATP 626P which is held 100% by its wholly owned subsidiary Jakabar Pty Ltd (together referred in this schedule as ICON).
>
> ICON has identified a potential resource of between 1.25 trillion and 7.0 trillion cubic feet of CSM in this area and it expects to convert a significant amount of this gas into reserves.
>
> ICON is seeking a conditional long term sales contract for up to 300 Petajoules of CSM with a well head price that reflects the cost to a Buyer of transporting the gas to market.
>
> Babcock & Brown Australia Infrastructure Pty Limited or one or its affiliates or funds managed by its affiliates (BNB) is seeking to purchase gas supply in Queensland and has the desire and capability to invest in and develop pipeline infrastructure.
>
> The parties current intentions in relation to this arrangement are as follows:

[36] Using standard conversion factors, 1.25 trillion cubic feet of gas would convert to a figure of over 1000PJ. That figure is consistent with the high range mentioned in the ASX release of 12 June 2008. It was not clear to me from where the 7 trillion cubic feet figure came from. And well after the events relevant to this proceeding occurred, Icon's drilling program eventually revealed that there were no commercially exploitable gas reserves in ATP 626P. But Icon did not know that at the time of the MOU or during the subsequent negotiations. What is significant, however, is that the preamble was adverting to a possible resource well over the 300PJ adverted to in the next paragraph, leaving Icon with significant potential extra capacity which it might be able to exploit. Icon was conscious of this as Mr James stated, and I accept, that:

> For us, the key elements of the GSA were the establishment of an offtake agreement where an offtaker would take the gas subject to certain criteria. It was to be up to a maximum of 300 PJ. That would leave 1700 PJ to do something else bearing in mind we had been told there were reserves of 2000 PJ.

[37] Reference to cll 1.2 and 1.3 and the body of Schedule 2 reveal that the parties contemplated that the potential GSA would have the following characteristics, although given the last paragraph of schedule 2 quoted above, such characteristics were indicative only and stated as a means to encourage discussion:

(a) The GSA would provide for the supply of gas over a period of 15 years commencing on when the relevant connecting pipeline had been constructed and commissioned and Icon delivered at least 5PJ a year. The contract period would extend for each year after year one in which the annual production was less than 5PJ.

(b) Annual quantity over the 15 year period would involve sale of gas in the following tranches:

(i) Tranche one: BBAI would purchase all gas produced from ATP 626P up to 10PJ per year.

(ii) Tranche two: Icon had a put option right to require BBAI to purchase up to an additional 10PJ per year of gas produced from ATP 626P with one year's notice to BBAI.

(iii) Tranche three: BBAI had a call option right to require Icon to sell any further gas produced from ATP 626P in excess of tranche one or tranche two gas.

(c) Minimum quantity of supply over the contract period would be 75PJ (presumably the 5PJ minimum per year for 15 years).

(d) Maximum quantity of supply over the contract period would be 150PJ (presumably the maximum tranche one quantity per year for 15 years) unless the options were exercised, in which case maximum quantity would increase by the amount of the option.

(e) Supply of gas to BBAI would be an absolute priority over third party sales.

(f) The GSA would be subject to certain specified conditions precedent, including:

(i) Icon securing sufficient financing to execute its exploration and appraisal program;

(ii) independent verification of the extent of reserves;

(iii) a binding GSA being executed by 30 September 2008;

(iv) Icon securing sufficient financing to develop the identified reserves.

(g) The price would be $3.15 per GJ, not subject to escalation until Icon delivered at least 5PJ in one year, but then subject to specified escalation and discounting.

(h) BBAI would procure a pipeline from the gas processing facility to a point from which gas could be transported to market. Subject to BBAI not exercising its tranche three call option, Icon would be permitted to use available capacity in the pipeline on a "marginal cost basis".

(i) The gas would conform to transportation pipeline quality gas specifications.

[38] The two sides, having promised each other that they would try to negotiate a GSA between themselves, but both having recognized that success was not guaranteed, obviously thought it was prudent to seek to protect themselves against exploitation during the period of the negotiations, including by being gazumped. They recorded an agreement as to how they would behave during a defined exclusivity period, including in relation to the manner they might deal with third parties and with any confidential information which each might give the other.

[39] The relevant terms were in cll 2 and 3 of the MOU, but critical to their operation were the definitions of "Competing Proposal", "Confidential Information" and "Exclusivity Period" set out in general terms and conditions in schedule 1 to the MOU, as follows:

"**Competing Proposal**" means a proposal that, if completed substantially on its terms, would:

- require ICON to abandon, or otherwise fail to proceed with [the potential GSA between Icon and BBAI];
- prevent B&B or one of its Related Bodies Corporate from concluding with ICON [the potential Gas Supply Agreement between Icon and BBAI]; or
- limit or reduce the amount of gas originated from the ATP 626P that could be supplied under [the potential Gas Supply Agreement between Icon and BBAI].

"Confidential Information" for the purposes of this MOU includes the existence and terms of this MOU and any information of any kind concerning, relating to or in connection with [the potential Gas Supply Agreement between Icon and BBAI], which is communicated to the Recipient, or to which the Recipient is given access, whether furnished before or after the date of the MOU, regardless of the form in which such information is communicated or maintained (whether written, oral, computerized or other) and regardless whether such information has been prepared by the Disclosing Party, their advisers, representatives or any other person, and including without limitation all reports, analyses, compilations, studies and other information (in whatever form communicated or maintained) prepared by the Recipient on the basis of such information. But does not include information that is already known to the Recipient at the time of execution of this deed, is or becomes known to the public through no act of the Recipient in violation of this deed, is approved for public release by the Disclosing Party, can be shown to have been independently developed by the Recipient's employees having no substantive knowledge of the Confidential Information or becomes available to the Recipient from an unrelated third party who is not to the Recipient's knowledge under an obligation of confidentiality to the Disclosing Party.

"**Exclusivity Period**" means the period commencing on the execution of this MOU, and ending on 30 October 2008, unless otherwise agreed in writing between the parties.

[40] The relevant provisions of cll 2 and 3 were:

2. Exclusivity

The parties agree that:

(a) During the Exclusivity Period:

(i) ICON must not, and must ensure that its subsidiaries and Related Bodies Corporate and its and their respective directors, officers, employees, advisers and agents do not:

A. enter into any legally binding contract or other written agreement or understanding with any person in relation to a Competing Proposal;

B. directly or indirectly solicit, invite or initiate any enquiries, negotiations, proposals or discussions in relation to any Competing Proposal or communicate any intention to do so;

C. participate in any negotiations or discussions with any person other than B&B in relation to a Competing Proposal or which may reasonably be expected to lead to a Competing Proposal; or

D. provide any information to any person other than B&B for the purposes of enabling that party to make a Competing Proposal or otherwise in connection with a possible Competing Proposal,

(ii) ICON will provide B&B with all information and access to the ATP 626P as is reasonably requested by B&B to enable it to conduct due diligence.

(b) Each party must work in good faith, to progress the Gas Supply Agreement in the manner contemplated during the Exclusivity Period.

(c) Each party must ensure that no other person (including any Related Body Corporate) does anything that the party must not do under this document.

3. Confidentiality

(a) The parties recognise that improper disclosure or use of Confidential Information disclosed by one party (the "**Disclosing Party**") to the other (the "**Recipient**") in connection with the development of the Gas Supply Agreement may result in damage to the Disclosing Party.

(b) Each party acknowledge and agree to comply with its respective confidentiality obligations set out in 3.2.

3.2 Conditions of Disclosure

The Recipient agrees:

(a) not to disclose the Confidential Information to any third party other than to its affiliates, associated companies, agents, advisors, lawyers, accountants, potential financing sources and potential co-investors, and in the case of Babcock & Brown Australia to its Affiliated Entities, (and its and their directors, officers and employees), (collectively "**Representatives"**) who require access to such Confidential Information for the purpose of evaluating the Gas Supply Agreement and who have been notified of the confidential nature of the Confidential Information and agree to be bound by the terms contained in clause 3 of this MOU; and

(b) at the Disclosing Party's written request, to return or to destroy any Confidential Information provided to the Recipient by the Disclosing Party (other than such Confidential Information which the Recipient (or its Representatives) is required to retain by law, regulation or internal policy including without limitation directors' papers, minutes of the relevant entity's board or any committee of that board to the extent that such papers and minutes contain the level of detail consistent with the normal practices of the entity).

[41] Two matters should be highlighted concerning the conduct which was regulated by cll 2 and 3 of the MOU.

[42] **First**, Icon was not subject to any absolute prohibition concerning dealing with competitors of BBAI during the exclusivity period. Each of the statements of the prohibition on dealings was only concerned with dealings which related in some specified way to a Competing Proposal (as defined). Dealings with competitors which were not relevantly related to a Competing Proposal (as defined) were not prohibited. Very broadly speaking, discussions with competitors concerning a proposed deal with them would not breach cl 2 if the proposal, **if completed substantially on its terms**, **would not –**

(a) require Icon to abandon, or otherwise fail to proceed with the potential Gas Supply Agreement between Icon and BBAI;

(b) prevent the conclusion of that potential Gas Supply Agreement between Icon and BBAI (or one of its related corporations); or

(c) limit or reduce the amount of gas originated from ATP 626P that could be supplied under the potential Gas Supply Agreement between Icon and BBAI.

[43] **Second**, the MOU permitted any recipient of Confidential Information to disclose Confidential Information to potential financing sources and to potential co-investors, if the following conditions were met:

(a) the potential financing source or potential co-investor required access to the information for the purposes of evaluating the potential GSA which was the subject of the MOU;

(b) the potential financing source or potential co-investor had been notified of the confidential nature of the Confidential Information; and

(c) the potential financing source or potential co-investor had agreed to be bound by the terms of cl 3 of the MOU.

[44] From these two matters comes the obvious conclusion that the MOU apparently allowed a reasonable degree of room for dealings to occur during the exclusivity period between Icon and third parties. In particular, Icon's right to pursue opportunities with potential financiers or co-investors was specifically preserved.

[45] Without attempting to be exhaustive concerning permitted third party dealings, Icon would not breach the cl 2 exclusivity promise if –

(a) the third party dealings were sufficiently inchoate that they could not yet be said to amount to a Competing Proposal (as defined) because there were no terms which could be substantially performed so as to result in the requisite conflict between it and the contemplated GSA with BBAI; or

(b) Icon made clear to the third party that any possible deal was subject to Icon first performing its obligations owed to BBAI under the MOU; or

(c) Icon made clear to the third party that, in the event that a GSA was concluded with BBAI within the time frame provided under the MOU, any proposal for sale of any gas would have to be for the sale of any gas which might be available after Icon discharged its obligations to BBAI.

[46] Indeed, notwithstanding the apparently unlimited call option provided for by tranche three of schedule 2 to the MOU, it was reasonably arguable that dealings with third parties could include discussing the possible supply of gas produced from ATP 626P over and above the 300PJ maximum referred to in the body of the MOU, given (1) the availability of an argument that the option provisions in schedule 2 should be regarded as subordinate to the terms of cl 1.2 of the MOU which specifically referred to 300PJ as the maximum supply over 15 years, and (2) the expressed indicative nature of schedule 2 in any event. And given Icon's view as to the potential size of the resource (as to which see [36] above), Icon could reasonably argue that it was legitimate for it to explore the possibility of other "offtakers" so long as it was not contemplating any dealing which would adversely affect BBAI's priority to 300PJ over the period of the contemplated MOU. Certainly this view of how the exclusivity terms of the MOU would operate was sufficiently open that I would not have regarded conduct consistent with having that view of the MOU as revealing a deceitful intention concerning compliance with the exclusive dealing provisions of the MOU.

[47] Of course, other views of the ambit of the clause were also reasonably open. It will appear that Icon's own solicitors expressed slightly different views of the way in which they would work: compare [64](f) and [64](i) below. And in cross-examination, Mr Barry (a careful and honest witness whose evidence I accept) expressed the view that although he was not sure that the MOU would prohibit Icon from entering into a discussion that was subject to BBAI's rights, he did think that the consequence of the exclusivity provision was, in practical terms as he understood it, that Icon could not partake in discussions with third parties about the sale of gas during the exclusivity period.

[48] The significant point here is that it would not necessarily be emblematic of breach of the exclusivity provisions that there were third party dealings which discussed the possibility of supply of gas to the third party. The question of the application of the obligations to the dealings would require a much more nuanced examination of the nature of the third party dealings and how they might bear on the GSA with BBAI (or the negotiations for it).

[49] Of course, the third party dealings just discussed would involve the risk that the provision of any information to the third party concerning the terms of the MOU would amount to a breach of the cl 3 obligation concerning confidential information. But at least the fact of the MOU and some information of its terms had been the subject of a release to the ASX. No suggestion has been made that that release constituted a breach of the MOU. That meant that the fact of the MOU and so much of its terms as had been made public in that way, no longer amounted to Confidential Information as defined. And, importantly, if the proposed dealing had a component which involved the third party acting as a potential financing source for Icon or as a potential co-investor with Icon, then the MOU did permit of the provision of requisite information, so long as the conditions to which I have already referred were met. Whilst it is true that one of those conditions was that the potential financing source or potential co-investor required access to the information for the purposes of evaluating the investment opportunity, it would be a misreading of the clause to conclude that disclosure would not be permitted if the recipient had an additional purpose other than an investment purpose (e.g. also to acquire access to gas production.)

[50] Mr Baldwin gave evidence concerning a common type of agreement by which owners of oil or gas tenements obtain finance to assist in their commercial exploitation of their tenements, namely a "farm-in" (or "farmin") agreement. In his view such an agreement was an agreement in which a company like Icon (who had a mining tenement which it was seeking to exploit) entered into an agreement with another company (usually a company with the money, technology and other resources to do work on the tenement, which the tenement owner did not have) in which the other company provided the requisite resources in return for a share of the tenement, usually including some form of a share in the production from the tenement. Dr McNamara gave a similar definition when he was explaining the concept to ASIC investigators in April 2009.

[51] However according to Mr Baldwin it could not be thought that there was any real prospect of finding a third party interested in a "farm-in" agreement with Icon during the time it was the subject of the MOU. I am not prepared to give that expression of opinion any significant weight. A third party standing in the shoes of the parties to the MOU at the time it was executed would have thought that the parties saw sufficient merit in preserving to Icon the right to deal with potential financiers or co-investors during the exclusivity period to provide explicitly for that possibility. And in May 2008 Mr Baldwin must have thought that there was merit in the possibility because he was the one who negotiated the terms of the MOU on behalf of Icon with BBAI, which so provided.

[52] For reasons which I have already articulated, if dealings with a third party did involve the discussion of a farm-in opportunity, it would not necessarily be emblematic of breach of (or intention to breach) the exclusivity provisions of the MOU that the opportunity might involve or be likely to involve providing to the farm-in co-investor some form of share in the production. Nor would it necessarily be emblematic of breach of the confidentiality arrangements that such a person might be provided with confidential information. Such a person could be provided with such information if the contractual conditions were met.

[53] Against that background, I turn to a consideration of the relevant events which took place after the MOU was executed. I will first outline the steps which took place under the MOU with a view to finalizing a GSA with BBAI, and I will then turn to the dealings which Icon had with various third parties during the exclusivity period.

Events after the MOU

Dealings concerning BBAI and the MOU

[54] After the execution of the MOU, Mr Baldwin continued negotiations with BBAI with respect to the terms of the GSA. The principal events are identified in the following chronology.

[55] On 4 July 2008, BBAI sent Mr Baldwin a first draft of a GSA for discussion.

[56] On 7 July 2008, BBAI sent Mr Baldwin an email suggesting that the appropriate documentation to implement the transaction might comprise –

(a) a GSA which would contain commercial terms;

(b) a Development Agreement, covering such matters as the milestones for assessing the gas resource and ongoing pipeline development; conditions precedent to the GSA and pipeline construction and commissioning; project agreement goals and structure; gas field development obligations; pipeline development obligations; GSA commencement date; and termination rights; and

(c) a Project Agreement developed by the parties under the Development Agreement as a basis for coordinating the commissioning of the gas plant and pipeline and thereafter the commencement of the GSA proper.

[57] On 8 and 9 July 2008, a BBAI representative met with Mr James and Mr Duerden of Icon to discuss ATP 626P and the GSA.

[58] On 14 July 2008, BBAI sent Mr Baldwin a Term Sheet identifying BBAI's understanding of the key elements for the GSA, and on 17 July 2008 a "Development Agreement Term Sheet".

[59] On 17 July 2008, BBAI sent Mr Baldwin an email advising that the contracts which they aimed to have executed by the end of August were a Development Agreement and a GSA (as a schedule of the Development Agreement).

[60] On 21 July 2008, BBAI sent Mr Baldwin an email setting out BBAI's "work plan" which included:

(a) legal advisors elaborating a new version of the GSA and a first version of the Development Agreement;

(b) discussion as to the Term Sheet;

(c) starting the pipeline concept study; and

(d) elaborating a list of key elements in relation to Icon's development plan.

[61] On 22 July 2008, Mr Baldwin responded with suggested changes to the Development Agreement term sheet and they were agreed on by BBAI. Later that day, BBAI sent to Mr Baldwin a "GSA Principal Elements" sheet, which was a document that had been agreed on between BBAI and Mr Baldwin regarding the GSA, including gas quantity, data access and performance triggers. BBAI said that the document incorporated all Mr Baldwin's previous comments over the last week. It stated "We are happy for you to share this with Icon if you like." Mr James acknowledged that Mr Baldwin sent the draft term sheet for the Development Agreement to him.

[62] On 30 July 2008, Icon advised the ASX as follows (emphasis added):

> Icon continues to move forward with the development of its coal bed methane operations in ATP 626P. The appraisal drilling programme of up to 24 wells is expected to commence in the next two months as soon as a suitable rig can be obtained. This programme will include the testing of the wells drilled in late 2007. A comprehensive programme is now under review now that staff has been engaged to plan and conduct this extensive programme. The previously reported commencement date for dewatering of the three wells has been placed on hold, waiting on final arrival of equipment from the USA and Canada and the engagement of the personnel required to conduct the larger programme.
>
> Icon's capital requirements for the gas development programme are being addressed.
>
> On 5th June 2008, Icon placed 16,000,000 shares in the Company to raise $2.8 million. Funding of the 24 well appraisal drilling programme is planned to be completed by early to mid October 2008. **Negotiations to raise this capital are still subject to several options, which include equity and farmin opportunities**. It is not intended to seek funds by way of an issue to shareholders in the current market. The capital raising negotiations will finally be determined in the best interests of shareholders.
>
> A key factor in the development of Icon's coal seam gas in ATP 626P was a market for the gas to yield the best return to Icon and provide surety to the commercial development.
>
> **In May 2008, a Memorandum of Understanding (MOU) was negotiated with Babcock & Brown to supply gas for electric power generation. This MOU was signed when Babcock & Brown were reportedly experiencing difficulties surrounding its share price and supporting credit providers. Whatever the outcome of these events, Icon has obtained a significant right under this MOU.**
>
> **1. Icon has a market for its gas;**
>
> **2. Icon has been given time to prove the commercial status of the gas reserves;**
>
> **3. Icon will be supporting local Australian power generators and will not seek to export these reserves now allocated under the MOU;**
>
> **4. A Gas Contract is in draft form for the supply of gas to Babcock & Brown;**

5. Under proposed Gas Contract terms, Icon has negotiated significant economic assistance in regard to pipeline transport and compression with upside potential and downside protection on the gas price.

[63] On 11 August 2008, Mr Baldwin sent drafts of the GSA and the Development Agreement to Mr James and Dr McNamara, informing them that "These agreements are in an advanced form and I look forward to your comments." I observe that on Mr Baldwin's pleaded case he had earned his fee by this conduct.

[64] Shortly prior to that, Icon met with external solicitors.[4] I observe:

(a) On 7 August 2008, Icon provided the executed MOU and the then draft of the GSA to its solicitors.

(b) On 8 August 2008, Icon asked its solicitors to review the MOU and the GSA and to provide advice. Icon raised some issues for particular consideration, including the need to "allow for a Farmin so the Farmin party has the right to sell Gas they produce" and to allow for cross-guarantees from BBAI's parent company. Icon noted that it was proposing to accept a lower price for gas from BBAI to assist in compensation towards the proposed pipeline costs and sought advice as to how to ensure Icon was compensated in the event that other gas suppliers used the pipeline once it was built. Icon asked whether there were "Any ACCC issues in relation to pipeline access by other parties. In particular, any issues that we need to consider for us to make sales other than to B&B and conversely can [B&B] prevent others using pipeline we have contributed [to]."

(c) On 12 August 2008, the solicitors gave a high level review of the draft GSA which also contained a table comparing the relevant parts of the MOU with the clauses of the draft GSA which covered the same ground. Amongst other things, the solicitors remarked adversely on the level of risk that the documents required Icon to assume in return for a limited commitment by BBAI. The solicitors advised that:

> This risk allocation might be acceptable in the context of multiple offtakers ranking equally (and then perhaps with a lower take or pay quantity), but not where the seller deals with one priority customer and essentially has only one point of access to the market.
>
> Way forward:
>
> - examine the risks the seller is asked to assume;
> - propose risk sharing based on one of two scenarios: (1) the buyer is the sole offtaker with first rights or (2) the buyer is entitled to take a fixed contract quantity and has rights of first refusal but ranks equally with all offtakers.

(d) On 21 August 2008, Icon's solicitors suggested a draft form of letter to be sent to BBAI requesting information on how it was proposed to address the question of the credit risk that the proposed gas buyer posed to Icon under the GSA. This was in the context of there having already been adverse publicity about at least one company within the Babcock & Brown group.

(e) On 21 August 2008, Icon's Mr Quayle emailed the external solicitors seeking advice as to how Icon could respond to an expression of interest by Sojitz without being in breach of the MOU. The email trail revealed the following steps had occurred.

(i) On 11 August 2008, a consultant acting on behalf of Sojitz emailed Mr James, indicating Sojitz sought to solicit expressions of interest for gas supply and stating that if the opportunity was of interest to Icon, the consultant could arrange to have a non-disclosure agreement sent through and, once that was

[4] It is not clear when the solicitors were formally retained, but it must have been sometime after 12 August 2008. The precise timing of the retainer does not matter.

executed, could then arrange to provide Mr James with an Information Memorandum.

(ii) On 18 August 2008, Icon executed a non-disclosure agreement and on 19 August 2008 Icon received the Sojitz Information Memorandum.

(iii) The email from Icon to its external solicitors on 21 August 2008 was in these terms:

> Attached are CA[5] we have signed with Sojitz and their expression of information document.
>
> Below is the correspondence in this matter to Owen Kelp in relation to Sojitz Corporation.
>
> We would like to express interest to Sojitz but realise that under our MOU with B&B we are unable to do this for the Supply of Gas.
>
> We would appreciate if you can advise us as soon as possible how we handle this expression of interest and not be in breach of the MOU.
>
> Their request is for Gas Supply but we would be prepared to offer Sojitz a Farmin Opportunity to ATP 626 or possible shareholding in the company.

(f) The solicitors responded by email on 25 August 2008. Their advice was consistent with the observations I have made about the extent of room for movement allowed by the terms of the exclusivity obligations in the MOU (emphasis added):

> **The MOU with BNB contemplates in schedule 2 that BNB effectively has a call option over all gas produced from the ATP. That schedule is, however, not binding. All the MOU itself says on supply commitment that might be regarded as binding (in the widest possible sense) is clause 1.2 that mentions "up to" 300 PJ and clause l(f) which says that BNB has first priority of gas supply (implying that there may be other customers).**
>
> Icon's obligation in clause 2 of the MOU is to avoid "Competing Proposals". The term is defined in schedule 1. The first 2 dot points in the definition are unlikely to be triggered by any EOI that ICON makes to Sojitz. **The third ("limit or reduce the amount of gas originated from the ATP 626P") could be triggered by an EOI to Sojitz. What you need to do is take a view on how much gas ICON would be prepared to make available to BNB, and then you're pretty well free to make an EOI to Sojitz for the balance**. In making that decision I suggest the parameters are:
>
> - 300 PJ reserved for BNB (MOU clause 1.2);
> - BNB with supply priority over Sojitz (clause 1.3(f) MOU).

(g) On 27 August 2008, a similar request was made of the external solicitors in relation to the proper manner of response to dealing with Stanwell, in these terms:

> We had discussions yesterday with Derek Hannigan of Stanwell in relation to how they could be involved in ATP 626.
>
> We advised Derek of our MOU with B&B and at this time we could not enter into or discuss any Gas Supply Agreements.
>
> Stanwell would however like to move ahead to discuss a Farmin opportunity into the lower section of the tenement and a possible equity position in Icon.
>
> However Derik [sic] is reluctant to go any further or spend funds on due diligence until we can clarify our position to Stanwell in relation to the status of our MOU with B&B.
>
> Accordingly we would like you to draft a formal letter based on your advice that we could provide to Stanwell advising them of your legal advice to us. We may also be able to use this letter for Sojitz and any other parties should it be necessary.

---

[5] The reference to "CA" was, presumably, an acronym for Confidentiality Agreement and in context was a reference to the non-disclosure agreement which had been signed.

(h) Further to that enquiry, Icon forwarded to the solicitors the Stanwell form of confidentiality agreement and the Sojitz non-disclosure agreement.

(i) The solicitors advised by email dated 27 and 29 August 2008 (emphasis added):[6]

> **ICON**:
>
> (a) **can negotiate and enter agreements with third parties for farm-ins or other participation by the third party in the development of ATP 626; but**
>
> (b) **cannot sell gas from ATP 626P to other parties or make or negotiate for any other agreement that has that effect**.
>
> For example, ICON could enter into a farm-in and joint venture for ATP 626P, but it could not agree to or negotiate for the sale of gas from ATP 626P other than to B&B, and it would have ensure that the third party investor acts consistently with that obligation.
>
> These restrictions will expire on 30 October 2008. At this point it is important to remember that Icon's obligation to negotiate in good faith for a GSA continue until that date.

(j) The solicitors also drafted a form of confidentiality undertaking which could be given to any potential financing source or potential co-investor and had drafted their advice in a form which could be provided to such a person. Mr James said, and I accept, that he recalled providing the letter to other parties so that there was no misunderstanding as to what Icon could and could not do.

[65] I observe that the fact and content of the communications which passed between Icon and its external solicitors were entirely consistent with the conduct of good faith negotiations with BBAI. And, importantly, they were not consistent with the notion that Icon had never had any intention of complying with its obligations in the MOU.

[66] On 21 August 2008, Icon sent to BBAI a development of the letter which had been drafted by their solicitors, as identified at [64](d) above. The letter appeared to be an appropriate due diligence response to an obvious risk in relation to which the solicitors had already given some advice.

[67] On 25 August 2008, Icon and BBAI had an email exchange in which BBAI was asked to and did review the terms of a release which Icon proposed to make to the ASX. Amendments were made at BBAI's request, including by deleting reference to BBAI by name. A draft prior to amendment provided (emphasis added):

> …
>
> **In June, Icon signed a memoradum [sic] of understanding with Babcock and Brown over the supply of at least 15 petajoules of Surat coal-seam gas annually to Babcock over the next 15 years.**
>
> The two parties are working toward turning the memorandum into a contract.
>
> **Mr James says it is common knowledge that Babcock is having a rocky time** but says Icon's future is not dependent on Babcock.
>
> **"Icon has every intention of honouring its agreement with Babcock as long as that company has the capacity and willingness to proceed.**
>
> **"Our gas will not only meet the needs of Babcock but will enable Icon to satisfy approaches the company has received from several parties in the last few weeks.**
>
> "These approaches have undoubtedly been fuelled by the speculation on Babcock's future, **However, the 5.44 TCF of gas in place estimate suggest that additional markets will be needed to maximise our resource on behalf of our shareholders."**
>
> **Mr James says that while the memorandum of understanding with Babcock constrains Icon from entering into any competing gas-sale agreement, the company is free to examine farm-in offers it has received from both LNG and other energy consumers.**

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[6] This advice seems to have a different approach to third party dealings which might involve supply of gas than did the advice of only a few days earlier.

[68] The version actually released contained the following terms to which BBAI did not object (emphasis added):

> Icon Energy is a major step closer to becoming a coal-seam gas producer in the wake of an announcement that indicates a five-fold increase in its prospective gas reserves in the southern Surat Basin.
>
> **Icon says its ATP 626P permit contains up to 5500 petajoules of ga**s.
>
> **The company says that is the energy equivalent of 5.44 trillion cubic feet of gas, or an energy equivalent of approximately 900 million barrels of oil.**
>
> Icon's estimate, based on coal samples, well log analysis, and modelling studies from 53 oil wells previously drilled in the area, has been audited by an independent reserves expert.
>
> Managing-director Ray James says the expert's estimate advances Icon dramatically along the road to developing a commercial gas field based on the Surat Basin's Walloon coal seams.
>
> "We now have to keep up the momentum by establishing production rates and 2P reserves.
>
> "Once we achieve that level of reserves by mid 2009 we will be only two years away from becoming a producer."
>
> Icon drilled three production wells at ATP 626P, which is between Goondiwindi and Moonie, late last year and has plans for a 24-well test program over the next 12 months.
>
> This program will include de-watering and monitoring program of the three 2007 wells.
>
> A pilot test involving a further three wells is planned for the remainder of 2008.
>
> Icon says discussions are at an advance stage for the funding of this pilot test.
>
> "Our aim is to be in full production by late 2011 or early 2012," says Mr James.
>
> **In June, Icon signed a memorandum of understanding for the supply of up to 300 petajoules of Surat coal-seam gas over the next 15 years. This MOU is for less than 10% of the indicated gas resource.**
>
> **Ray James said that additional gas sales will be needed in the future to develop our resource on behalf of our shareholders.**
>
> **Mr. James says that the memorandum of understanding does not constrain Icon from examining farm-in offers it has received from both LNG and other energy consumers.**

[69] Icon submits that Mr James' recognition of Icon's intention to pursue third party opportunities is supportive of its proposition that there was never any intention by Icon to comply with what it took to be its obligations under the MOU. I disagree. The observations in this release are certainly consistent with an intention at the time of the release to exploit opportunities created by the fact that the then apparent extent of the reserve significantly exceeded the 300PJ maximum supply to Icon. That is an intention consistent with a construction of the MOU which was reasonably open: see my observations at [42] to [49] above. The observations in the release do not reveal any intention either then or at the earlier stage of ignoring MOU obligations. A test of how realistic Icon's view of what is said to be revealed by the ASX release is that there is no evidence of BBAI objecting to the notion that Icon would behave in the way that it had suggested it would. And the reason for that was that BBAI's Mr Murphy in fact understood the MOU to be fundamentally directed towards the purchase and sale of 300PJ of gas over a 15 year period, and he thought the MOU did not prevent Icon from exploring whether it could sell gas above 300PJ to other people. He was not concerned with Icon pursuing other proposals as long as BBAI could get its 300PJ of gas.

[70] On 4 September 2008, Icon's Mr McGill emailed to Mr Baldwin a document containing Icon's comments on issues arising out of the draft documents which Mr Baldwin had sent to Icon on 11 August 2008. The document raised a number of matters which Icon identified as issues which it wanted to discuss with Mr Baldwin, presumably before conveying the matters of concern to BBAI. The letter was an obvious development from the preliminary comments concerning imbalance of risk which had been advanced by Icon's external solicitors. Amongst other things, Icon raised concerns as to the apparent

limitation on Icon's ability to make sales to anyone other than BBAI during the term of the proposed GSA. Mr Baldwin responded to Icon on 8 September 2008.

[71] On 4 September 2008, BBAI responded to the letter which Icon had sent it, to which I have referred at [66]. However, the letter did not offer any substantial response to Icon's previously expressed concerns about the credit-worthiness of the party with whom it would contract, other than to acknowledge the concern and to say that "It is our intention that the B&B counterpart entity be a creditworthy entity and we are undertaking an internal review at this time to assess the best option that will meet your expectations." BBAI did communicate that it remained focussed on the transaction and was seeking to finalize it as soon as possible.

[72] By 17 September 2008, BBAI had communicated to Icon its concern as to what it described as the delay in receiving a response from Icon on the draft agreements which had been forwarded in early August 2008.

[73] Icon provided a detailed response on 19 September 2008 in the form of a four page letter which stated that whilst Icon was continuing to review the draft documents, it thought negotiations would be accelerated if Icon clarified some of "the underlying principles and key issues". The evidence revealed that its terms had been settled by Icon's external solicitors.

[74] I will not attempt to summarise the entirety of the letter. It started with the observation that Icon felt that the documentation did not reflect a fair and balanced dealing with the risks and obligations of both parties. This reflects a continued development of the theme first specifically identified by the external solicitors in their first response to Icon having reviewed the documents on 12 August 2008: see [64](c) above. That theme of risk imbalance was developed in a number of ways. Significantly, however, the letter expressed concerns as to the restrictions expressed in the documents on Icon's ability to exploit the resource. It emphasised also the point already made about the credit-worthiness of the Babcock & Brown entity proposed as the contracting party. It suffices to quote these paragraphs, the emphasis being in the original:

> 4. Icon's management is responsible for the management of Jakabar on behalf of its shareholders. The GSA and DA as they are now constructed would constrain Icon's management significantly. In particular, we are unable to agree to clauses which restrict how we can raise capital. In general, we have three sources of finance, equity, loan capital, and farm-ins. The Agreements currently seek to prevent us from making any loan finance (we cannot register a first ranking charge) and it prohibits entering into farm-in agreement. Farm-in agreements are one of the most frequently used avenues for raising finance in the exploration and development fields. How we raise finance is a matter for the management of Icon and its Board of Directors. We are unable to agree to restrictions of this nature. Icon is required to demonstrate that we have "development funding in place". This will simply be impossible with the current restrictions that the GSA places on Icon's ability to access capital. **As a principle, Icon and Jakabar must be free to use any funding avenue deemed appropriate by its Board including, but not limited to, farmins, loans (first ranking secured and unsecured), and equity placements. Consequently Icon will not be providing security over the assets of Jakabar.**
>
> **5. We also seek from you a better understanding of the technical, financial and commercial ability of the entity that you propose as our counterparty, to enable us to consider requirements for buyer security.**
>
> 6. Icon both accepts and values B&B as a foundation customer, but we cannot accept an agreement that makes B&B our only customer. When we signed the MOU it was for up to 300PJs of gas and was signed in the context of 1TCF of gas in place resource estimates. Our gas in place estimate is now 5.44TCF. In addition, the market for coal seam gas has changed dramatically since the signing of the MOU. The recent ConocoPhillips/Origin agreement values 3P reserves at $1.65/GJ. Gas reserves are now approaching the price we will receive under the MOU for gas at the pipeline flange. We also accept that the ability of B&B to sell gas from this ATP is a function of the pipeline capacity. Currently, the only documentation we have on this is the MOU that requires B&B to provide a pipeline capable of carrying 20PJ per annum based on average daily quantities.

> Unless the GSA and DA provide a greater capacity, this is the quantity ceiling for the GSA. **As a principle, Jakabar will agree to the sale of up to 300PJ of gas to B&B at the rates specified in the MOU with the sale of any gas over and above 300PJ to be subject to separate negotiation and separate gas-sale agreements. Jakabar must be free to sell any such additional gas in its discretion.**
>
> 7. The supply of 300PJs of gas in a cornerstone of the MOU and, we assume, the basis for B&Bs economic evaluation of the pipeline. For security for B&B's investment we acknowledge that they will require sufficient reserves to quarantined to meet their contractual requirements. **As a principle, bearing in mind the other comments in this letter Jakabar will ensure that sufficient reserves are indentified [sic] and quarantined to meet the contract with B&B and that no gas will be supplied to other parties in priority to B&Bs contracted requirements.**

[75] The letter concluded that it did not represent a comprehensive commentary on the draft documents but focussed on issues of principle that had emerged from the draft agreements. It suggested that Icon would comment in more detail on the drafts when the parties had addressed the issues of principle which it had identified.

[76] There was a meeting with BBAI representatives which took place on 8 October 2008 in which Icon insisted on the importance to it of some of the matters identified in its letter and responded to a request which BBAI had made to an extension of the exclusivity period provided for in the MOU. Icon communicated that it –

(a) insisted on "some form of cross charges/guarantee with [BBAI]" to address the issue of the credit-worthiness of the party with whom it would contract;

(b) insisted that the "intention of the MOU was only ever for a maximum of 300PJ";

(c) refused to contemplate an extension of the exclusivity period as requested by BBAI; and

(d) requested that the pipeline accommodate more than 20PJ/annum, that request being made in light of Icon's then (but, as it later transpired, mistaken) impression that ATP 626P had very significant quantities of commercially exploitable gas.

[77] Although there was further contact between Icon and BBAI after this date, nothing was finalized. Icon refused to extend the exclusivity period deadline, and the MOU expired on 30 October 2008 in accordance with its terms.

<u>Dealings with third parties during the exclusivity period</u>

Dealings with AWE

[78] On 16 June 2008, Icon contacted AWE about the possibility of AWE becoming a co-investor. The terms of the email acknowledged the fact of the MOU commitments with BBAI and stated:

> Because of confidentiality clauses we cannot disclose the value of this contract [namely the MOU] at this time but we are free to disclose information to our investors. In anticipation that we may be able to discuss the prospects of your involvement with us in 626, I have attached a confidentiality agreement whose signing will enable us to have more free and frank discussions. We can say that our gas sale contact [i.e. the contemplated GSA with BBAI] should provide a payback on your investment of between three and five years depending on the amount of gas taken under the agreement. The minimum quantity is 10PJs per annum.
>
> As Ray James indicated at the meeting our internal estimates of gas in place in 626 is between 2 TCF and 7TCF with a most likely estimate of 5-6TCF. Any reasonable farmin with us should deliver to AWE the 1 billion increase in value you seek.

[79] I observe that the terms of this email are not consistent with intentional or reckless disregard of the MOU provisions concerning exclusive dealings, quite the contrary. And I infer nothing at all from the timing of when the contact occurred. The opportunity to pursue co-investor opportunities was specifically preserved, albeit subject to some constraints. And the fact that the MOU contemplated a GSA with a minimum quantity of

10PJ per annum over 15 years had been the subject of a previous ASX release and was public information.

[80] On 2 July 2008, Icon entered into a confidentiality agreement with AWE in relation to ATP 626P which identified the purpose of the confidentiality as follows:

> ... certain coal seam gas exploration and production rights held by [Icon] or its Affiliated Companies under or in respect of certain exploration petroleum licences ("ATP") and petroleum production licences ("PL") granted under State of Queensland Act 1923 ...

[81] The confidentiality agreement so entered into did not comply with the MOU requirement that potential co-investors be (1) notified of the confidential nature of the Confidential Information, and (2) agree to be bound by the terms contained in cl 3 of the MOU. But there is no reason to think that the relevant Icon actors did not think that the document achieved the same goal. Notably they did not obtain advice as to the appropriate mechanism to ensure compliance on 29 August 2008: see [64](i) and [64](j) above. But, in any event, this is not a case in which BBAI seeks to recover damages for breach of cl 3. Indeed no allegation that there was a breach of cl 3 is pleaded by BBAI.

[82] In July and August 2008, there was further communication with AWE about the possibility of AWE becoming a co-investor by taking an interest in ATP 626P. On 18 August 2008, Icon made an offer to enter into a farm-in agreement which would place shares with AWE for $5 million and give it an opportunity to earn up to 30% of ATP 626P by funding the appraisal drilling program estimated to be $40 million.

[83] On 26 August 2008, AWE emailed Icon seeking information about the proposal in these terms:

> Thank you for offering AWE this proposal.
>
> AWE are interesting in this opportunity and are currently undertaking a detailed evaluation. To this end, we are currently reviewing the information you provided to us in July.
>
> There are some matters on which we would like further detail, although I expect to have some additional questions once our technical review is complete.
>
> 1. Cost estimates. You have estimated to initial cost to AWE at $40m and would like to understand how these estimates have been developed
>
> 2. B&B contract. We would like to further understand the extent to which this MoU is binding upon the owners of 626
>
> 3. Are there any impediments that might impact the stage 3 program and thus tenure of the permits, ie landowners, rig availability etc

[84] The reply was sent by Dr McNamara on 27 August 2008 in these terms:

> ...
>
> We will send you a detailed answer to each of your questions over the next day or two. In general, we have broad estimates as to the cost of completing the field and the detail of the engineering estimates are firming up on a daily basis. These should be sent to you soon. We have our gas contracts expert (lawyer) working on this but the initial advice seems to be that B&B has first priority up to 300PJ and that we have an implied right to sell above that amount. We are also constrained from engaging in Competing Proposals for gas sales agreement. As part of the gas supply agreement we are negotiating, we need to take a view on how much gas ICON would be prepared to make available to BNB. We are free to undertake a farmin.
>
> …

[85] This response is broadly consistent with the content of the advice which had been received from the external solicitors on 25 August 2008, which I have recorded at [64](f).

[86] At about the time the advice was being sought from external solicitors about how Icon could deal with third parties in a way which complied with the MOU, Mr Baldwin had telephone discussions with Mr James which touched upon, amongst other things, the

dealings which Icon had and proposed to have with AWE and with Stanwell and Sojitz. As to this:

(a) In a conversation on 26 August 2008, Mr James told Mr Baldwin that he thought that BBAI was "holding them up on getting finance but at the end of October they would be free" of BBAI. He told Mr Baldwin that there was nothing stopping Icon from entering into farm-in agreements or selling interests in ATP 626P. Mr Baldwin told Mr James that he should make Stanwell aware that anything they talked about was subject to the MOU. I observe that Mr James' statements were consistent with the advice which Icon had been given by external solicitors at that stage.

(b) There was a further conversation on 26 August 2008, in which Mr James referred to discussions that Icon had just had with Stanwell and that Stanwell had expressed concerns to know about the impact of the Icon relationship with BBAI.

(c) In a conversation on 27 August 2008, Mr James had another discussion with Mr Baldwin in which he referred to discussions which were occurring with Stanwell, Sojitz and AWE. Mr Baldwin taped the conversation and the relevant part of it also reveals that Mr James' statements to Mr Baldwin were consistent with the advice which Icon had been given:

> RJ: now we haven't got down to numbers with Stanwell and we're a long way from that
>
> RWB: yeh
>
> RJ: and we're also going to talk to Sojitz
>
> RWB: yes
>
> RJ: and of course we've got AWE here now
>
> RWB yes
>
> RJ: with a reply back to us now AWE have come back and said – we made the offer to them on our terms – now AWE have come back and said
>
> "We're interested in this opportunity and are currently undertaking a detailed evaluation to this end. We are currently reviewing the information you provided us in July. There are some matters we like more detail on. These are cost estimates of the 40 Million. (We are preparing a more detailed budget on that now) The B & B contract - we would like you to f – we would like to further understand the extent to which this MOU is binding on the owners of 626 (and we are getting a legal opinion from Hopgood Ganim – Martin Klapper)
>
> RWB: yep
>
> RJ: to give them a reply to that question now
>
> RWB: yep
>
> RJ: Ah um and basically it says that we've said that over and above the 300 PJ's and beyond the 31st October we would be free to enter other gas sales agreements
>
> RWB: uh huh
>
> RJ: and in any case we – legally we are required to negotiate 300 PJ's but beyond that it is not binding
>
> RWB: uh huh
>
> RJ: but anyway he'll give us that opinion …

(d) The reference to the legal opinion seems to be that which is referred to at [64](i) and [64](j) above.

[87] BBAI pleaded that the matters discussed with AWE must be regarded as a Competing Proposal as defined by the MOU in that the farm-in opportunity proposed to AWE:

(a) would require Icon to abandon or otherwise fail to proceed with the GSA;

(b) prevent BBAI or one of its Related Bodies Corporate from concluding with Icon the GSA; and

(c) identified the GSA as being limited to 300PJ and thereby limited the amount of gas that originated from ATP 626P that could be supplied under the GSA.

[88] In my view it is not relevant to the cause of action in deceit to determine whether or not, on the proper construction of the MOU the proposal was to be regarded as a Competing Proposal as defined. What is in issue is fact finding which sheds light on what was Icon's subjective intention as at 12 June 2008. I do not see how the question whether or not there was in fact a breach of cl 2 does that. And as to why there was a reasonable argument open that it would not breach cl 2 to deal with AWE in the manner revealed by the evidence, see [41] to [52] above.

Dealings with Stanwell

[89] Dealings with Stanwell during the exclusivity period followed the same sort of path as the dealings with AWE, namely Icon dealt with Stanwell with a view to it becoming a co-investor pursuant to some form of farm-in arrangement, Stanwell needing to know about the MOU, and Icon taking advice on the question.

[90] The course of dealings with Stanwell during the exclusivity period was as follows.

[91] In July 2008, Icon had discussions with Stanwell in relation to a possible farm-in arrangement and the provision of further information to Stanwell concerning the MOU, initially at a lunch which took place on 15 July 2008. Stanwell provided a form of confidentiality agreement to Icon by email on that day.

[92] On 24 July 2008, Ms Palmer of Icon sent an amended draft which tracked changes to that document which Icon proposed. Amongst the tracked changes were proposed new recitals E, F and G as follows:

> E Icon Energy Limited acknowledges that Stanwell requires access to such Confidential Information for the purpose of evaluating the Memorandum of Understanding between Icon Energy Limited and Babcock & Brown.
>
> F Stanwell acknowledges the Confidential Nature of the Memorandum of Understanding (MOU) dated 12 June 2008 between Icon Energy Limited, Jakabar Pty Ltd and Babcock & Brown and the Gas Supply Agreements (GSA) presently being negotiated between Icon Energy Limited, Jakabar Pty Ltd and Babcock & Brown
>
> G Stanwell agrees to be bound by the confidentiality terms contained in the MOU dated 12 June 2008.

[93] I observe that the fact that Icon could be asking for such changes to the Stanwell document seems inimical to the existence of the alleged deceitful intent as at 12 June 2008.

[94] On 30 July 2008, Stanwell emailed Icon an executed form of confidentiality agreement. The agreement as executed by Stanwell did not incorporate the proposed new recitals. The evidence suggests that Icon executed the confidentiality document in that form at about that time. But the fact that Icon did not succeed in having its proposed changes incorporated in the final form (or even decided not to press what it had asked for in the email) does not assist the deceit case. The confidentiality agreement so entered into did not comply with the MOU requirements. But, as was the case with AWE, there is no reason to think that the relevant Icon actors did not think that the document achieved the same goal.

[95] And, as I have said, this proceeding is not a case in which BBAI seeks to recover damages for breach of cl 3.

[96] The evidence does demonstrate that by the time Icon sought advice from its external solicitors on 27 August 2008, Icon had held meetings with Stanwell the content of which

was referred to in the request for advice from Icon, as to which see [64](g). I find that it would have been apparent to Icon that at least part of Stanwell's motivation to pursue a farm-in arrangement with Icon was to obtain a share of the production of gas from ATP 626P.

[97] Evidence from Mr Hannigan was that he walked away from a meeting which had occurred on 7 August 2008 thinking that the opportunity looked unattractive in light of what they had been told about the MOU, but that he also told Icon at a meeting on 26 August 2008 that Stanwell was interested in moving ahead to discuss a farm-in opportunity "into a lower section of the tenement" but he was reluctant to go ahead and spend funds until Stanwell could clarify the position in relation to the MOU.

[98] A diary note from Icon's Mr Duerden concerning the 7 August 2008 meeting was consistent with Mr Hannigan's evidence. Mr Duerden's diary note was relevantly in these terms:

> …
>
> Stanwell appeared quite keen on a minor investment in Icon as an "assumed" good will gesture in getting their hands on some gas.
>
> The MOU and all its details emerged and was thrashed around on the table including all commissions and prices.
>
> Stanwell lost interest when the apparent strangle hold that B&B et al have on control of the gas from the heads of agreement became clear.
>
> In essence they did not want to be getting into a position where they had only second (or possibly no) peck at the peak gas.
>
> Stanwell stated that they would take 10 PJ/year for 25 years (under the right contractual conditions – implied)
>
> Stanwell seemed quite interested in the possibility of building a Power Station on 626 – they would need 16 ha for this purpose. They became aware that Icon Energy intended to buy some freehold land in 626P and such land may be appropriate.
>
> …

[99] There is no evidence of any dealings with Stanwell during the exclusivity period after the meeting of 26 August 2008.

[100] There were negotiations with Stanwell after the end of the exclusivity period.

[101] By 13 November 2008, Icon had completed negotiations for a farm-in agreement and a gas sale agreement with Stanwell and had circulated the documents to the members of the Board of Directors of Icon for their consideration. And, on 24 December 2008, Icon and Jakabar entered into a written agreement with Stanwell entitled "Farm-in Agreement" that Stanwell would provide $6 million by way of farm-in arrangement with a view to earning a 50% interest in the gas from ATP 626P. Icon made a public ASX release about this agreement on 9 January 2009. Icon submit, and I would accept, that the ultimate agreement with Stanwell represented a development of the discussions which had occurred during the exclusivity period.

[102] BBAI pleaded that the matters discussed with Stanwell must be regarded as a Competing Proposal as defined by the MOU in that it was proposed that:

(a) it would require Icon to abandon or otherwise fail to proceed with the GSA;

(b) prevent BBAI or one of its Related Bodies Corporate from concluding with Icon the GSA;

(c) the farm-in opportunity required agreement to be reached about a gas supply agreement and would have had the effect of transferring ownership of a proportion of

the gas produced from ATP 626P to Stanwell, thereby limiting the amount of gas that originated from ATP 626P that could be supplied under the GSA; and

(d) a block of land from ATP 626P could be excluded from ATP 626P, which could have limited the amount of gas that originated from ATP 626P that could be supplied under the GSA.

[103] As to this, I repeat the observation which I made in relation to the AWE dealings at [88] above.

Dealings with CS Energy

[104] On 19 September 2008 Icon entered into a confidentiality agreement with CS Energy in relation to:

> In connection with the evaluation and the possible acquisition by the Receiving Party of certain petroleum exploration and production rights held by the [Icon] or its Affiliated Companies under or in respect of certain exploration petroleum licences ("ATP") and petroleum production licences ("PL") granted under State of Queensland Act 1923 which licences are described in Schedule 1 [ATP 626P] ...

[105] It is impossible to see how the fact of that agreement can give rise to any inference as to the alleged deceitful intent.

[106] BBAI pleaded that the matters discussed with CS Energy must be regarded as a Competing Proposal as defined by the MOU in that:

(a) it would require Icon to abandon or otherwise fail to proceed with the GSA;

(b) prevent BBAI or one of its Related Bodies Corporate from concluding with Icon the GSA; and

(c) the farm-in opportunity would have had the effect of transferring ownership of a proportion of the gas produced from ATP 626P to CS Energy and thereby limited the amount of gas that originated from ATP 626P that could be supplied under the GSA.

[107] As to this, I repeat the observation which I made in relation to the AWE dealings at [88] above.

Dealings with Sojitz

[108] The dealings with Sojitz on which BBAI relies were those mentioned at [64](e).

[109] BBAI pleaded that the matters discussed with Sojitz must be regarded as a Competing Proposal as defined by the MOU in that:

(a) it would require Icon to abandon or otherwise fail to proceed with the GSA;

(b) prevent BBAI or one of its Related Bodies Corporate from concluding with Icon the GSA; and

(c) the supply of gas or a farm-in opportunity would have had the effect of transferring ownership of a proportion of the gas produced from ATP 626P to Sojitz and thereby limited the amount of gas that originated from ATP 626P that could be supplied under the GSA.

[110] As to this, I repeat the observation which I made in relation to the AWE dealings at [88] above.

Mr Baldwin's case

The competing arguments

[111] Mr Baldwin's pleaded case was that, properly construed, all that cl 2 of the agency contract required of him in order that he earn his share options fee was that he:

(a) find a buyer for gas to be produced from ATP 626P; and

(b) negotiate the terms and preparation of a draft agreement or agreements with the buyer that –

(i) addressed Item l of the agency contract; and

(ii) constituted, in his opinion, an appropriate first draft of an agreement or agreements for the sale of gas from ATP 626P to facilitate further negotiations directly between Icon and BBAI.

[112] Mr Baldwin's pleaded case was that he provided draft documents to Icon on 11 August 2008 which met those requirements. The documents which he provided and which he had developed through discussions with BBAI were a draft GSA and a draft related agreement referred to as a Development Agreement. His pleaded case was that those documents met the two requirements identified in [111](b) and were generally in accordance with the type of agreement that Icon was looking for. He acknowledged that after he had delivered the draft documents on 11 August 2008, negotiations in relation to the draft agreements took place directly between Icon and BBAI in accordance with the MOU.

[113] Contrary to his pleaded case, Mr Baldwin's oral and written evidence seemed to be that he thought he had satisfied cl 2 when he had secured in-principle agreement to the MOU which was ultimately entered into on 12 June 2008. In-principle agreement to the terms of the MOU was achieved by about 20 May 2008. The plaintiffs' written submissions seemed to support that argument but also relied on the date of 30 July 2008, by which time there was a draft GSA in existence and Icon had made a positive ASX announcement.

[114] For its part, Icon contended that what was required by cl 2 was that negotiations between the parties to the contract of sale for CSM had reached a state where it could be said that a contract of sale for CSM had been negotiated. Icon contended that in order for that condition to be met, negotiations as between Icon and BBAI would have to have been concluded and a contract executed. Icon says, correctly, that that never occurred.

<u>The proper construction of the agency contract</u>

[115] The following matters are notable.

[116] First, the recitals (described in the agency contract as "preamble") revealed that Icon was seeking a buyer for CSM and Mr Baldwin had agreed to try to obtain contracts for the sale of CSM. As to the significance of recitals:

(a) In *OneSteel Manufacturing Pty Ltd v BlueScope Steel (AIS) Pty Ltd* (2013) 85 NSWLR 1 at [63], Allsop P observed (emphasis in original):

> The recitals to the agreement set out those aspects of the background that give explanation to the transaction. There may be other background facts, but the recitals reveal the background **chosen by the parties** by way of the identification of relevant context. The recitals can assist in interpretation of operative provisions, though they do not control the latter's operation when clear and unambiguous …

(b) The remarks of Allsop P were referred to with approval by Meagher JA in *Schwartz v Hadid* [2013] NSWCA 89 at [81] (emphasis added):

> **Recitals often set out aspects of the background or context to the transaction which is the subject of the agreement. Used in that way, they are available to assist in the interpretation of the operative provisions, often recording the object or purpose of the agreement as identified by the parties.** However, as Allsop P noted in *OneSteel Manufacturing Pty Ltd v BlueScope Steel (AIS) Pty Ltd* [2013] NSWCA 27 at [63], ordinarily the recitals do not control the interpretation of the operative provisions when those provisions are clear and unambiguous. The relevant approach was stated succinctly by Lord Esher MR in *Ex parte Dawes; In re Moon* (1886) 17 QBD 275 at 286:

> "If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred."

[117] Second, the operative terms provided two mechanisms by which Mr Baldwin could obtain remuneration for his efforts.

[118] Third, the first mechanism could not result in remuneration unless three things occurred, namely: (1) Mr Baldwin introduced a buyer or buyers to Icon who could be regarded as meeting the description of "buyer or Buyers for its CSM in the quantities and generally on the conditions set out in Item 1 hereof"; (2) a sales contract was entered into with the buyer or buyers so introduced; and (3) commission could be calculated at the end of each calendar year of the sales contract by reference to the formula "5% of the well-head sale price of all gas sold by ICON to the Buyer or Buyers in that year".

[119] Fourth, the second mechanism contemplated that the agent's entitlement to his remuneration in the form of the share purchase option would accrue at an earlier time than the remuneration which might accrue under the first mechanism. That time would be "when a Contract of Sale for CSM is negotiated". The burning question is whether that revealed an intention other than that the entitlement to remuneration would only accrue in the event of an actual contract of sale for CSM being achieved.

[120] Mr Baldwin suggests that it was the use of the words "is negotiated" rather than other words which might more obviously have required that a contract be actually entered into, which supported his argument that he could earn his fee even if no contract of sale for CSM was actually made and consequent upon his having negotiated the contract to a stage which in his opinion was an appropriate first draft. As I have mentioned, he also advanced an apparent alternative case that the achievement of the MOU sufficed.

[121] I disagree with both these notions.

[122] The recitals were not expressed in terms which provided any support for the proposition that Icon was seeking and willing to pay for something less than what Mr Baldwin had agreed he would try to get for them, namely a contract of sale for CSM. Clause 1 plainly could not involve payment if no contract of sale for CSM was achieved. And the use of "negotiated" in cl 2 seems to me to be intended to be descriptive of the time when the "Contract of Sale for CSM" could be regarded as having a particular status or quality. The Oxford English Dictionary defines "negotiated" when used adjectivally as "agreed or achieved by means of negotiation". That status could not be reached unless the putative parties to the contract had done something as between themselves which meant that the contract could be so regarded. Execution is the most obvious means by which a contract is agreed or achieved, but other means might be satisfactory. The problem for Mr Baldwin is that the production by the agent of a first draft for the purpose of further negotiation between Icon and the buyer could not possibly meet that requirement. And it was not even arguable that the MOU could be so regarded.

[123] In my view the reasonable businessperson standing in the shoes of the parties to the agency contract would regard it to be a contract by which an agent was appointed to obtain contracts for the sale of CSM. One condition *sine qua non* of the agent earning his commission under cl 1 and his share purchase option fee under cl 2 was that a contract for the sale of CSM be actually agreed or achieved as between Icon and a buyer. Such a person would conclude that neither the recitals nor the operative terms of the contract lent themselves to the notion that any entitlement to remuneration could be earned at any time before a contract for the sale of CSM was agreed or achieved, as between the putative parties to it. This conclusion is consistent with the wording of the recitals and the operative terms and also with the intention which the law will, prima facie, attribute to

parties to such agency contracts, namely that "[w]here an agent is employed on commission to sell … (and non-completion is not due to the default of the vendor[7]) the commission only becomes payable if the sale is completed": *Anderson v Densley* (1953) 90 CLR 460 at 467 (Williams ACJ, Webb and Taylor JJ).[8]

[124] The conclusion just reached puts paid to Mr Baldwin's construction of the agency contract. I should also add, however, that it seems to me to be most unlikely that the reasonable businessperson standing in the shoes of the parties to the agency contract would think that the parties intended that the question of the agent's entitlement to his fee would be left to turn on the agent's own subjective intention as to the suitability of his own efforts in negotiating an adequate first draft of the contract. Such a construction would be commercially unattractive. More importantly, there is nothing in the words which the parties used which supports it. Mr Baldwin was not appointed as an agent to negotiate a first draft of a contract for sale of CSM, he was appointed as an agent to obtain a contract for sale of CSM.

[125] If a contract for sale of CSM had been agreed or achieved by negotiation, a question might well have arisen as to whether it would have been necessary for Mr Baldwin to have been the effective cause of the contract which was achieved before he could earn his fee under cl 2 or his commission under cl 1. The relevant considerations are discussed in in *Midgley Estates Ltd v Hand* (1952) 2 QB 432 at 435, cited with approval by the High Court in *Anderson v Densley* and also in *Challenger Group Holdings Ltd v Concept Equity Pty Ltd* [2008] NSWSC 801, per Young CJ in Eq at [11] to [20]. In this case I would conclude that Mr Baldwin would have needed to be the effective cause of the contract of sale for CSM, if one had come into existence.

[126] For completeness I should address some other arguments which Mr Baldwin advanced in support of his construction of the agency contract.

[127] Mr Baldwin contended that the language was ambiguous and that a consideration of "the context, purposes and object" of the contract "powerfully corroborated" a construction in which the agent's fee could be earned even though no contract for the sale of CSM was agreed or achieved.

[128] Mr Baldwin's written submissions[9] relied on the following propositions, some of which were contested by Icon:

(a) Icon had little knowledge or expertise in relation CSM;

(b) Icon had limited financial resources in March 2008;

(c) Icon's share price had decreased between October 2007 and April 2008;

(d) Icon, by April 2008, needed:

(i) to certify its gas reserves for ATP 626P;

(ii) someone to introduce a potential buyer for gas from ATP 626P;

(iii) to announce to the market the gas reserves for ATP 626P and the potential for a buyer of gas from ATP 626P so that it could undertake funding raising activities; and

(iv) money;

(e) Mr Baldwin had experience in relation to the commercialisation of CSM;

---

[7] Mr Baldwin did not advance a case that any conduct of Icon prevented him from earning the right to his fee.

[8] *Challenger Group Holdings Ltd v Concept Equity Pty Ltd* [2008] NSWSC 801 demonstrates that these principles are not limited in application to real estate agency contracts.

[9] See plaintiffs' written submissions at [277].

(f) the defendants sought Mr Baldwin's expertise in relation to CSM production;

(g) the defendants wished to engage Mr Baldwin as a consultant; and

(h) to achieve a gas sale agreement in relation to ATP 626P the defendants did not have, as at the date of execution of the agency contract, the appropriate skills to achieve such an outcome. They therefore needed the assistance of Mr Baldwin, who they accepted had the relevant skills to achieve this outcome to introduce a potential buyer of gas from ATP 626P and to negotiate such commercial and technical terms of a gas sale agreement as would, in Mr Baldwin's opinion, be appropriate for the sale of gas from ATP 626P.

[129] The most obvious response to Mr Baldwin's argument is that even if the aspects of context to which Mr Baldwin now points were all true and supported his argument, the context which the parties actually chose to express so as to record the purpose of the agency contract – namely that expressed in the preamble – did not. The second response is that I agree with the argument advanced by Icon, namely that the context identified (even if I accepted it all) was neutral at best. That it was a fact known to both parties that it would be to Icon's advantage to make public announcements concerning steps taken along the way towards achieving a contract for the sale of CSM does not demonstrate that Icon agreed to pay Mr Baldwin his fee at a stage before he had achieved the goal for which he was appointed. Nor does any demonstration of his comparative expertise. The final response is that I think that Mr Baldwin's articulation of context is exaggerated and I would not accept it all. The findings I would make as to the facts which were known to the parties as at the date the agency contract, would be the following:

(a) At the time the agency contract was struck, Icon was in need of further funds.

(b) It was in Icon's financial interest to obtain a contract for the sale of CSM from ATP 626P.

(c) It was in Icon's financial interest to be able to make public announcements that positive and concrete steps had been taken towards achievement of that goal, as soon as it could.

(d) Mr Baldwin had experience in relation to the commercialization of CSM, and may have been perceived by Icon as having comparatively more such experience than did Icon.

(e) It was in the financial interest of both Icon (for the above reasons) and Mr Baldwin (because of the agency contract) that he render Icon such assistance as his experience permitted him to give towards obtaining a contract for the sale of CSM from ATP 626P.

[130] Mr Baldwin also argued that there was conduct after the agency contract which should be regarded as admissions that Mr Baldwin had satisfied his obligations under cl 2 of the agency contract.[10] As a general proposition, the "admissions" sought to be relied upon by Mr Baldwin were admissions by words and conduct by persons on behalf of Icon which might be taken to have suggested that Mr Baldwin had earned the right to receive the options under the agency contract. The evidence on which reliance was placed included conduct which occurred before he had even, on his own pleaded case, done that which would have established his contractual entitlement to the share options. The table below identifies my findings of fact in relation to the matters on which Mr Baldwin placed reliance.

[10] See plaintiffs' written submissions at [296].

Item	Finding in relation to the alleged "admissions"
1	On 23 May 2008 Mr Baldwin met with Icon's Mr James. Mr Baldwin said, and I accept, that the meeting followed an agenda prepared by Mr Baldwin. Amongst other things, Mr Baldwin communicated to Mr James the proposition that the 10 million options referred to in cl 2 of the agency contract could be issued. I find that Mr James probably did not demur. I would not find that he expressly agreed to the proposition advanced to him.
2	On 26 May 2008, a telephone conversation occurred between Mr Baldwin, Mr James and Dr McNamara,[11] Mr Baldwin advised that BBAI had encountered a major reporting problem and, while their attitude was the MOU had been agreed, they did not want to sign it until the reporting problem settled down. Mr James responded that it was not a surprising reaction and that an announcement at this time would likely reduce their share price.
3	On 4 June 2008, Icon made an ASX announcement declaring that 5,000,000 shares had been issued as part of an agency agreement settlement to secure an MOU and GSA to develop the gas reserves in ATP 626P. This was the announcement which reflected the eventual resolution of an initial oral agreement between Mr James and Mr Baldwin made on 1 May 2008. It had nothing to do with the agency contract.
4	On 12 June 2008, Icon made an ASX announcement advising it had agreed to enter into the MOU. The announcement provided details of the MOU.
5	In the last week of July 2008, Mr Baldwin and Dr McNamara met and discussed Icon's desire to redraft a "Finance Agreement" with Mr Baldwin, which was a separate agreement by which Mr Baldwin stood to earn a further fee if he assisted Icon to obtain finance. Mr Baldwin stated that in the course of that discussion Dr McNamara said words which, amongst other things, accepted that Mr Baldwin would receive his 10 million options from the agency contract.
6	In an email dated 22 July 2008 from Mr Baldwin to Mr James and Dr McNamara (and copied to BBAI representatives), Mr Baldwin provided a draft term sheet for the GSA with BBAI. The term sheet set out the terms on which BBAI and Icon proposed to develop a detailed development agreement.
7	On 30 July 2008, Icon made an ASX announcement that it continued to move forward with the development of its CSM operations in ATP 626P. It referenced again the fact that in May 2008, an MOU had been negotiated and had been signed by BBAI for the supply of gas for electric power generation. And it mentioned that a GSA was in draft form for the supply of gas to Babcock & Brown.
8	On 1 October 2008, Mr Baldwin and Dr McNamara arranged by telephone to speak the next day with an agenda to discuss whether it was time to issue the 10 million options, whether they should buy the 20 million Santos options, and how much money would be needed and when for the GSA and Icon program. On 2 October 2008, they discussed whether it was the right time to issue the 10 million options. Dr McNamara said he would speak to Mr James about the timing but thought it should not be a problem to issue them then. Mr Baldwin and Dr McNamara agreed that the 10 million share option would be issued in the next few weeks as this had been settled in May 2008. Mr James agreed that he had mentioned the need to schedule the timing of the options so as not to exceed the ASX 15% Rule.
9	Icon continued to use Mr Baldwin's services between May 2008 and December 2008.
10	Icon had not disputed the fact that they had agreed to issue the options until after Mr Baldwin sought to remove Mr James and Dr McNamara from the Icon Board on 23 December 2008.
11	In an interview between Dr McNamara, Mr James and ASIC staff on 3 April 2009: • Dr McNamara, who was an executive director, company secretary and CFO identified the relationship between Mr Baldwin and Icon as "Ron Baldwin was appointed as our agent to

[11] The plaintiffs' submissions at [296] refers to paragraphs of its submissions that relate to a telephone conversation on 26 August 2008. This appears to be a reference error.

Item	Finding in relation to the alleged "admissions"
	authorize a gas sale agreement". • Mr James said of Mr Baldwin that "He said that he had his own legal team and therefore he would look after the negotiations with Babcock & Brown and the legal aspects of the document and um, when we actually finally got the contract, it, it wasn't one that, um, I think a reasonable business person would sign." • Mr James acknowledged that Mr Baldwin had good contacts in BBAI which he used to negotiate the MOU and draft gas sub-agreements on Icon's behalf.
12	In an interview with ASIC on 3 April 2010, Dr McNamara told ASIC that at the time of engaging Mr Baldwin, Icon needed finance and a gas sale contract, and that while Mr Baldwin's proposed MOU terms were inappropriate, they saw a benefit in having a contract with BBAI in that they were able to use it get an independent certification of the gas. However, Dr McNamara said it was not a contract they would have proceeded with given BBAI's surfacing financial difficulties.

[131] The best aspects of evidence from Mr Baldwin's point of view appear in items 1, 5 and 8 of the table. I should first observe that although those aspects of the evidence suggests that Icon via Mr James and Dr McNamara might at one time have indicated their agreement that cl 2 had been performed sufficiently to earn the right to share options, Mr Baldwin does not suggest that the agency contract was varied, or that the agreement was contractual in nature. Nor was any estoppel case advanced. The only reliance which was placed on this evidence was that the evidence should be regarded as "admissions" which might assist a case to be advanced on the proper construction of the agency contract as originally entered into.

[132] In my view the evidence suggests, at best, that Mr Baldwin temporarily persuaded Icon via Mr James and Dr McNamara that he had complied with cl 2 of the agency contract. But it is an insurmountable problem for Mr Baldwin that evidence of post-contractual conduct is not admissible in aid of construction of a contract: *Agricultural and Rural Finance Pty Limited v Gardiner* (2008) 238 CLR 570 at [35] (Gummow, Hayne and Kiefel JJ) and at [163] (Heydon J). Moreover, to the extent that such evidence impliedly revealed the maker's opinion as to a question of law (namely what the agency contract meant, and, in particular, whether upon its proper construction, Mr Baldwin could earn (or had earned) his fee at a time antecedent to a contract for the sale of CSM having been agreed or achieved by negotiation), it would be valueless: see *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 and the discussion of it and other cases in *Johnston v Brightstars Holding Company Pty Ltd* [2014] NSWCA 150 at [78]-[84] (Beazley P) and at [119]-[122] (Basten JA, with whom Gleeson JA agreed); and *Mushroom Composters Pty Ltd v IS and DE Robertson Pty Ltd* [2015] NSWCA 1 at [65]-[69] (Sackville AJA, with whom McFarlan and Gleeson JJA agreed).

[133] If it was not relied on for those impermissible purposes, what could be the utility of such evidence? Of what fact, material to the alleged cause of action, was the evidence probative? None of the evidence could be relevant to proof that a contract of sale for CSM as between Icon and BBAI had been agreed or achieved by negotiation, because no such contract ever was agreed or achieved. And unless it went towards that, the evidence was of no value at all. Certainly Mr Baldwin's submissions did not identify any other fact which was material to his cause of action and of which the alleged "admissions" could be probative. That is because what was relevantly in dispute was the legal characterization of facts, not the facts themselves. It seemed to me that the purpose of placing reliance on the evidence of the alleged "admissions" must have been the impermissible purpose of seeking to persuade me to adopt a particular construction of the agency contract, by reference to conduct of Icon's representatives which suggests that at least at one stage, they may have

accepted that the achievement of the MOU amounted to satisfactory compliance with cl 2 of the agency contract.

[134] The alleged "admissions" did not advance Mr Baldwin's case in any respect.

[135] There is one matter, not strictly relevant, upon which I should comment. One might be forgiven for wondering why, if the proper construction of the agency contract was that which I have stated, Mr James and Dr McNamara could have said and done things consistently with Mr Baldwin having already earned his share option fee, when there was no doubt that no contract for the sale of CSM had been eventuated through his efforts. They may have been simply confused or mistaken as to the effect of cl 2 of the agency contract. Alternatively, they may not have been attributing any particular weight to the question. After all, Icon was not going to have to be out of pocket if Mr Baldwin had and exercised the options. To the contrary, Icon would have raised a further $1 million in much needed capital. I am not in a position to make any finding as to their reasoning.

Was the fee earned?

[136] No contract for the sale of CSM was ever agreed upon or achieved as between Icon and BBAI. Given the view that I have reached as to the meaning of cl 2, the fee was not earned. It must follow that Mr Baldwin's claim fails.

[137] If, contrary to my view, the proper construction of the agency contract was that for which Mr Baldwin contends, would the evidence establish that he had earned his fee, and, if so, what would follow in relation to his damages claim?

[138] If his construction of the agency contract was correct, Mr Baldwin would have to prove by evidence that he had negotiated the terms and preparation of a draft agreement or agreements that –

(a) addressed Item l of the agency contract; and

(b) constituted, in his opinion, an appropriate first draft of an agreement or agreements for the sale of gas from ATP 626P to facilitate further negotiations directly between Icon and BBAI.

[139] But another weakness of Mr Baldwin's argument was that it did not address with any clarity what would be required for the draft agreements to meet the requirement of "addressing" Item 1 of the agency contract. If, contrary to my view, the fee under cl 2 could be earned by anything other than an actual contract for sale having been agreed as between the parties to it, then what would have been required would have to be influenced by cl 1 of the agency contract, namely that the first draft be "in the quantities and generally on the conditions set out in Item 1". But in this regard, the defendants argued (and I agree) that the draft agreements which Baldwin provided to Icon did not meet those requirements for three reasons:

(a) What was produced involved a Development Agreement which in turn proposed a number of conditions precedent before a GSA could ever come into existence, but nothing in Item 1 of the agency contract permitted that course.

(b) Paragraph E of Item 1 of the agency contract required that the pricing mechanism should be such that the price would never be adjusted downward at any time, but that requirement was absent from the pricing mechanism in the draft GSA.

(c) There was a discounting mechanism in the MOU, which was inconsistent with the requirement in paragraph E of Item 1 that "The prices for Tranche Two shall be 50 cents below and $1.00 above that of Tranche One in each five year period as the case may be".

[140] The defendants contested the proposition that the drafts which Mr Baldwin submitted could have met his own posited requirements because he had acknowledged that there were some unsatisfactory elements in the drafts. If, contrary to my view, the fee under cl 2 could be earned by submitting something which Mr Baldwin thought was an appropriate first draft, I would not have found the point which the defendants make to be an insurmountable obstacle. First drafts often have something unsatisfactory in them. Negotiations do not usually result in one side having everything that it wants.

[141] Assuming, one way or the other, Mr Baldwin established his entitlement to the fee specified in cl 2 of the agency contract, would he have established his damages claim? I think the answer to that is yes. I would have found (if, contrary to my view, the proper construction of the contract was that for which Mr Baldwin contends):

(a) If Icon had performed the agency contract according to its terms, immediately after 11 August 2008 it would have become subject to the obligation "to issue to Mr Baldwin or his nominee an option to purchase 10,000,000 shares in ICON at a price of 10c each with the option able to be exercised at any time from the date of issue to 31st December 2010."

(b) Either that obligation required Icon to make an open offer to sell at the price specified, capable of acceptance by Mr Baldwin or his nominee within the time specified, or (and I think this is the better view) it should be regarded as effectively stating that Icon would be subject to a call option, capable of being exercised by Mr Baldwin or his nominee at the price specified within the specified time frame.

(c) Mr Baldwin would likely have exercised the right to purchase the subject shares in his name at some time in or after May 2009 and would have held the shares so purchased until selling them at a time in September 2009, thereby achieving an average profit of 40 cents per share.

(d) The appropriate measure of Mr Baldwin's loss would be $4,000,000.

BBAI's case

[142] I should describe the essential elements of the case, as pleaded.

[143] First,[12] BBAI alleged that by evincing a willingness to enter into the MOU and by entering into the MOU on 12 June 2008 Icon and Jakabar –

(a) represented that they would behave in the way promised in cll 2(a)(i)(B) to 2(a)(i)(D) of the MOU in relation to dealings with third parties during the exclusivity period;

(b) represented that they would not disclose to third parties the terms of the MOU or information concerning, relating to and in connection with the GSA; and

(c) represented they would work in good faith, to progress the GSA during the exclusivity period as promised by cl 2(b) of the GSA.

[144] Second, those representations were made with the intention of inducing BBAI to enter into the MOU and to continue to negotiate the GSA.[13]

[145] Third, each of the representations was made in the knowledge that it was false or was made with reckless indifference as to its truth or falsity, in that as at 12 June 2008 the defendants did not have the intention of behaving in the way they had represented they would behave, that lack of intention being a matter to be inferred from the fact and content of dealings with third parties which were commenced immediately after the execution of the MOU.[14]

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[12] Statement of claim at [47].
[13] Statement of claim at [58].
[14] Statement of claim at [50] to [54] and [48].

The specific matters pleaded as a basis for the inference of the lack of intention were identified at statement of claim [48](a) to (d) which were in turn picked up by cross-reference in other subparagraphs. They encompassed:

(a) As to AWE, the matters I have referred to at [78] to [83] above.

(b) As to Stanwell, the matters the matters I have referred to at [89] to [101] above.

(c) As to CS Energy, the matters the matters I have referred to at [104] above.

(d) As to Sojitz, the matters the matters I have referred to at [108] above.

[146] Fourth, in reliance on the representations BBAI entered into the MOU and continued to negotiate the GSA.[15]

[147] Fifth,[16] in so doing BBAI incurred expenses as follows:

(a) legal costs of at least $69,085.03 associated with preparing the MOU, GSA and Development Agreement and other documents;

(b) consultant's costs of at least $32,282.48 in respect of work done on the pipeline concept study prepared in accordance with the MOU;

(c) wages for B&B personnel who were involved in the negotiations the subject of the MOU of at least $457,000.

[148] With one exception, I am prepared to conclude that the conduct to which BBAI points justifies the conclusion that it has established the first and second of those elements. The exception is there was never any absolute representation about non-disclosure of the terms of the MOU or of information concerning the GSA. Certainly evincing a willingness to enter into the MOU and then entering into it could not give rise to such a representation, because disclosure to potential financing sources or co-investors was always possible, if the specified conditions were met. The case founded on that pleaded representation is misconceived. A case might have been pleaded as to a representation that they would not have disclosed such information to third parties except in the circumstances permitted by cl 3.2(a), but that was not done. Nor was there any plea that cl 3 was breached.

[149] However, I conclude that BBAI's case falls at the critical hurdle of establishing the relevant deceitful intent as at 12 June 2008 in relation to those representations which I do find to have been established.

[150] First, *Uniform Civil Procedure Rules* 1999 (Qld) r 150(1)(k) requires the deceitful intention to be specifically pleaded and UCPR r 150(2) requires any fact from which the deceitful intention is claimed to be an inference also to be specifically pleaded. The defendants took objection during the trial to the admission of any evidence said to support the alleged inference as to intention, which went beyond the specific matters pleaded as supporting the inference. I admitted evidence, subject to that objection. I think the objection should be upheld. The UCPR provisions are clear, facts were pleaded as a basis for the alleged inference, and the defendants sought to hold the plaintiffs to the pleadings. It follows that the only evidence to which regard should be had in support of the alleged process of inference is that to which reference was made in the pleadings.

[151] Second, companies act by natural persons. If a pleading alleges that a company has a particular state of mind, then the pleading must be taken to have asserted that a particular person or persons had that state of mind and that it should be inferred that their state of mind should be attributed to the company. In breach of the rules of pleading BBAI did not identify the person or persons who had the deceitful intent as at 12 June 2008. However,

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[15] Statement of claim at [59].
[16] Statement of claim at [60].

BBAI's case at trial was that the intention of Icon and Jakabar could be established by reference to the intentions of Mr James. No objection was advanced in this regard and I would not refuse the plaintiffs the ability to advance that argument because of the inadequacy of this aspect of their pleading. But for the following reasons, I would not accept the underlying proposition that the intention of Icon and Jakabar could be established by reference to the intentions of Mr James alone:

(a) In *Stirling Resources NL v Capital Energy NL* (1996) 14 ACLC 1,005 Hill J explained:

> Views in the minds of individual directors not communicated to other directors nor made the subject of board decision, cannot be taken as being the plans of the company of which the proponents are directors. It is trite to say that a company can only act through its directors. Likewise a company's intentions can only be judged by reference to the intentions of the directors, not the directors singly but the directors acting as a board. There may be cases in which a particular person may be found as a fact to the governing mind of a company so that that person's intentions may be taken as being the intentions of the company.

(b) There is no pleading that the directors acting as a board had the alleged deceitful intention. But, in any event, there is no basis for drawing the inference that the directors acting as a board had the alleged deceitful intention. I agree with the defendants' submission that there had been no attempt by the plaintiffs to do this because, quite apart from the evidence of Mr James, there had been no attempt to establish the state of mind of Mr Pyecroft or Dr McNamara and, importantly, no relevant challenge to Mr Barry's statement evidence, the effect of which was that he as a director of Icon intended that the company would comply with its obligations under the MOU. The plaintiffs sought to make something from the defendant's failure to call Dr McNamara, but it is trite law that the *Jones v Dunkel* inference cannot be employed to fill gaps in the evidence, or to convert conjecture and suspicion into inference.

(c) Nor is there any basis for concluding that Mr James was the governing mind of Icon and Jakabar for the purposes of making the alleged deceitful representation. There was almost no attention paid at trial to establishing the levels of decision-making delegation which operated within Icon and Jakabar. Such evidence as there was suggested that the decision to enter into the MOU was a board level decision, rather than a decision within the sole purview of Mr James. And although the agency contract had been signed by Mr James as director, the MOU itself was executed "in accordance with s 127 of the Corporations Act" by both Mr James and Dr McNamara.

[152] Third, even if I accepted that the intention of Icon and Jakabar could be established by reference to the intentions of Mr James as at 12 June 2008, I would not be prepared to find that Mr James had the alleged deceitful intention as at that time, whether by reference to the matters which are raised in the pleadings, or even by reference to matters beyond those matters which were received subject to objection. Nor would I find that Mr James lacked the intention as at that time of complying with the obligations in cl 3.

[153] I repeat the observations I made concerning judicial inferential reasoning in *Inghams Enterprises Pty Ltd v Kim Yen Tat*:[17]

> The approach which must be taken to the process of inferential reasoning … is clear: see per Gageler J in Henderson v Queensland (2014) 255 CLR 1 at [87]–[91] and Gordon J in Re Day (2017) 340 ALR 368 at [18], and the authorities which their Honours cite. Whether the subject of the inference is a particular fact, or the existence of a state of affairs:

[17] [2018] QCA 182 at [55] (Gotterson and Morrison JJA agreeing).

> … where direct proof is not available it is enough [if] the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture … But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then though the conclusion may fall short of certainty it is not to be regarded as a mere conjecture or surmise.[18]

[154] As I have said, I did not form a positive impression of Mr James. My adverse impression of him might justify my speculating that at some time in or after August 2008, when concerns as to BBAI's financial future were becoming more severe, and he was finding that potential financiers and co-investors were expressing reluctance to become involved in light of the terms of the MOU, he became less than perfectly committed to continued negotiation in good faith with BBAI. My adverse impression of him might justify my forming the view that Mr James could well have become so intent on pursuit of profit for Icon and Jakabar that conscious breach of what he perceived to be contractual obligations was not beyond him, if he thought he could get away with it.

[155] But even if Mr James so conducted Icon's business as to breach the exclusivity provisions of the MOU in or after August 2008, it is an entirely different thing to leap backwards from such a conclusion to an inference as to the existence of the alleged deceitful intent months earlier on 12 June 2008. Fact finding at trials is not an occasion for speculation, conjecture or surmise. *A fortiori*, where the allegation is as serious as deceit.

[156] In my view the fundamental problem with BBAI's case theory is that it characterizes **any** third party dealing which had a possibility or even a likelihood that the third party might wish to have gas supplied to it, as necessarily involving breach of the exclusivity provisions of the MOU. On BBAI's case theory, if Mr James always intended to explore the possibility of such dealings, it must follow that he had the alleged deceitful intent.

[157] I reject this view. I have already explained that the terms of the MOU specifically recognised that it was possible legitimately to pursue dealings with third parties and to comply with the MOU obligations at the same time: see [41] to [52] above. I have there explained that –

(a) the MOU apparently allowed a reasonable degree of room for dealings to occur during the exclusivity period between Icon and third parties;

(b) Icon's right to pursue opportunities with potential financiers or co-investors was specifically preserved;

(c) it was reasonably arguable that, given Icon's view as to the potential size of the resource (as to which see [36] above), Icon could always legitimately explore the possibility of other "offtakers" so long as it was not contemplating any dealing which would adversely affect BBAI's priority to 300PJ over the period contemplated in the MOU;

(d) this view of the significance of the MOU was sufficiently open that I would not have regarded conduct consistent with having that view of the MOU as revealing a deceitful intention concerning compliance with the exclusive dealing provisions of the MOU; and

(e) third party dealings which discussed the possibility of supply of gas to the third party (whether or not in the context of a farm-in arrangement) would not necessarily be emblematic of breach of the exclusivity provisions, because the question of the application of the obligations to the dealings would require a nuanced examination of

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[18] *Henderson v Queensland* (2014) 255 CLR 1 per Gageler J at [88] citing *Bradshaw v McEwans* Pty Ltd (1951) 217 ALR 1 per Dixon, Williams, Webb, Fullager and Kitto JJ at 5.

the nature of the third party dealings and how they might bear on the GSA with BBAI (or the negotiations for it).

[158] I think it is unlikely that Mr James had the alleged deceitful intent as at 12 June 2008. I think the most likely inference to draw as to Mr James' intent as at the time of execution of the MOU is that he always intended to cause Icon to act with a view to exploring opportunities with third parties and thought the MOU permitted him to do so, within some constraints. At least that view would have been correct. I think the view which he probably had was more along the lines of that to which I have referred in the previous paragraph, which, as I have said, was apparently BBAI's own view. That view was at least reasonably open. It does not matter for the resolution of this case whether that view accords with the proper construction of the MOU because even if it is not the proper construction, having a mistaken view is not the same as having a deceitful intent.

[159] To my mind the subsequent conduct of Icon (and, in particular, the fact and content of the communications which passed between Icon and its external solicitors) was consistent with Icon having recognized that it was subject to obligations, and Icon seeking to explore the means by which it could legitimately pursue other opportunities with third parties consistently with those obligations. It seems likely that Icon failed in some respects to comply with its obligations concerning confidentiality (in that it may have disclosed more than it should have disclosed in relation to the MOU before obtaining confidentiality undertakings from the relevant third parties in the terms required of it) and I have my doubts as to whether Icon negotiated in good faith with BBAI for the whole of the exclusivity period, but this is not a case where Icon and Jakabar are being sued for damages for breach of cl 2 or cl 3.

[160] I am not persuaded that the circumstances appearing in the evidence give rise to a reasonable and definite inference that Icon had the deceitful intent alleged by BBAI as at 12 June 2008.

[161] It would follow that BBAI's case must fail.

[162] In case I am wrong in that assessment, I will briefly address the remaining elements, namely reliance and damages, including exemplary damages.

[163] As a general proposition, I think it is clear that BBAI relied on Icon's representations that they would behave in the way promised in the MOU in relation to dealings with third parties during the exclusivity period, insofar as I have found those representations to have been made. I agree with BBAI's submission that reliance was sufficiently established by Mr Murphy's evidence that he regarded the exclusivity provisions as a necessary requirement to ensure that considerable time, money and effort was not wasted.

[164] However if, contrary to my view, it was deceitful of Icon to harbor the intent as at the date of the MOU that it could always explore the possibility of other "offtakers" so long as it was not contemplating any dealing which would adversely affect BBAI's priority to 300PJ over the period contemplated in the MOU, then BBAI would not have established that the deceit induced BBAI to take a course which resulted in it suffering loss. Mr Murphy's own view was that Icon was free to pursue opportunities with third parties which did not interfere with BBAI's desire to obtain 300PJ of gas over 15 years. It would have made no difference to him if the deceit had not occurred and Icon had made plain what its intention was.

[165] An award of exemplary damages was alleged to be justified by the fact that the defendants' deceitful conduct was conduct which was reprehensible and in contumelious disregard for BBAI's rights and was conduct which was done deliberately with a view to the benefit of the defendants. The fact that I have not been prepared to find the existence of the relevant

deceitful intent means that there is no basis on which I can make any determination of exemplary damages.

[166] I can however make findings relevant to compensatory damages.

[167] That a person who relied on a deceitful representation might measure their damages by reference to the incurrence of expenses of the nature of those identified at [147] above would normally be unremarkable. It would usually be a simple matter to prove such damages.

[168] As to the legal costs claimed, Mr Murphy's statement demonstrates that Clayton Utz assisted BBAI in preparing the MOU, GSA and a DA. In the course of that retainer it rendered professional fees totaling the claimed amount. The company invoiced was not BBAI, but was another company in the group: Babcock & Brown Australia Pty Ltd. I will infer that Clayton Utz was in fact paid by or on behalf of the company invoiced. Mr Murphy regarded those expenses to have been wasted. The case theory here, which may be accepted, is that the expense would not have been incurred at all by whoever paid for it, but for the deceit. The issue which needs to be resolved is whether BBAI ever incurred the expense, so that it can say that it would not have incurred the expense but for the deceit, and recover that amount as damages.

[169] As to the consultant's costs, Mr Murphy's statement demonstrates that a consultant was engaged to prepare a pipeline study. The consultant also invoiced another company in the group: Babcock & Brown Power Pty Ltd. I will infer the consultant was in fact paid by or on behalf of the company invoiced. Mr Murphy regarded those expenses to have been wasted. The case theory here, which may be accepted, is that the expense would not have been incurred at all by whoever paid for it, but for the deceit. The issue which needs to be resolved is whether BBAI ever incurred the expense, so that it can say that it would not have incurred the expense but for the deceit, and recover that amount as damages.

[170] As to wages, the hypothesis was that $457,000 represented a reasonable estimate of the value of the time spent by relevant group employees who worked on or assisted with the negotiations for the GSA. Mr Murphy regarded the wages costs of those employees to have been wasted. A similar issue arises here as arises for the other two categories of cost, because BBAI did not employ or pay the relevant employees. But there is another, more fundamental, problem, and that is the notion that any portion of a wages bill can be regarded as an expense which would not have been incurred but for the deceit. It cannot be that the wages costs would not have been incurred at all but for the deceit, because there is no indication that the employment of the various employees was not a fixed overhead, which would have continued to be incurred regardless of whether or not the Icon transaction went ahead. I think this is an insurmountable obstacle to the recovery of the $457,000 estimate. However, for the moment, let it be assumed that I am wrong in that view.

[171] Let me turn to the question of how it could be said that BBAI incurred the legal, consultants and wages expenses when it was in fact someone else in the group who paid the lawyers, the consultants and the employees.

[172] The proposition that the expenses were incurred by BBAI depends on my being persuaded that an expense-transferring practice within the Babcock & Brown group existed and was in fact implemented, such that the company within the group which ultimately bore the financial burden of expenses became BBAI, notwithstanding that it did not pay out any money originally.

[173] By virtue of the demise of the group, documentary evidence was very limited.

[174] Mr Murphy's statement was that the practice within the group was:

(a) As a director of BBAI and other companies in the group, he was familiar with the practices and procedures of the group in relation to the incurring of expenses and then recouping those expenses from the individual companies within the group by expensing them by its internal accounting procedures.

(b) Babcock & Brown Australia Pty Limited was the company within the group which employed him, and to his knowledge, the majority of group employees. Employees were then seconded out to various subsidiary companies within the group, and then expensed against Babcock & Brown Australia Pty Limited.

(c) BBAI had no employees, but various staff members from other companies in the group were seconded to it as necessary.

(d) If BBAI was involved in a prospective transaction, then:

> [Babcock & Brown Australia Pty Limited] would pay for the expenses (e.g. B&B employee wages, legal expenses, consultants such as engineers, travel and the like) involved with the prospective transaction. In accordance with the practice within the B&B group of companies for incurring, paying and accounting for expenses, the negotiation and due diligence expenses for the Icon Energy Limited (**Icon**) transaction would have been paid by [Babcock & Brown Australia Pty Limited] in the first instance. [Babcock & Brown Australia Pty Limited] would then expense the full extent of those expenses to the relevant company within the B&B group. Consequently, in the case of the proposed Icon transaction the practice was that [Babcock & Brown Australia Pty Limited] would have incurred the expenses in relation to that proposed transaction and expensed them back to BBAI so that it ultimately incurred the responsibility for those expenses.

[175] Mr Murphy gave evidence before me and was plainly an honest witness. The problem was that his unreliability was demonstrated when he was cross-examined on the practice covered by his statement. As to this:

(a) He acknowledged that the aim of the Icon transaction was to secure gas for power stations to be operated by Babcock & Brown Power Pty Ltd. Babcock & Brown Power Pty Ltd would be the company within the group which would benefit from Icon transaction, but so would Babcock & Brown Limited, because it would have been the developer of the power stations.

(b) He said the two intended beneficiaries from a gas sale transaction with Icon were Babcock & Brown Power Pty Ltd, which would buy the gas and receive it, and Babcock & Brown Limited, which would engage in the construction of the power stations and make money out of that. He said that Babcock & Brown Limited would transfer the assets from its balance sheet to Babcock & Brown Power Pty Ltd at the completion of construction.

(c) Babcock & Brown Power Pty Ltd carried on its own separate business and did not as part of so doing, spend money on behalf of BBAI.

(d) He acknowledged that when the pipeline consultant was engaged by Babcock & Brown Power Pty Ltd, it was engaged for the purposes of a pipeline study which would have been done for the independent purposes of that company.

(e) He acknowledged that he had previously told a solicitor that "the practice in 2008 and earlier within the Babcock & Brown group of companies was that all expenses incurred by an entity within that group – in this case, BBAI – were paid for and expensed through [Babcock & Brown Australia Pty Limited]. [Babcock & Brown Australia Pty Limited] would then charge BBAI a management fee to recover all of those costs."

(f) He was confused as to whether the way in which expenses were usually dealt with was by a management fee mechanism or by the mechanism described in his statement. He thought it was more likely to be the latter, in the form of an

accounting entry done at the end of the project in question or the financial year. But he acknowledged that he did not do the actual accounting.

(g) He said that when projects that were not going to proceed, there was some decision-making process by the accountants about when to make accounting entries which attributed the expenses to a particular project company, and when those expenses would be written off. He did not think there was any automatic process, but that a review was done on a semi-annual basis.

(h) He was taken to a copy of a note to an entry in the financial statements of Babcock & Brown Australia Pty Limited for the financial year ended 31 December 2009 which recorded a reversal in 2009 of income for 2008 in these terms:

> In 2008 in accordance with the BBIPL Group's Offshore Banking Unit ("OBU") expense allocation policy, the Company had accrued income it intended to recharge to certain BBIPL Group entities in relation to operating and employment costs it had incurred in 2008. In light of the current commercial circumstances impacting the BBIPL Group, the Company decided not to issue the service charge invoices and as such, the accrued income from 2008 has been reversed in 2009.

(i) I observe, parenthetically, that the note suggested: (1) that the practice of Babcock & Brown Australia Pty Limited in relation to operating and employment costs which Babcock & Brown Australia Pty Limited intended to re-charge other companies in the group, was to issue service charge invoices; (2) that Babcock & Brown Australia Pty Limited had incurred operating and employment costs in 2008 for which it had intended to recharge other entities in 2009; and (3) because of the commercial circumstances (which I infer was a reference to the group's perilous financial circumstances) it had decided not to issue the service charge invoices for those operating and employment costs.

(j) The following question and answer was demonstrative of the true state of Mr Murphy's knowledge:

> All right. So is it fair to say you've got no idea about what [Babcock & Brown Australia Pty Limited's] practice actually was – about how it went about recouping operating and employment costs in respect of other companies in the group? I – I – I recall that – that the companies were charged, but the mechanism by doing it, I – no idea.
>
> Do you have any basis to challenge what the accounts of the company say, that the mechanism was by issuing service charge invoices? No.

(k) He acknowledged that the judgments which formed the basis of the estimates of time spent which underlay the $457,000 estimate could not have been based on any written or time charging records because there was no such practice. Any estimate of time spent was on a very rough judgment conducted at the time bonuses were being calculated.

(l) Ultimately he conceded that he had no idea whether any charges were made by Babcock & Brown Australia Pty Limited to BBAI to recoup any costs in respect of the Icon transaction.

[176] Mr Scalia's statement was broadly consistent with that of Mr Murphy, although he thought that the company which actually paid the expense, and then would expense them out to the relevant subsidiary, was the ultimate parent company, Babcock & Brown Limited, rather than Babcock & Brown Australia Pty Limited.

[177] Mr Scalia too gave evidence before me and was also plainly an honest witness. The problem was that his unreliability as a source of evidence as to the alleged practice was also demonstrated when he was cross-examined on the practice covered by his statement. As to this:

(a) He acknowledged that he was not involved with the question about what was done with expenses incurred by Babcock & Brown group companies.

(b) He acknowledged that it was fair to say that he did not know what the practice was about how expenses were allocated between different companies with respect to prospective transactions, but he explained that he did know that expenses which were incurred would be expensed to the company that would ultimately have the transaction investment, i.e. the company which would ultimately benefit from the transaction was the company to which, at some stage, the expenses would be allocated.

(c) I observe that if this was so, then when one matches his evidence with that of Mr Murphy as to the identity of the companies within the group who were intended to benefit from the Icon transaction (namely Babcock & Brown Power Pty Ltd and Babcock & Brown Limited) that would be contrary to the notion of allocation of expenses to BBAI which underlies BBAI's case theory.

[178] BBAI placed before me its audited financial statements filed with ASIC for the financial year ending 31 December 2008. They revealed:

(a) BBAI did incur expenses from operations.

(b) BBAI did have current liabilities for "trade and other payables".

(c) BBAI did receive payments from and make payments to related companies.

(d) Some payments it made were for "expenses paid by parent".

[179] BBAI placed before me the audited financial statements filed with ASIC for the financial year ending 31 December 2008 of Babcock & Brown Australia Pty Limited. They revealed:

(a) Babcock & Brown Australia Pty Limited did incur expenses from operations. Those expenses included salaries.

(b) Babcock & Brown Australia Pty Limited did have current liabilities for "trade and other payables".

(c) Babcock & Brown Australia Pty Limited did receive loan repayments from and make loan payments to related companies.

[180] However neither set of financial statements demonstrated that any of the amounts necessarily encompassed the expenses the subject of the damages claim.

[181] I accept that in a different case proof of a practice such as that alleged might be sufficient to demonstrate the incurrence of expense, but the simple fact is that in this case, the evidence was insufficiently reliable to justify the conclusion which BBAI submits should be drawn about the existence and actual implementation of the practice in relation to the expenses concerned. There probably was in place some form of system by which a company other than the one who initially paid an invoice ultimately bore some part of the financial burden of the expense, but I am entirely unclear how it was done, including whether it was done by management fee or by service charge invoice and, if so, whether the way in which the fee or charge was calculated would reflect entirely the pecuniary value of the expense. And the notes to the financial report of Babcock & Brown Australia Pty Limited in 2009 suggested that the commercial circumstances which faced the group led to an abandonment of some part of what had been the usual practice in 2009. No adequate explanation was contained in the evidence about the note, but, as I have observed, it casts doubt on whether the usual practice was actually implemented in relation to 2008 expenses. And whatever practice was in place, affected as it may have been by the financial position in which the group found itself, the evidence tends to suggest that it was

more likely that the expenses would have been sheeted home to Babcock & Brown Power Pty Ltd and Babcock & Brown Limited instead of BBAI, because those companies had been intended to be the ultimate beneficiaries of the Icon project.

[182] I am not persuaded that BBAI has proved on the balance of probabilities that it incurred any of the expenses which it claims form the basis of its claim for compensatory damages. It is not necessary to examine any other issues in relation to that claim.

Conclusions

[183] The orders which I make are:

(a) The first plaintiff's claims against the first defendant are dismissed, with costs.

(b) The second plaintiff's claims against the first defendant and the second defendant are dismissed, with costs.