SUPREME COURT OF QUEENSLAND

CITATION:	*Wellington v Huaxin Energy (Aust) Pty Ltd (formerly Cuesta Coal Limited)* [2019] QSC 18
PARTIES:	**OWEN REGINALD WELLINGTON AND ROXANNE WELLINGTON AS TRUSTEES FOR THE OR & R WELLINGTON SUPERFUND ABN 81 576 722 911** (First Plaintiffs) AND **OWEN REGINALD WELLINGTON AS TRUSTEE FOR OR & R PARTNERSHIP ABN 84 165 075 135** (Second Plaintiff) AND **FOX INVESTMENTS (QLD) PTY LTD ACN 159 501 845 AS TRUSTEE FOR THE FOX FAMILY TRUST** (Third Plaintiff) **v** **HUAXIN ENERGY (AUST) PTY LTD (FORMERLY CUESTA COAL LIMITED) ACN 153 351 994** (First Defendant) AND **BLACKWOOD EXPLORATION PTY LTD ACN 142 208 982** (Second Defendant)
FILE NO/S:	BS No 5591of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	10 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	6 & 7 August 2018
JUDGE:	Jackson J
ORDER:	**The judgment of the court is that:** **1. The plaintiffs' claim be dismissed.**

2. The plaintiffs pay the defendants' costs in this proceeding.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PROVISIONS – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – whether implied duty to cooperate existed – whether implied duty to cooperate required defendants to undertake further work – where plaintiffs failed to establish breach of the implied duty to cooperate

CONTRACTS – GENERAL CONTRACTUAL PROVISIONS – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – whether implied duty to undertake detailed and reliable exploration work existed – where the term was not 'so obvious' it goes without saying – where the circumstances yielded a number of possible alternatives

CONTRACTS – GENERAL CONTRACTUAL PROVISIONS – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – whether plaintiffs' entitlement to issue of Third Tranche Shares and Third Tranche Options persisted after Third Milestone Date – where ongoing duty inconsistent with express term in Agreement – where inconsistent with Third Milestone Date constituting a "sunset date"

Mineral Resources Act 1989 (Qld), s 133, s 137, s 137A, s 141
Mineral Resources Regulation 2003 (Qld), s 13A

Ansett Transport Industries v Commonwealth (1977) 139 CLR 54, cited
Australis Media Holdings Pty Ltd & Ors v Telstra Corporation Ltd (1998) 43 NSWLR 104, cited
BP Refinery (Western Port) v Hastings Shire Council (1977) 180 CLR 266, considered
Bruce v Tyley (1916) 21 CLR 277, cited
Butts v O'Dwyer (1952) 87 CLR 267, cited
Campbell v BackOffice Investments Pty Ltd (2008) NSWCA 95, cited
Castlemaine Tooheys Ltd v Carlton & United Breweries 10 NSWLR 468, cited
Chaplin v Hicks [1911] 2 KB 786, cited
Clark v Macourt (2013) 253 CLR 1, cited
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337, considered
Commonwealth Bank of Australia v Barker (2014) 253 CLR 169, considered
Elders IXL Ltd v National Employers' Mutual General Insurance Association Ltd (1988) 5 ANZ Ins Cas 60-847, considered
Fink v Fink (1946) 74 CLR 127, cited

Grieve v Enge [2006] QCA 213, cited
Hamlyn & Co v Wood & Co [1891] 2 QB 488, cited
Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd [2006] QCA 126, cited
Kennedy v Vercoe (1960) 105 CLR 521, cited
Kosho Pty Ltd v Trilogy Funds Management Ltd [2013] QSC 135, cited
Longdon v Kenalda Nominees Pty Ltd [2003] VSCA 128, cited
Luxor (Eastbourne) Ltd v Cooper [1941] AC 108, cited
Mackay v Dick (1881) 6 HL (Sc) 251, considered
Marks and Spencer plc v BNP Paribas Securities Services [2016] AC 742, cited
Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd (2015) 237 FCR 534, cited
McRae v Commonwealth (1951) 84 CLR 377, cited
McWilliam v McWilliams Wines Pty Limited (1964) 114 CLR 656, cited
Meehan v Jones (1982) 149 CLR 571, cited
Meyers v Griffiths [1948] St R Qd 216, cited
Milne v Municipal Council of Sydney (1912) 14 CLR 54, cited
Norton v Angus (1926) 38 CLR 523, cited
Ogdens Ltd v Nelson [1904] 2 KB 410, cited
Perri v Coolangatta Investments Proprietary Limited (1982) 149 CLR 537, cited
Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd [2017] QCA 254, cited
Prosperity Advisers Pty Ltd v Secure Enterprises Pty Ltd t/as Strathearn Insurance Brokers [2012] NSWCA 192, cited
Quinn Villages Pty Ltd v Mulherin [2006] QCA 433, cited
R v Paddington & St Marylebone Rent Tribunal [1947] KB 984, cited
Raging Thunder Pty Ltd v Bank of Western Australia Ltd [2012] QSC 329, cited
Ray v Davies (1909) 9 CLR 160, cited
Reigate v Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592, cited
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596, considered
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332, cited
Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481, cited
Shirlaw v Southern Foundries (1926) Ltd [1939] 2 All ER 113, cited
Sino Iron Pty Ltd v Palmer (No 3) [2015] 2 Qd R 574, cited
Stirling v Maitland (1864) 5 B & S 840, cited
Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272, cited
The Moorcock (1889) 14 P.D., 64, cited
Waterways Authority of New South Wales v Coal & Allied

(Operations) Pty Ltd [2007] NSWCA 276, cited
Williamson & McGillivray v JIA Holdings Pty Ltd [2011] QCA 346, cited
WIN Corp Pty Ltd v Nine Network Australia Pty Ltd (2016) 341 ALR 467, cited
Wolfe v Permanent Custodians Ltd [2013] VSCA 331, cited

COUNSEL:	D O'Brien QC and D Favell for the Plaintiffs D Clothier QC and D de Jersey for the Defendants
SOLICITORS:	Rouse Lawyers for the Plaintiffs Thomson Geer for the Defendants

Jackson J:

[1] The plaintiffs claim damages for breach of contract or a declaration that the contract is still on foot and capable of future performance. The proceeding arises from the sale by the first and second plaintiffs, Owen Reginald and Roxanne Wellington, and Ronald Fox, (who was later replaced by the third plaintiff) as the "Vendors", to the second defendant, as the "Purchaser", and Blackwood Coal Pty Ltd (which was later replaced by the first defendant) of an exploration permit for coal, EPC 1802, and the related environmental authority and mining information as property ("the Assets").

[2] On 1 July 2009, Mr Wellington applied for an exploration permit for coal ("EPC") over an area of 130 sub-blocks on the Series B Clermont – Block Identification Map in the area of coal resources in Queensland known as the Galilee Basin. The area of the 130 sub-blocks, totalling approximately 45,000 hectares, is located approximately 150 kilometres south of Charters Towers.

[3] On 6 July 2010, the original Vendors entered into a heads of agreement for the sale with the Purchaser and Blackwood Coal Pty Ltd ("Heads of Agreement").

[4] On 29 October 2010, EPC 1802 was granted to Mr Wellington.

[5] On 17 November 2010, the Vendors, the Purchaser and Blackwood Coal Pty Ltd entered into a contract styled the Tenement Sale Agreement, in substitution for the Heads of Agreement ("Tenement Sale Agreement").

[6] On 13 December 2010, the cash component of the consideration payable under the Tenement Sale Agreement was paid.

[7] On 9 May 2011, the parties varied the terms of the Tenement Sale Agreement by a contract styled the Amended and Restated Tenement Sale Agreement ("Amended and Restated Tenement Sale Agreement").

[8] On 28 October 2011, the parties to the Amended and Restated Tenement Sale Agreement and the first defendant, then named Cuesta Coal Ltd, entered into a contract that was called the "Cuesta Deed" in evidence and submissions, varying the parties to the contract up to that time by substituting the first defendant for Blackwood Coal Pty Ltd, and varying the consideration payable to the Vendors for purchase of the Assets ("Cuesta Deed").

[9] On 8 December 2011 and 3 January 2012, that part of the consideration payable under the Amended and Restated Tenement Sale Agreement defined as the "First Tranche Payment" was paid.

[10] On 18 January 2012, EPC 1802 was transferred to the second defendant.

[11] On 10 December 2012, the parties to the contract at that point and the third plaintiff, Fox Investments (Qld) Pty Ltd, entered into a contract styled a Deed of Assignment under which the third plaintiff became a party to the Amended and Restated Tenement Sale Agreement, as varied by the Cuesta Deed, in replacement for Mr Fox.

[12] On 18 October 2013, the parties to the contract varied the consideration payable under the Amended and Restated Tenement Sale Agreement to the Vendors ("final contract").

[13] On 21 October 2013, 21 January 2014 and 17 April 2014, the part of the consideration payable to the Vendors under the final contract styled the "Second Tranche Payment" was paid.

[14] On 29 October 2013, the first defendant made an ASX announcement that a Competent Person had estimated an Inferred Mineral Resource upon EPC 1802 of 364.1 million tonnes ("Mt").

[15] In June 2014, the second defendant was granted an extension of EPC 1802 for five years.

Provisions of the contract

[16] The central issue in dispute turns on the operation of clauses 4.1(1)(b)(iii) and 4.2(2) of the final contract. They provide as follows:

> **"4.1 Consideration**
>
> (1) The consideration for the purchase of the Assets is:
>
> …
>
> (b) Subject to Completion occurring, any necessary shareholder approvals being obtained (including approvals required under the ASX Listing Rules), the Vendors entering into any restriction agreement required by the ASX under the ASX Listing Rules and doing anything else required in accordance with the ASX Listing Rules:
>
> …

(iii) the issue of the Third Tranche Shares and Third Tranche Options by Cuesta to the Vendors on the date that is:

(A) 10 Business Days after the Third Milestone occurred if Cuesta is listed on the ASX as at the date the Third Milestone occurred; or

(B) 10 Business Days after the Third Milestone occurred and the Purchaser receives a valuation from an Independent Expert which is carried out in accordance with clause 4.1(2) if Cuesta is not listed on the ASX as at the date the Third Milestone occurred…

4.2 Failure to Meet Second Milestone and Third Milestone

(1) …

(2) If the Purchaser fails to meet the Third Milestone by the 5th anniversary of the grant of the Tenement (**Third Milestone Date**) but a Competent Person infers the existence of a Measured Mineral Resource with an estimated tonnage of at least 40,000,000 but less than 100,000,000 tonnes of coal in the Tenement Area as at the Third Milestone Date, then Cuesta must issue the Third Tranche Shares and the Third Tranche Options to the Vendors (adjusted on a pro rate basis) on the date that is

(a) 10 Business Days after the Third Milestone Date if Cuesta is listed on the ASX at the time; or

(b) 10 Business Days after the Third Milestone Date and the Purchaser receives a valuation from an Independent Expert which is carried out in accordance with clause 4.1(2) if Cuesta is not listed on the ASX at the time."

[17] The relevant defined expressions in those clauses are as follows:

"(53) **Third Milestone** means the date a Competent Person infers the existence of a Measured Mineral Resource with an estimated tonnage of 100,000,000 tonnes or more of coal in the Tenement Area;

(54) **Third Milestone Date** has the meaning given to it in Clause 4.2(2);

(55) **Third Tranche Option** means that number of Cuesta Options equal to the number to Third Tranche Shares;

(56) **Third Tranche Shares** means:

(a) if Cuesta is listed on the ASX as at the date the Third Milestone occurs and:

(i) the volume weighted average trading price of fully paid ordinary shares in Cuesta for the 10 Business Days immediately preceding the date the Third Milestone occurs is above the Listing Price, the number of fully paid ordinary shares in cuesta equal to N, as set out below:

$$N = \frac{\$3,000,000}{\text{Listing Price}}; \text{ or}$$

(ii) the volume weighted average trading price of fully paid ordinary shares in Cuesta for the 10 Business Days immediately preceding the date the Third Milestone occurs is equal to or below the Listing Price the number of the fully paid ordinary shares in Cuesta equal to N, as set out below:

$$N = \frac{\$3,000,000}{\text{VWAP}}$$

Where **VWAP** means the volume weighted average trading price of fully paid ordinary shares in Cuesta for the 10 Business Days immediately preceding the date the Third Milestone occurs; or

(b) if Cuesta is not listed on the ASX as at the date the Third Milestone occurs that number of ordinary shares in the capital of Blackwood Coal which represents a value of $3,000,000 as determined by the Independent Expert in accordance with clause 4.1(2);"

Alleged implied terms

[18] The plaintiffs allege:

(a) first, that it was an implied term of the final contract that the first defendant owed a duty of cooperation that required it to do all things necessary to give the plaintiffs the benefit of the Amended and Restated Tenement Sale Agreement and not to do anything that would derogate from the benefit of the Amended and Restated Tenement Sale Agreement ("implied duty of cooperation"); and

(b) second, that it was an implied term of the final contract that the first defendant would obtain detailed and reliable exploration sampling and testing information gathered through appropriate techniques from locations spaced closely enough to confirm the geological and grade continuity of the coal deposit within the EPC 1802 area sufficient for a Competent Person to undertake an analysis to calculate the measured mineral resource, provide that information to the Competent Person and obtain from the Competent Person the relevant calculation ("detailed and reliable exploration implied term").

Alleged breach of contract

[19] It is not in dispute that, after the second defendant carried out exploration work on EPC 1802 necessary to be able to make the ASX announcement on 29 October 2013, a Competent

Person estimated an Inferred Mineral Resource of 364.1 Mt. After that, however, the second defendant did not carry out further exploration work, by way of drilling, sampling or testing, to further upgrade the mineral resource.

[20] The plaintiffs allege that was in breach of both the alleged implied terms.

[21] The defendants deny that any implied duty to cooperate required them to do any drilling, sampling or testing and deny that the detailed and reliable exploration implied term was a term of the final contract.

Alternative case

[22] Alternatively to their claim for damages for breach of the implied duty to cooperate or breach of the detailed and reliable exploration implied term, the plaintiffs allege that if the second defendant, or its successor in title, meets the Third Milestone within a reasonable time the plaintiffs will be entitled to issue of the Third Tranche Share and the Third Tranche Options under cl 4.1(b)(iii) of the final agreement.

Commercial purpose, genesis, background, context and the market of the final agreement

[23] The application for the permit that became EPC 1802 contained a proposed work program as follows:

> "**Proposed Exploration Program**
>
> Initial exploration on the project will take approximately 1-2 years to complete and will consist of the following program;
>
> - Collection and correlation of all historical data into a modern data package
> - Access and compensation agreements
> - Scout rotary drilling to determine the presence of coal seams
> - Design detail drill evaluation programs
> - Carry out preliminary resource drilling programs
>
> Assuming the first phase study is favourable the second phase (years 3-4) of exploration will incorporate the following;
>
> - Resource modelling and mine design
> - Coal separation test work
> - Engineering design
> - Environmental Impact Study
> - Project Economics with a goal of proceeding to a Mining Lease Application
>
> **Proposed Exploration Programme and Budget**

> It is proposed that the term of the EPM is for five years. The proposed exploration programme and budget is as follows:-
>
> **Year 1-2 Proposed Budget $250,000.**
>
> **Year 3-4 Proposed Budget $450,000.**"

[24] The application for EPC 1802 was made under the *Mineral Resources Act 1989* (Qld) ("MRA").

[25] Section 133(f)(i)-(ii) provided that an application for an exploration permit had to be accompanied by a statement specifying a description of the program of work proposed to be carried out under the authority of the exploration permit if granted and specifying the estimated human, technical and financial resources proposed to be committed to exploration work during each year of the exploration permit.

[26] Section 137(1) empowered the Minister to grant an application for an exploration permit, with or without conditions, or to refuse it. However, it was a condition of the grant of the application that the Minister has approved the program of work that accompanied the application – see s 133(f)(i). Under s 137(3) the Minister must consider several matters when deciding whether to approve a program of work and under s 137A(h), when an exploration permit is granted, it must state the program or work and the studies to be carried out under it.

[27] Lastly, under s 141(1)(a), an exploration permit is subject to a condition that the holder shall carry out such programs of work and such studies for the purposes for which the exploration permit was granted and in accordance with the MRA and the conditions of the exploration permit and for no other purpose. Under s 141(1)(f)(i), the holder must provide the Minister with reports containing prescribed information, which then included information about compliance with the program of work and its results – see s 13A of the now repealed *Mineral Resources Regulation 2003* (Qld).

[28] EPC 1802 contained a condition that the holder would carry out the work program and comply with the expenditure commitments that were detailed Annexure C thereto. The work program required work by way of review, drilling, assaying and interpretation in each of years 1 to 4 and expenditure of $105,000 for year 1, $100,000 for year 2 and $210,000 in each of year 3 and year 4. The work was to be done over an area of 130 sub-blocks in each of years 1 and 2, an area of 100 sub-blocks in year 3 and the area of 80 sub-blocks in year 4. It provided for the relinquishment of 30 sub-blocks at the end of year 2, 20 sub-blocks at the end of year 3 and 20 percent of the remaining sub-blocks if renewal of the permit was sought.

[29] As at November 2010, and up to this day, it was commonly known and would have been mutually known to the parties that no coal resource in the Galilee Basin in the area of EPC 1802 had been developed into an operating mine. There was no infrastructure, either for the production of coal or for the transport of coal by rail to market. In this sense, any market for coal to be produced from the Galilee Basin was a future market, dependent on future events.

[30] A relevant part of EPC 1802 of interest in this case is located approximately 25 kilometres from what was the proposed Adani Carmichael mine rail head. It is now known as the "Yellow Jacket" area of deposit.

JORC Code

[31] Three other relevant terms defined in the final contract are:

> "(33) '**Inferred Mineral Resource**' has the meaning defined in the JORC Code.
>
> (36) '**JORC Code**' means the Australasian code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (2004 Edition) published by The Joint Ore Reserves Committee of the Australasian Institute of Mining and Metallurgy, Australian Institute of Geoscientists and Minerals Council of Australia and any revisions to or replacements of, it.
>
> (39) '**Measured Mineral Resource**' has the meaning defined in the JORC Code."

[32] The JORC Code sets a required minimum standard for public reporting and also recommends its adoption as a minimum standard for other reporting. The 2004 edition JORC Code was replaced by the 2012 edition JORC Code. Although it is a code for public reporting, it does not provide for the manner in which a Competent Person estimates a mineral resource. Thus, the words "JORC Compliant" should be interpreted to mean "reported in accordance with the JORC Code and estimated (or based on documentation prepared) by a Competent Person, as defined by the JORC Code". Figure 1 of the 2012 edition JORC Code illustrates that as the level of geological knowledge and confidence for a mineral deposit increases, utilising exploration results and other techniques, a mineral resource may be found to be an "inferred" mineral resource, then upgraded to "indicated" mineral resource and then further upgraded to a "measured" mineral resource. As this case is concerned with the question of upgrading an inferred mineral resource to a measured mineral resource, some of the underlying concepts and requirements may be simplified in these reasons. One underlying concept is that the portions of a deposit that do not have reasonable prospects for eventual economic extraction must not be included in a "mineral resource".

[33] The plaintiffs' starting point in the present case is that from 29 October 2013 EPC 1802 contained an "Inferred Mineral Resource" of 364.1 Mt. As defined in the 2012 edition JORC Code, an "Inferred Mineral Resource" is:

> "That part of a mineral resource for which quantity and grade (or quality) are estimated on the basis of limited geological evidence and sampling. Geological evidence is sufficient to imply but not verify geological and grade (or quality) continuity. It is based on exploration, sampling and testing information gathered through appropriate techniques from locations such as outcrops, trenches, pits, workings and drill holes.
>
> An inferred mineral resource has a lower level of confidence than that applying to an indicated mineral resource and must not be converted to an ore reserve. It is reasonably expected that the majority of inferred mineral resources could be upgraded to indicated mineral resources with continued exploration."

[34] Second, the 2012 edition JORC Code defines an "indicated mineral resource" as:

> "That part of the mineral resource for which quantity, grade (or quality), densities, shape and physical characteristics are estimated with sufficient confidence to allow the application of Modifying Factors in sufficient detail to support mine planning and evaluation of the economic viability of the deposit.
>
> Geological evidence is derived from adequately detailed and reliable exploration, sampling and testing gathered through appropriate techniques from locations such as outcrops, trenches, pits, workings and drill holes, and is sufficient to assume geological and grade (or quality) continuity between points of observation where data and samples are gathered.
>
> An indicated mineral resource has a lower level of confidence than that applying to a measured mineral resource and may only be converted to a probable ore reserve."

[35] Third, the definition in the 2012 edition JORC Code of "measured mineral resource" is:

> "That part of a mineral resource for which quantity, grade (or quality), densities, shape and physical characteristics are estimated with confidence sufficient to allow the application of Modifying Factors to support detailed mine planning and final evaluation of the economic viability of the deposit.
>
> Geological evidence is derived from detailed and reliable exploration, sampling and testing gathered through appropriate techniques from locations such as outcrops, trenches, pits, workings and drill holes, and is sufficient to confirm geological and grade (or quality) continuity between points of observation where data and samples are gathered.
>
> A measured mineral resource has a higher level of confidence than applying to either an indicated mineral resource or an inferred mineral resource. It may be converted to a proved ore reserve or under certain circumstances to a probable ore reserve."

[36] As defined, the crux of the distinction between an indicated mineral resource and a measured mineral resource lies in the degree of confidence. Thus, for an indicated mineral resource, the data must be such "as to allow confident interpretation of the geological framework and assume continuity of mineralisation", whereas for a measured mineral resource, the data must be such as "to leave no reasonable doubt, in the opinion of the Competent Person determining the mineral resource, that the tonnage and grade of the mineralisation can be estimated to within close limits, and that any variation from the estimate would be unlikely to significantly affect potential economic viability". The measured mineral resource category requires "a high level of confidence in, and understanding of, the geological properties and controls of the mineral deposit".

[37] Clauses 42 to 44 of the 2012 edition JORC Code relate specifically to the public reporting of coal resources. They provide that for guidance on the estimation of coal resources, readers are referred to the 'Australian Guidelines for Estimating and Reporting of Inventory Coal, Coal Resources and Coal Reserves' as published from time to time by the Coalfields Geology Council of New South Wales and the Queensland Resources Council. The 2003 edition of those guidelines deals with the estimation of coal resources from points of observation or "POB".

Paragraph 4.5.3 provides that measured coal resources may be estimated using data obtained from POBs normally less than 500 metres apart, but the distance may be extended if there is sufficient technical justification to do so; for example, if supported by geostatistical analysis.

[38] It is not in dispute in the present case that, to the date of the trial, the exploration and drilling program carried out by the first defendant in the relevant areas of EPC 1802 constituted a total of up to 45 drill holes of which 6 are POB quality. The POBs are spaced between 3000 and 4000 metres apart. That exceeds the maximum spacing that is permissible to estimate or determine a measured mineral resource.

[39] The plaintiffs' expert, Troy Turner, proposes that a drilling program of 21 x 63 millimetre dome and core holes and 21 pilot open chip holes would be required to "convert" (upgrade) the most prospective zone of the current 364.1 Mt Inferred Mineral Resource area on EPC 1802, in the Yellow Jacket area of the EPC, to approximately 100 Mt of Measured Mineral Resource. The proposed area was described in the evidence of the case as the "100 Mt polygon". I will describe this proposed drilling program as the "21 hole exploration program". The defendants' experts agreed that the 21 hole exploration program is a reasonable approach to a first stage of drilling with the intention to define a Measured Mineral Resource, but reserved whether further in-fill drilling or possibly step-out drilling and drilling into adjacent areas may be required. However, the plaintiffs contend, for the purposes of their case, that it was the 21 hole exploration program that the first defendant failed to carry out, in breach of the implied duty to cooperate or the detailed and reliable exploration implied term.

[40] Mr Turner opined that the 21 hole exploration program would have cost in the range between $0.73 million and $1.1 million and would have taken 70 days to complete the exploration work and a further 90 days to carry out the associated laboratory and assessment work, in accordance with the proposed exploration budget attached as Appendix D to his first report.

Implied duty to cooperate and implied terms

[41] The common starting point for the parties' submission on the implied duty to cooperate is the statement of Mason J in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*:[1]

> "But it is common ground that the contract imposed an implied obligation on each party to do all that was reasonably necessary to secure performance of the contract. As Lord Blackburn said in *Mackay v Dick*…:
>
> > '… as a general rule … where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.'

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1 (1979) 144 CLR 596, 607.

> It is not to be thought that this rule of construction is confined to the imposition of an obligation on one contracting party to co-operate in doing all that is necessary to be done for the performance by the other party of his obligations under the contract. As Griffith CJ said in *Butt v M'Donald*…:
>
> > 'It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.'
>
> It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself."

[42] The plaintiffs' case is that the duty to cooperate was imposed by implication upon the first defendant for the plaintiffs to have the benefit comprised in the Third Tranche Shares and Third Tranche Options to be issued, by doing acts such as the 21 hole exploration program to enable an assessment by the Competent Person that the contractual threshold of 100 Mt of measured mineral resource was present or, if not, that an amount of 40 Mt or greater was present.

[43] Against that, the defendants make a number of submissions. First, they submit that the final agreement contains terms that define the parties' rights and obligations relating to cooperation and benefit. In particular, they submit that the existence or application of an implied duty to cooperate in the circumstances of the present case is negated by there being an inconsistent express term in cl 15.1 of the final contract that provides:

> "Other than as set out in this document, each party must, at its own cost from time to time, do all things (including executing all documents) necessary to give full effect to this Agreement."

[44] Such a term is often termed a further assurance clause. Simplifying, the defendants submit that cl 15 covers the ground which might be covered by the implied duty to cooperate and therefore excludes it.

[45] In support of that contention, the defendants rely on a statement by Young CJ in *Campbell v BackOffice Investments Pty Ltd,*[2] that where there is an express term in a contract, it is almost impossible for the court to imply a term that operates in the same area, referring to

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[2] (2008) NSWCA 95, [557].

Castlemaine Tooheys Ltd v Carlton & United Breweries.[3] Neither of those cases concerned a further assurance clause in a contract of sale of land or similar. In *Campbell*, the difficulty was that the implied duty to cooperate was said to contractually oblige Campbell, personally, as joint managing director of a company, to cause the company to make payments to BackOffice Investments under a services agreement. But under that agreement, the obligation to make and the entitlement to receive those payments were expressly provided for as between different parties that did not include Campbell, personally. In *Castlemaine Tooheys*, the question was whether an alleged implied term against a vendor acting to reduce the value of the goodwill sold to the purchaser was inconsistent with an express term of the contract under which the parties turned their minds as to what the vendor could do and could not do in restraint of trade in relation to the hotels it sold to the purchaser. Young CJ took the view that the relevant clause was not inconsistent with the suggested implied term,[4] but the Court of Appeal disagreed.[5]

[46] Of passing interest in the present case is that in *Castlemaine Tooheys* a further assurance clause was relied upon by the purchaser as a source of the vendor's alleged obligation to do necessary or appropriate things to enable the purchaser to receive the full benefit and advantage of the assets and business acquired under the contract and as requiring the vendor to refrain from conduct that would depreciate those benefits and advantages. It was held that the operation of a further assurance clause is "to assure", meaning to transfer property,[6] and that did not extend to conduct in restraint of trade of the vendor after the transfer was made.

[47] In my view, cl 15.1 of the final contract does not repel the existence or operation of an implied duty to cooperate. No other specific provision of the final contract was identified by the defendants as having that effect.

[48] Next, the defendants submit that the implied duty to cooperate only operates to oblige a party to cooperate in the performance of the fundamental obligations of the other party that require the cooperation of the first party and that there is no fundamental obligation of the plaintiffs to be performed that requires the cooperation of the defendants by performance of exploration work such as the 21 hole exploration program. I reject the contention that the implied duty to cooperate is confined to cooperation to enable the other party to perform, although that is an important area of its operation. Neither the statement of Mason J in *Secured Income* set out above, nor the cases discussed below, that relied on *Mackay v Dick*,[7] so confines it.

[49] The defendants submit that exploration such as the 21 hole exploration program is not essential to the performance of the first defendant's obligations and is not fundamental to the final contract. They submit that the final contract left the first defendant at liberty to decide

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3 (1987) 10 NSWLR 468.

4 (1987) 10 NSWLR 468, 496.

5 (1987) 10 NSWLR 468, 496.

6 (1987) 10 NSWLR 468, 483.

7 (1881) 6 HL (Sc) 251.

for itself whether exploration such as the 21 hole exploration program, or any exploration, shall be done, even if the consequence of its decision was to disentitle the plaintiffs to the benefit of the Third Tranche Shares and Third Tranche Options or any proportionate part of them. The defendants submit that the correct interpretation of the final contract depends not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself. The defendants submit that carrying out the 21 hole exploration program is to be viewed as acts that may be necessary to entitle the plaintiffs to a benefit under the contract but not as acts which are essential to the performance by the defendants of obligations under the contract and not as fundamental to the contract.

[50] These submissions raise important questions as to what are acts "essential" to the defendants' performance under the contract and what is "fundamental" to the contract in the relevant sense? The cases do not yield an easy answer in any general way.

[51] A fundamental obligation of the defendants was to pay the consideration for the purchase of the Assets. In a general sense, there is no more "fundamental" obligation or act more "essential" to the performance of a buyer under a contract of sale than payment of the purchase price. Under the final contract, the obligation to issue the Third Tranche Shares and the Third Tranche Options to the sellers, by way of payment, was expressly part of the consideration moving from the buyer for the Vendors' transfer of the Assets. However, the obligation was contingent, because it was conditioned on the quantity and quality of the mineral resource contained in the permit area and on those matters being established by a "sunset" date. The defendants submit that carrying out acts such as the 21 hole exploration program was neither a "fundamental" obligation nor "essential" to the performance of the defendants' obligations, so as to engage the application of the implied duty to cooperate.

[52] If that be correct, they also submit that the correct approach is to take a step away from the concept of the application of the implied duty to cooperate. Specifically, they submit that the court is required to apply the reasons of P McMurdo J (with whom Jerrard JA agreed) in *Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd*.[8] P McMurdo J said as follows about the statement of Mason J in *Secured Income*, set out above:

> "Mason J thereby distinguished between acts according to whether they are necessary to the performance of a party's fundamental obligations under the contract. There is a duty to co-operate in the doing of acts which are necessary to the performance of such obligations. But a duty to co-operate in the doing of acts which are not necessary to the performance of fundamental obligations has to be found in "the intention of the parties as manifested by the contract itself", **that is by a term implied in fact**."[9] (emphasis added)

[53] The defendants submit that by those words, I am bound to apply the requirements in law for a "term implied in fact" to the contention that the alleged implied duty of cooperation required the second defendant to carry out work such as the 21 hole exploration program.

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8 [2006] QCA 126.

9 [2006] QCA 126, [50].

[54] Generally speaking, subsequent cases, at intermediate appellate court level, have referred to *Jackson Nominees* with approval.[10] However, they have not expressly referred to the particular passage relied upon by the defendants, although a couple of single judge decisions have cited it.[11] But no subsequent case has analysed the operation of the duty to cooperate through the legal test for a "term implied in fact".

[55] Under the Australian common law, the legal taxonomy that has developed for the implication of terms in a contract is reflected in a classification that distinguishes among different classes of implied terms. For this purpose, I consider that I am bound by the judgment of the plurality in *Commonwealth Bank of Australia v Barker*,[12] who said:

> "Courts have implied terms in contracts in a number of ways:
>
> - in fact or ad hoc to give business efficacy to a contract;
> - by custom in particular classes of contract;
> - in law in particular classes of contract; or
> - in law in all classes of contract.
>
> …
>
> Implication of a term in fact in a contract, by reference to what is necessary to give it business efficacy, was described in *Codelfa* as raising issues 'as to the meaning and effect of the contract'. Implication is not 'an orthodox exercise in the interpretation of the language of a contract, that is, assigning a meaning to a particular provision'. It is nevertheless an 'exercise in interpretation, though not an orthodox instance'. The implication of terms in fact was also characterised in *Attorney General of Belize v Belize Telecom Ltd* as an exercise in construction. Lord Hoffmann, delivering the judgment of the Privy Council, said (at [22]):
>
> > '… it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.'
>
> The distinction thus drawn is appropriate even though the scope of the constructional approach adopted by Lord Hoffmann has been debated."[13]

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10 *WIN Corp Pty Ltd v Nine Network Australia Pty Ltd* (2016) 341 ALR 467, [71]; *Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd* (2015) 237 FCR 534, [139]; *Williamson & McGillivray v JIA Holdings Pty Ltd* [2011] QCA 346, [33]; *Quinn Villages Pty Ltd v Mulherin* [2006] QCA 433, [22]; *Grieve v Enge* [2006] QCA 213, [40].

11 *Kosho Pty Ltd v Trilogy Funds Management Ltd* [2013] QSC 135, [132]; *Raging Thunder Pty Ltd v Bank of Western Australia Ltd* [2012] QSC 329, [76].

12 (2014) 253 CLR 169.

13 (2014) 253 CLR 169, 185-186, [21]-[22].

[56] Later in those reasons, the plurality discussed the implication of terms in law in contracts generally, that can also be characterised as rules of construction, referring to the statement of Mason J in *Secured Income* set out above.[14] The plurality continued:

> "It has also been argued that some 'terms' said to be implied in law are in fact rules of construction and that all implied 'terms' of universal application fall into that category. The application of that proposition to what has been treated as a contractual duty to cooperate is considered below. Debates about characterisation have attracted persuasive protagonists on both sides. They involve taxonomical distinctions which do not necessarily yield practical differences. Those debates are not concerned with the distinct question whether, and when, implication of a term is to be regarded as an exercise in the construction of a contract or class of contract."[15]

[57] Later still, the plurality said:

> "In *Byrne v Australian Airlines Ltd*, McHugh and Gummow JJ emphasised that the 'necessity' which will support an implied term in law is demonstrated where, absent the implication, 'the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined' or the contract would be 'deprived of its substance, seriously undermined or drastically devalued'. The criterion of 'necessity' in this context has been described as 'elusive' and the suggestion made that 'there is much to be said for abandoning' the concept. Necessity does, however, remind courts that implications in law must be kept within the limits of the judicial function. They are a species of judicial law-making and are not to be made lightly. It is a necessary condition that they are justified functionally by reference to the effective performance of the class of contract to which they apply, or of contracts generally in cases of universal implications, such as the duty to cooperate. Implications which might be thought reasonable are not, on that account only, necessary. The same constraints apply whether or not such implications are characterised as rules of construction."[16] (footnotes omitted)

[58] The defendants submit that the consequence of the proposition that acts which are not necessary to the performance of a party's fundamental or essential obligations must be justified as a "term implied in fact" is that the obligation to do such acts must pass through the gateway of the principles enunciated in 1977 in *BP Refinery (Western Port) v Hastings Shire Council*,[17] as accepted in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*,[18] as to an alleged term implied in fact that:

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14 (2014) 253 CLR 169, 187, [25].

15 (2014) 253 CLR 169, 187, [24].

16 (2014) 253 CLR 169, 187, [29].

17 (1977) 180 CLR 266.

18 (1982) 149 CLR 337, 347.

> "(1) it must be reasonable and equitable;
>
> (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
>
> (3) it must be so obvious that 'it goes without saying';
>
> (4) it must be capable of clear expression; and
>
> (5) it must not contradict any express term of the contract."[19]

[59] The defendants submit that the court is bound to approach the requirements of the implied duty to cooperate in that way in the present case. They also submit that the court is bound to follow the statement of McHugh JA in *Elders IXL Ltd v National Employers' Mutual General Insurance Association Ltd*,[20] that:

> "Where a person promises that he will pay money or confer a benefit the fulfilment of which is dependent upon the existence of a state of affairs or condition, a term that the promisor will do nothing to put an end to that state of affairs or condition will only be implied where the promisee has already given consideration for the promise and the promisor has a present obligation to fulfil the promise."

[60] Neither side of the present dispute focussed on cases of authority that consider the obligation of a promisor to do acts in relation to the satisfaction of a contingent condition to the performance of a contract, either as a matter of the implied duty to cooperate or as a term implied in fact.

[61] For example, in *Grieve v Enge*,[21] purchasers sought specific performance of a contract of sale of land where they had failed to notify satisfaction of the finance condition within the time stipulated. The reason for their failure was that the vendor had refused permission for the purchasers' financier's valuer to inspect the property in order to value it. That was held to be a breach of the implied duty to cooperate or the correlative obligation to refrain from doing anything which would prevent completion of the contract. On appeal, it was held that obtaining finance was inextricably linked to the purchasers' performance of the contract by payment of the purchase price and that the vendor was obliged to permit access for the purpose of the valuation, because of the "implication of the general duty to cooperate".[22]

[62] Further, the judgments in a number of other cases in the High Court decided before *Secured Income* recognised implied obligations on parties to do things of different kinds in reliance upon Lord Blackburn's formulation of the duty to cooperate in *Mackay v Dick*.[23] So, in *Ray v*

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19 (1977) 180 CLR 266, 267.

20 (1988) 5 ANZ Ins Cas 60-847, 75, 299.

21 [2006] QCA 213.

22 [2006] QCA 213, [35], [41] and [43].

23 (1881) 6 HL (Sc) 251.

Davies,[24] Isaacs J would have implied an obligation for the purchaser under a contract of sale to execute a mortgage if the vendors arranged for a loan on the terms stated in the contract.[25] In *Milne v Municipal Council of Sydney*,[26] Barton J implied an obligation on the part of the Council to allow the other party to do the work that it had promised to do at fixed rates for a 12 month period.[27] In *Bruce v Tyley*,[28] both Barton and Isaacs JJ considered that where B agreed with A to do certain works and B sub-contracted with C for C to do part of the works, B was under an implied obligation to C to do all that was necessary on B's part to enable C to do the sub-contracted work.[29] And in *Norton v Angus*,[30] Isaacs J held that, under a contract of sale of perpetual leases where the transfer of the leases was by statute subject to the Minister's approval, each of the parties was impliedly obliged "to do all that was reasonable" to secure the lawful transfer.[31]

[63] There are other relevant High Court cases dealing with implied obligations attaching to contingent conditions affecting the performance of contracts, that are not expressly linked to Lord Blackburn's formulation of the duty to cooperate in *Mackay v Dick*. First, there is a series of cases concerned with contracts of sale of land subject to approval by a third party, of which *Norton v Angus*, previously mentioned, was a forerunner. So, in *Butts v O'Dwyer*,[32] it was held that a lease and option to buy and thereby obtain a transfer of land subject to Crown lands legislation, that required the Minister's consent to any transfer, was subject to an implied condition on the part of the transferor to do all that was reasonable on his part to the end that the Minister's consent might be obtained, applying the principle of *The Moorcock*.[33] A similar obligation was implied in other like cases, such as *McWilliam v McWilliams Wines Pty Limited*,[34] and in other analogous cases, such as to act to obtain a landlord's consent to assignment of a lease: see *Kennedy v Vercoe*.[35]

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24 (1909) 9 CLR 160.

25 (1909) 9 CLR 160, 169-170.

26 (1912) 14 CLR 54.

27 (1912) 14 CLR 54, 69-70. It is notable that in the same case Griffith CJ found the same obligation by reference to *The Moorcock* (1889) 14 P.D., 64, 68 ie based on necessity to give business efficacy; (1912) 14 CLR 54, 65-66.

28 (1916) 21 CLR 277.

29 (1916) 21 CLR 277, 285 and 287-288.

30 (1926) 38 CLR 523.

31 (1926) 38 CLR 523, 535.

32 (1952) 87 CLR 267.

33 (1952) 87 CLR 267, 280.

34 (1964) 114 CLR 656, 661 and 663.

35 (1960) 105 CLR 521, 526.

[64] Second, in *Perri v Coolangatta Investments Proprietary Limited*,[36] completion of a contract of sale of land was made subject to the purchasers first completing the sale of their existing property. It was held that the purchasers were impliedly obliged to make all reasonable efforts to sell their existing property.[37]

[65] Third, cognate reasoning emerges in the case of a conditional contract of sale of land that is subject to satisfactory finance. Whether such a contract is enforceable was considered in *Meehan v Jones*.[38] It was necessary to consider whether the buyer was obliged to obtain and consider an offer of finance. Although the extent of the obligation was not resolved, the judgments accepted that the buyer was impliedly obliged to apply for the finance and to consider either honestly, or in good faith and reasonably, whether any offer of finance was satisfactory.[39]

[66] In accordance with the statements of principle from these sources, in my view, the question in the present case might have been whether the final contract on its proper construction impliedly obliged the second defendant to carry out the exploration work reasonably required to assess whether the Third Milestone was achieved or whether it left the second defendant at liberty to decide for itself whether any exploration work should be carried out, notwithstanding that the consequence of not doing so would be to disentitle the plaintiffs to the benefit of the promise to pay the Third Tranche Shares and Third Tranche Options if the Third Milestone was met. The correct construction of the contract depends on the objectively ascertained and attributed intention of the parties as manifested by the terms and context of the contract.

[67] However, I do not accept that the proper construction of the contract, as so ascertained, by reference to the principle underlying the duty to cooperate that is based on giving business efficacy to the contract, must necessarily be parsed further, or again, through each of the five factors of the *BP Refinery (Western Port)* analysis as applied to the acts or omissions alleged to constitute breach of the duty of cooperation. That would make application of the *Secured Income* duty to cooperate largely irrelevant in a context like the present case.

[68] This difference may matter in some cases. For example, two of the five *BP Refinery (Western Port)* factors are that the proposed implied term must be "reasonable and equitable" and "necessary to give business efficacy to the contract". In practice, most, if not all, failed cases of alleged terms implied in fact (or ad hoc implied terms as they are sometimes called) fall at the hurdle that the alleged term is not necessary to give business efficacy. That supports Lord Neuberger's statement in *Marks and Spencer plc v BNP Paribas Securities Services*,[40] that it is

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36 (1982) 149 CLR 537.

37 (1982) 149 CLR 537, 547, 553 and 566.

38 (1982) 149 CLR 571.

39 (1982) 149 CLR 571, 581, 590-591 and 597.

40 [2016] AC 742.

questionable whether the requirement that an alleged term implied in fact must be reasonable and equitable "will usually, if ever, add anything".[41]

[69] Be that as it may be, *Secured Income* itself does not support the requirement to apply the five *BP Refinery (Western Port)* factors in all cases falling within the last paragraph of the statement of Mason J in *Secured Income* set out above. In that case, a contract of sale of an office building provided for part of the sale price to be paid four months after the date of settlement. It further provided for the reduction of the purchase price if the aggregate rental payable was not equal to a nominated amount by the expiration of the four month period. There were thus two relevant periods: first, the period between the date of the contract and the date for settlement of the sale; second, the period after settlement until the four month period expired. Before settlement, any new tenancy would be granted by the vendor, and the contract expressly provided that was subject to the purchaser's consent to the tenancy and that the consent was not to be arbitrarily or capriciously withheld. After settlement, any new lease would be granted by the purchaser, now as owner of the premises, but the contract made no express provision as to any obligation of the purchaser to accept any proposed new tenant. The question for decision was whether the purchaser was in breach of contract in refusing to accept the vendor as a tenant after the contract was settled but before the four month period expired.

[70] Although the contract did not expressly oblige the purchaser to act reasonably or in good faith in deciding whether to accept or reject any new tenant proposed by the vendor after settlement but before expiry of the four month period, Mason J held that the purchaser was obliged not to arbitrarily or capriciously reject the vendor as a new tenant.[42] In reaching that conclusion, Mason J did not apply the five *BP Refinery (Western Port)* factors, even though he did refer to that case earlier in his reasons.[43]

[71] It is appropriate to return to *Elders IXL*. There are a number of notable features about that case.

[72] First, the passage relied on by the defendants, set out above, would suggest that there is a rule of law that a term that a "promisor will do nothing to put an end to the state of affairs or condition will only be implied where the promise has already given consideration for the promise and the promisor has a present obligation to fulfil the promise". So far as that statement might apply to this case, there is no difficulty in the requirement that the plaintiffs have already given consideration. When the final contract was entered into (and from the time of the Heads of Agreement) they promised to transfer the Assets and to do so before it would have been known whether the obligation to issue the Third Tranche Shares and Third Tranche Options would arise on satisfaction of the Third Milestone. However, because of the conditional nature of the obligation to issue the Third Tranche Shares and Third Tranche Options, it could not be said that there was a "present obligation to fulfil the promise", until the condition of the Third Milestone was satisfied.

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41 [2016] AC 742, 755, [21].

42 *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 609.

43 *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 605.

[73] Second, in considering the application of the principle of *Mackay v Dick*, it was said in *Elders IXL* that "[i]n terms it applies only to a case where the parties have agreed to do something which requires their joint co-operation. It does not apply to a case where one party has promised to pay money or confer a benefit in exchange for the other party's act or forbearance."[44] In my view, whatever the scope of the application of that statement, it does not preclude the operation of the implied duty to cooperate in all cases of a conditional contract of sale. *Mackay v Dick*[45] itself was such a case. The buyer's promise to accept and pay for the goods under the agreement for sale of an excavator was subject to a condition that the excavator was capable of excavating and filing 350 cubic yards per ten hour day into wagons at a test to be carried out on the buyer's construction site in a railway cutting. It was the buyer's refusal to permit the seller to install the excavator and carry out the agreed test on a fair face that was the breach of the duty to cooperate.[46]

[74] In any event, *Secured Income* clearly stands as authority in support of the wider statement of principle from *Butt v M'Donald,* set out above, that "each party agrees, by implication, to do all things as are necessary on his part to enable the other party to have the benefit of the contract".

[75] Third, however, the cases demonstrate that not every hoped for or conditionally promised benefit to a promisee obliges a promisor to do all possible acts to bring the benefit about under the duty to cooperate. It depends on the context of the class of contract or particular terms of the contract. So, in *Elders IXL*, an insurer's contingent promise of a money payment or equivalent to the insured on a subsequent renewal of the insurance contracts if the claims under the existing policies over the year of insurance fell below a certain amount did not require the insurer to stay in the business of writing the relevant class of insurance for the following year. And in *Jackson Nominees*, a customer's promise to exclusively give a carrier all the carriage work from the customer's place of business for a specified term or period did not require the customer to stay in business for the whole term of the contract.[47]

[76] These cases are allied to cases involving a term implied often associated with the statement of Cockburn CJ in *Stirling v Maitland*[48] that:

> "if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end

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44 (1988) 5 ANZ Insurance Cases 60-847, 75, 299.

45 (1881) 6 HL(Sc) 251, 263.

46 (1881) 6 HL (Sc) 251, 263.

47 See also *Hamlyn & Co v Wood & Co* [1891] 2 QB 488. On the other side of a similar analysis, see *Ogdens Ltd v Nelson* [1904] 2 KB 410.

48 (1864) 5 B & S 840.

> to that state of circumstances, under which alone the arrangement can be operative."[49]

[77] Many cases involve terms implied of that kind and it would not be profitable to essay them. Again, in my view, the limits of the operation of that statement of principle depend on the context of the class of contract[50] or particular terms of the contract.

[78] Last in these general submissions, the defendants submit that the implied duty to cooperate only operates with respect to matters that the contract requires to be done. Another way in which the point was put is that for the implied duty to cooperate to be engaged one must find something that the contract requires to happen.

[79] The defendants advanced the argument in relation to the final contract in two ways. First, that in the absence of a term requiring the performance of exploration work such as the 21 hole exploration program, the implied duty to cooperate does not assist the plaintiffs. Second, the plaintiffs' chance of entitlement to receive the Third Tranche Shares and Third Tranche Options, which depended on satisfaction of the condition as to the Measured Mineral Resource contained in the Third Milestone, was not something that the contract required to happen. Therefore, there could be no implied duty to cooperate so as to give the chance any particular likelihood of success by doing any of the further exploration work required for satisfaction of the condition. In my view, at those levels of generality, the submissions should not be accepted.

[80] These general submissions drew again on the judgment of P McMurdo J in *Jackson Nominees,* as well as *Australis Media Holdings Pty Ltd & Ors v Telstra Corporation Ltd*,[51] *Campbell v BackOffice Investments Pty Ltd*,[52] *Wolfe v Permanent Custodians Ltd*[53] and *Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd*.[54]

[81] Perhaps the strongest statement on this point, and one that is relied on heavily by the defendants, was made in *Australis Media* where the court said that:

> "Leaving aside fiduciary obligations… there cannot be a duty to cooperate in bringing about something which the contract does not *require* to happen."[55]

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49 (1864) 5 B & S 840, 851-852.

50 For example, in a contract of appointment of a commission agent for the sale of land, where there is no express term or terms to contrary effect, the principal may usually terminate the agency and withdraw the land from sale or sell the land otherwise: *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108; *Meyers v Griffiths* [1948] St R Qd 216.

51 (1998) 43 NSWLR 104.

52 (2009) 238 CLR 304, [170].

53 [2013] VSCA 331, [28].

54 (2015) 237 FCR 534.

55 (1998) 43 NSWLR 104, 124.

[82] In my view, that statement does not mean that, where an obligation of one party to perform is conditional upon a contingency which requires action by that party before the contingency can be satisfied, the conditional obligation is something which the contract does not require to happen. The point is illustrated by drawing on some of the cases already discussed involving contracts for the sale of land as examples. First, where a purchaser's obligation to complete, by payment of the purchase price, is subject to finance satisfactory to the purchaser, the purchaser is obliged to apply for finance and to consider *bona fide* (or *bona fide* and reasonably) whether the finance offered is satisfactory.[56] Second, if a purchaser's obligation to complete is subject to a condition that the purchaser sells the purchaser's own house first, there is an implied obligation to take reasonable steps to do so.[57] Third, where both parties' obligations to complete are subject to a condition that the Minister consents to or approves of the sale, there is an implied obligation on both parties to do that which is reasonable to obtain the consent.[58] Although similar examples of conditional obligations could be multiplied, in my view, those cases are enough to show that it would be an error to regard the statement in *Australis*, relied upon by the defendants, as withdrawing all conditional obligations from the scope of the implied duty to cooperate because the contract does not require the conditional obligation to be performed unless the contingent condition is satisfied.

[83] In addition to the arguments already considered, the defendants submit that there are other reasons why, under the terms of the final contract in this case, properly construed, the second defendant was at liberty to decide not to do any further exploration work.

[84] First, the defendants submit that, on any view, the plaintiffs' entitlement to the Third Tranche Shares and Third Tranche Options was dependent on an uncertain chance that might never mature. To the extent that any entitlement depended on the performance of exploration work that yielded information that would enable a Competent Person to make the required assessment of 100 Mt (or, if not that, 40 Mt or more) of measured mineral resource, before the period for the condition to be fulfilled expired, it is obviously correct that the plaintiffs' entitlement, if any, was a matter of chance, not certainty. But, in my view, that does not gainsay that the plaintiffs were at risk of the first defendant deciding not to do any further exploration so as to preclude the possibility of the condition being fulfilled and thereby reduce the chance to nil.

[85] There is nothing untoward about a contract where the consideration is a conditional promise being aptly characterised as a contract to provide the promisee with the chance of obtaining a reward or benefit.[59] Further, the cases referred to previously show that in the present case the fact that the plaintiffs' entitlement was conditional, and depended on the estimated quantity and quality of the mineral resource at a particular degree of confidence, says little or

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56 *Meehan v Jones* (1982) 149 CLR 571, 581, 590-591 and 597.

57 *Perri v Coolangatta Investments Proprietary Limited* (1982) 149 CLR 537, 566.

58 *Butts v O'Dwyer* (1952) 87 CLR 267, 280; *McWilliam v McWilliams Wines Pty Ltd* (1964) 114 CLR 656, 661.

59 For examples, see *Chaplin v Hicks* [1911] 2 KB 786; *Fink v Fink* (1946) 74 CLR 127; and *McRae v Commonwealth* (1951) 84 CLR 377.

nothing about whether the defendants were obliged to carry out exploration work so as to be able to ascertain whether the resource was of that quantity and quality.

[86] Second, the defendants rely upon the provision in the Heads of Agreement that the Purchaser would meet all expenditure commitments as proposed under the application for the EPC and would endeavour to commence drilling to redrill the discovery hole to 200 metres within 90 days of the grant of the tenement, as revealing that the parties understood the topic of exploration and other work was one for express agreement and that the defined obligation under the Heads of Agreement was considered sufficient to make the plaintiffs' chance of receiving the Third Tranche Shares and Third Tranche Options a real one.

[87] In my view, this argument should be rejected. First, the express agreement that the Purchaser would meet the expenditure was made in the context where the EPC had not yet been granted and where, when granted, the work expenditure commitment would be the statutory obligation of Mr Wellington. The promise under the Heads of Agreement for the Purchaser to carry out or pay for the exploration work reduced the risk to Mr Wellington from exposure to that obligation. On 18 January 2012, the risk was eliminated when EPC 1802 was transferred to the second defendant. That was after the obligations as to payment of the plaintiffs in their final form were agreed, on 9 May 2011, in the Amended and Restated Tenement Sale Agreement. Further, the specific provision as to redrilling the discovery hole to 200 metres within 90 days of the grant of the EPC does not speak in any rational way to the extent of the work that would be required for a Competent Person to assess or infer a Measured Mineral Resource under the JORC Code. In any event, the Heads of Agreement were rescinded by the Tenement Sale Agreement, which itself was varied on subsequent occasions without this subject matter being reconsidered or included. In my view, that does not form a firm foundation on which to draw the inference that the parties to the final contract considered and rejected any obligation on the part of the second defendant to do any further exploration work, of the kind that would repel an implied term to the contrary, in accordance with the reasons of Mason J in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*.[60]

[88] I would add that there is also a disconformity in time in the defendants' submissions that would attach importance to the program of exploration work proposed in the application for the EPC. According to the copy in evidence, the application for the EPC was for a period of four years, so that the obligations to be performed by way of the proposed work program would expire at the end of year four. However, the entitlement of the plaintiffs to payment of the Third Tranche Shares and Third Tranche Options depended on reaching the Third Milestone by the "fifth anniversary" of the grant of the Tenement, being the Third Milestone Date, as defined. That was a year later than the expiry of the proposed EPC at the time when the Heads of Agreement were entered into. Further, at the time when the Heads of Agreement were entered into, there was no period provided by which the Third Milestone, as it came to be called under the Tenement Sale Agreement, was to be achieved.

[89] An additional point relied on by the defendants is that cl 4.2(2)(b)(iii) of the Tenement Sale Agreement provided that if the resource were further defined after the pro rata payments were made, as applying on the Third Milestone Date, "the original agreement is still in force",

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60 (1982) 149 CLR 337, 352-353.

meaning that further entitlements to the Third Tranche Shares and Third Tranche Options might accrue after the Third Milestone Date had passed. On 9 May 2011, that sub-clause was deleted by the Amended and Restated Tenement Sale Agreement. In effect, the defendants submit that the deletion had the effect of making the fifth anniversary a "sunset date" for any entitlement to the Third Tranche Shares and Third Tranche Options, and that it was obvious that any obligation of the first defendant to carry out further exploration work, before the sunset date expired, should have been provided for, but was not. In my view, this argument does not persuasively detract from the contention that there was such an obligation as part of the implied duty to cooperate or the detailed and reliable exploration implied term. When considering an implied term constructional argument, it is rarely a decisive consideration that the parties could have, but did not provide for the matter expressly.[61]

[90] Next, the defendants submit that it should be accepted as a surrounding circumstance for the purpose of construing the final contract, that the amount of financial and other resources that might be required to enable a Competent Person to make the assessment of whether there was 100 Mt of measured resource in the EPC was likely to be substantial but was also indeterminate. In my view, to the extent that submission suggests that the question was completely open ended, the evidence partly contradicts it. The evidence as to the 21 hole exploration program that was agreed between the experts, and its cost as assessed by the plaintiffs' expert, were matters ascertained for the purposes of this case. The 21 hole exploration program was made by relying upon information available from the exploration work that was carried out up until 29 October 2013, when the first defendant made the ASX announcement that there was an inferred resource of 364.1 Mt in EPC 1802. I accept that, on 9 May 2011, when the terms of the Amended and Restated Tenement Sale Agreement were agreed at least some of that information would not have been available. Nevertheless, the history and evidence do not clearly support the notion that a reasonable budget figure could not have been determined as at the time of the parties entering into the Amended and Restated Tenement Sale Agreement for any hypothetical exploration program. That was not a subject matter covered by the evidence and I decline to draw any broad brush inference about it in favour of the defendants.

[91] However, I do accept the defendants' submission that, depending on the economic circumstances, the interests of the plaintiffs on the one hand and the defendants on the other hand as to when and in what amounts further expenditure on exploration should be undertaken were not identical. It was in the plaintiffs' interest for the second defendant to undertake more work at an earlier time, because that would be more likely to convert their contingent right to receive the Third Tranche Shares and Third Tranche Options into an accrued right to that property in payment at an earlier date. On the other hand, in the defendants' interests, it was quite possible that circumstances might favour deferring exploration work and the associated costs. For example, there might have been a delay in the timeline before there could be any commercial development of a coal deposit in the Galilee Basin because of the absence of infrastructure. There might be no market advantage to be gained by early capital or sunk expenditure on development of the deposit in a presently non-productive location. Further, even if other factors favoured carrying out exploration work at an

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61 Compare *Sino Iron Pty Ltd v Palmer (No 3)* [2015] 2 Qd R 574, [87]-[88] and *Waterways Authority of New South Wales v Coal & Allied (Operations) Pty Ltd* [2007] NSWCA 276, [238].

earlier time, it might have advantaged the defendants not to carry out the last part of the work necessary to reach a measured resource of either 100 Mt or 40 Mt or above. Deferring that point by even one day after the fifth anniversary of the grant of EPC 1802 might relieve the first defendant of the obligation to pay the consideration represented by issue of the Third Tranche Shares or the Third Tranche Options.[62]

[92] Overall, in my view, at a high level of abstraction, these considerations do not generally favour the conclusion that the parties' objectively ascertained intention was that neither of the defendants was under an obligation to carry out any exploration work to enable assessment of any Measured Mineral Resource. On the contrary, they tend to suggest that in the absence of such an obligation, at least from 9 May 2011, when the Tenement Sale Agreement was amended by the Amended and Restated Tenement Sale Agreement the plaintiffs' conditional entitlement to the Third Tranche Shares and Third Tranche Options was virtually valueless, unless there was otherwise a commercial likelihood that the defendants[63] would, in any event, carry out or pay for exploration work to be carried out that would show whether either the 100 Mt or 40 Mt threshold quantities for a Measured Mineral Resource quality was achieved, before expiry of the sunset date.

[93] It is appropriate to return to a common aspect of the *Mackay v Dick* and *Butt v M'Donald* formulations contained within the statement of Mason J from *Secured Income*, set out above. As Lord Blackburn put it, the obligation under the duty to cooperate is "that each agrees to do all that is necessary to be done on his part for the carrying out of that thing…" and, as Griffith CJ put it, the obligation is "that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit…". Both statements limit the obligation to what is necessary.

[94] It was agreed by cl 7.1 of the Amended and Restated Tenement Sale Agreement that transfers of the EPC and associated environmental authority were to be registered as soon as practicable after the date of the Tenement and Sale Agreement. Particularly from 18 January 2012 when EPC 1802 was transferred to the second defendant, the plaintiffs were dependent on the defendants carrying out or paying for the relevant exploration work before any entitlement to payment of the Third Tranche Shares or the Third Tranche Options could accrue.

[95] The difficult question remains, however, as to the uncertain scope of the exploration or other work that might be required to answer the question of the existence of a measured resource of 100 Mt or 40 Mt or above in EPC 1802. The EPC comprised the whole of the 130 sub-blocks, not the particular target area of interest that subsequently emerged. The cost estimate to carry out the 21 hole exploration program was at least $0.73 million but could have been be as high as $1.1 million. On top of that, the whole of the exploration costs for the EPC to date already exceed $4 million. What was it that the parties are to be presumed to have agreed would be the scope of the necessary exploration to be performed by the defendants when the relevant terms of the final agreement were made?

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62 For this discussion, I put to one side an argument by the plaintiffs that, on the proper construction of the final contract, the fifth anniversary of the grant of EPC 1802 does not operate as a sunset date.

63 Treating the first defendant as the successor in title and interest to Blackwood Coal Pty Ltd's obligations.

[96] In this respect, the present case is unlike the other cases referred to. I do not accept that the purchaser impliedly agreed by the implied duty to cooperate to undertake whatever work was necessary to ascertain whether there was a Measured Mineral Resource of 100 Mt or 40 Mt or above across the whole of the EPC, if that would require that many areas over the whole of the 130 sub-blocks must be drilled in the fashion of the 21 hole exploration program.

[97] A possible limitation to the extent of the work that might be required to meet the obligations of the duty to cooperate by carrying out or paying for the relevant exploration work is that the obligation is only to do that which is reasonable in the circumstances. But there are two significant difficulties in reasoning that way. First, the plaintiffs go not allege that the obligation under the implied duty of cooperation was limited by a standard of what was reasonable in the circumstances. They allege that the implied term was that the first defendant owed a duty to cooperate that required it do all things necessary to give the plaintiffs the benefit of the Amended and Restated Tenement Sale Agreement, and that required the work of the 21 hole exploration program.

[98] Second, there was no evidence in the case as to the factors that would inform any assessment of what was reasonable by way of exploration work and expenditure upon EPC 1802, from the point of view of any or all the parties, as at the date of either the final agreement or the Amended and Restated Tenement Sale Agreement.

[99] In the result, in my view, the plaintiffs have failed to establish that the duty to cooperate required the defendants to do the work of or such as the 21 hole exploration program.

Detailed and reliable exploration implied term

[100] The second implied term of the final contract alleged by the plaintiffs is the detailed and reliable exploration implied term, namely that it was an implied term that the first defendant would obtain detailed and reliable exploration sampling and testing information gathered through appropriate techniques from locations spaced closely enough to confirm the geological and grade continuity of the coal deposit within the EPC 1802 area sufficient for a Competent Person to undertake an analysis to calculate the measured mineral resource, provide that information to the Competent Person and obtain from the Competent Person the relevant calculation.

[101] The plaintiffs allege that the detailed and reliable exploration term was breached by the failure to cause the 21 hole exploration program to be obtained, to provide the information obtained to the Competent Person and to obtain the Competent Person's calculation of the Measured Resource.

[102] The defendants submit that there was no detailed and reliable exploration implied term because none of the five requirements of the *BP Refinery (Westernport)* case is satisfied. They submit that:

(a) the term is not reasonable and equitable because it is directed solely to the financial interests of the vendors in maximising their uncertain chance of a conditional benefit vesting and does not limit the obligation of the first defendant to cause reasonable exploration sampling and testing information to be obtained;

(b) the term is not necessary to give business efficacy to the contract because the final contract is effective without it and the chance that the Vendors have of obtaining the Third Tranche Shares and Third Tranche Options on the Third Milestone being reached was not illusory;

(c) the term is not so obvious that it goes without saying because if the second defendant and Blackwood Coal Pty Ltd had been asked to make an open ended commitment to exploration work over a period of 5 years regardless of market and economic conditions or their own commercial circumstances it is not at all obvious that they would have answered "yes";

(d) the term is not capable of clear expression because of the imprecise terminology used, such as "detailed", "reliable", "appropriate" and "closely enough";

(e) the term contradicts the express terms of the contract because cl 6.1(f)(ii) of the final contract required the Vendors to comply with the approved work program and expenditure commitment and cl 6.1(1) permitted the second defendant to enter and conduct works and activities during that time; and

(f) the first defendant is not subject to the term because it is not the holder of EPC 1802 and has no rights to conduct exploration work.

[103] Although there may be substance in more of these points, it is sufficient to deal with only two of them to decide that the detailed and reliable exploration implied term must fail.

[104] The third requirement that the term must be so obvious that it goes without saying is sometimes associated with the statements of principle by Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd*,[64] and Sir Wilfred Greene MR in *Shirlaw v Southern Foundries (1926) Ltd*,[65] as expressions of a test of what is required to show that an implied term is necessary to give business efficacy to the contract. For similar reasons to those on which the plaintiffs' reliance on the implied duty of cooperation fails, in my view, the plaintiffs are unable to show that either of the defendants would have answered "yes" to the suggestion that they agreed to an open ended commitment to exploration work over a period of 5 years, regardless of market and economic conditions or their own commercial circumstances.

[105] The fourth requirement, that the term must be capable of clear expression, has two relevant aspects under the case law. One is that a term that is incapable of being expressed with a sufficient degree of precision is unlikely to have been agreed by the parties, as a matter of fact, in the absence of an objective standard, such as reasonableness. Examples are *Ansett Transport Industries v Commonwealth*[66] and *Shell UK Ltd v Lostock Garage Ltd*.[67] The other is that a term may fail if it lacks sufficient precision among a range of possibilities. An example is

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64 [1918] 1 KB 592, 605.

65 [1939] 2 All ER 113, 124.

66 (1977) 139 CLR 54, 62.

67 [1977] 1 All ER 481, 488, 491, 494.

R v Paddington & St Marylebone Rent Tribunal,[68] but the statement of Mason J in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*[69] is perhaps more useful in the present case:

> "Even so, there remains an insurmountable problem in saying that 'it goes without saying' that had the parties contemplated the possibility that their legal advice was incorrect and that an injunction might be granted to restrain noise or other nuisance, they would have settled upon the term implied by the Court of Appeal or that implied by the Arbitrator and by Ash J. at first instance. I doubt whether the fiction of treating the parties as reasonable and fair makes the problem any the less difficult. This is not a case in which an obvious provision was overlooked by the parties and omitted from the contract. Rather it was a case in which the parties made a common assumption which masked the need to explore what provision should be made to cover the event which occurred. In ordinary circumstances negotiation about that matter might have yielded any one of a number of alternative provisions, each being regarded as a reasonable solution."[70]

[106] In my view, the detailed and reliable exploration implied term in the present case fails for the same reason. In ordinary circumstances, negotiations about the extent of the exploration work that the second defendant would carry out or pay for might have yielded a number of alternative provisions, each being regarded as a reasonable solution. It is no answer to that weakness to say that without any implied term to do exploration work beyond the scope of the work program for EPC 1802, the Vendors were at a considerable risk that the second defendant would not do sufficient work to reach the Third Milestone in the five year period.

Alternative case

[107] The plaintiffs' alternative case to their claim for damages for breach of contract assumes that, as I have found, they fail to establish a breach of the duty to cooperate or that the detailed and reliable exploration program term was an implied term of the final contract. In those events, the plaintiffs contend that should the second defendant or its successor achieve the Third Milestone within a reasonable time, the plaintiffs will be entitled to issue of the Third Tranche Shares and the Third Tranche Options pursuant to cl 4.1(b)(iii) of the final contract. In other words, the plaintiffs contend that their right to issue persists even if the Third Milestone is not reached within the five year period from the grant of EPC 1802 that was the Third Milestone Date.

[108] It is necessary to set out the most relevant parts of the Heads of Agreement, Tenement Sale Agreement and the Amended and Restated Tenement Sale Agreement.

[109] The Heads of Agreement provided in Schedule 1, Item 2 for the key commercial terms of the future sale and purchase agreement. Paragraph (a)(vi) thereof provided:

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68 [1947] KB 984, 990.

69 (1982) 149 CLR 337.

70 (1982) 149 CLR 337, 355-356.

"On the date which is 10 Business Days after delineation of a JORC measured resource of 100M tonnes of coal on the Tenement, the Purchaser must (subject to any necessary shareholder approvals and any necessary approval under Listing Rule 7.1) issue the Third Tranche Shares and options to the Vendors."

[110] No time limit was provided by which the delineation of a JORC "measured resource" of 100 Mt must be achieved.

[111] Clause 4.2 of the Tenement Sale Agreement provided:

"**4.2 Failure to meet Second Milestone and Third Milestone**

(1) If the Purchaser fails to meet the Second Milestone by the 3rd anniversary of granting of the Tenement (**Second Milestone Date**) but a Competent Person infers the existence of an Inferred Mineral Resource with an estimated tonnage of at least 60,000,000 but less than 100,000,000 tonnes of coal in the Tenement Area as at the Second Milestone Date, then Blackwood Coal must issue the Second Tranche Shares and the Second Tranche Options to the Vendors (adjusted on a pro rata basis) on the date that is

(a) 10 Business Days after the Second Milestone Date if Blackwood Coal is listed on the ASX at the time; or

(b) 10 Business Days after the Second Milestone Date and the Purchaser receives a valuation from an Independent Expert which is carried out in accordance with clause 4.1(2) if Blackwood Coal is not listed on the ASX at the time.

(2) If the Purchaser fails to meet the Third Milestone by 5th anniversary of granting of the Tenement (**Third Milestone Date**) but a Competent Person infers the existence of a Measured Mineral Resource with an estimated tonnage of at least 40,000,000 but less than 100,000,000 tonnes of coal in the Tenement Area as at the Third Milestone Date, then Blackwood Coal must issue the

(a) Second Tranche Shares and Second Tranche Options to the Vendors (adjusted on a pro rata basis);

(b) Third Tranche Shares and the Third Tranche Options to the Vendors (adjusted on a pro rata basis) on the date that is

(i) 10 Business Days after the Third Milestone Date if Blackwood Coal is listed on the ASX at the time; or

(ii) 10 Business Days after the Third Milestone Date and the Purchaser receives a valuation from an Independent Expert which is carried out in accordance with clause 4.1(2) if Blackwood Coal is not listed on the ASX at the time.

(iii) If after the pro-rata payments are issued and then the resource is further defined than the original agreement is still in force."

[112] The most relevant parts of clauses 4.1(b)(iii) and 4.2 of the final contract are set out in paragraphs [16] and [17] above.

[113] At least arguably, cl 4.2(2)(b)(iii) of the Tenement Sale Agreement had the effect that reaching the Third Milestone after the Third Milestone Date would entitle the vendors to issue any unissued pro rata amount of the Third Tranche Shares and Third Tranche Options before the milestone was achieved. In the absence of that provision, the natural and ordinary meaning of cl 4.2 is that, if the Purchaser failed to meet the Third Milestone by the fifth anniversary of the grant of the tenement, cl 4.2(2) only operated if a Competent Person inferred the existence of a Measured Mineral Resource with an estimated tonnage of at least 40 Mt, although less than 100 Mt as at the Third Milestone Date. That is, in the absence of cl 4.2(2)(b)(iii), cl 4.1(1)(iii) and 4.2(2) otherwise operated so that the Third Milestone Date was a "sunset date". If the Purchaser failed to meet the Third Milestone by that date and no Competent Person inferred the existence of a Measured Mineral Resource of at least 40 Mt as at that date, the Vendors would not be entitled to issue of the Third Tranche Shares or the Third Tranche Options, either entirely or adjusted on a pro rata basis.

[114] Notably, whilst cl 4.2(2)(b)(iii) was a term of the Tenement Sale Agreement, it operated only "if after the pro rata payments are issued". In other words, if no Competent Person had inferred the existence of a Measured Mineral Resource of at least 40 Mt resulting in "pro rata payments" being "issued", then a further definition of the resource after the Third Milestone Date would not engage cl 4.2(2)(b)(iii).

[115] It is also notable that if the condition that pro rata payments had been issued was met and then the resource was further defined, the consequence was "than (sic) the original agreement is still in force". Although that language is inelegant, a fair construction is that it referred to the promise to issue of the Third Tranche Shares and Third Tranche Options.

[116] On making the Amended and Restated Tenement Sale Agreement, the parties deleted cl 4.2(2)(b)(iii). The ordinary meaning of cl 4.2, as then amended, does not include any express provision that would have the effect of extending the time by which the Vendors' right to issue of the Third Tranche Shares and the Third Tranche Options persists, if there is a further definition of the resource occurring after the Third Milestone Date.

[117] However, the plaintiffs submit that the five year time limit contained in cl 4.2(2) under the definition of the Third Milestone Date constrains only the prospect of pro rata payments and not the consideration generally. They rely on the circumstance that there was no time limit such as the Third Milestone Date in the Heads of Agreement. They submit that the removal of cl 4.2(2)(b)(iii) from the Tenement Sale Agreement by the Amended and Restated Tenement Sale Agreement is explained because that provision did not make sense. They submit there was no pro rata "payment" under the Tenement Sale Agreement, only a possible pro rata issue of shares and options.

[118] It is true that cl 4 of the Tenement Sale Agreement and cl 4 of the Amended and Restated Tenement Sale Agreement refer to the consideration for the purchase of the Assets being a cash payment and the issue of shares and options, not to the issue of shares and options as a "payment". However, the issue of the shares and options is part of the consideration for the purchase of the Assets. In my view, there is nothing incomprehensible about the use of the word "payments" in cl 4.2(2)(b)(iii). Specifically, in my view, the relevant "pro rata payments", were a reference to issuing shares and options "adjusted on a pro rata basis" under cl 4.2(2)(a) and (b) of the Tenement Sale Agreement.

[119] It is also true that cl 4.2(2)(b)(iii) as it appeared in the Tenement Sale Agreement was misnumbered and wrongly formatted. It is apparent, however, that the paragraph does not relate to the date for the issue of the Third Tranche Shares and Third Tranche Options. Even so, whatever may be the difficulties of the meaning of cl 4.2(2)(b)(iii), in my view, its deletion had the effect of removing any express provision for payment or issue of the Third Tranche Shares and the Third Tranche Options after the Third Milestone Date had passed, without a Competent Person inferring the existence of a Measured Mineral Resource with an estimated tonnage of 40 Mt or more as at that date.

[120] In those circumstances, in my view, it is a bridge too far for the plaintiffs to establish that their right to the issue of the Third Tranche Shares or Third Tranche Options, or a pro rata adjusted amount, continues after the Third Milestone Date has passed, without the relevant conditions being satisfied, until a "reasonable time" has elapsed.

[121] There are two reasons for that conclusion. First, for the right to issue of the Third Tranche Shares and Third Tranche Options to persist beyond the agreed sunset date by way of an implied term that it continues for a reasonable time is inconsistent with the express provision in cl 4.2 of the Amended and Restated Tenement Sale Agreement that the right to issue is conditioned on satisfaction of the relevant conditions by the Third Milestone Date. Second, to the extent that it is permissible to have regard to prior negotiations or arrangements between the parties in order to determine whether or not a term should be implied, one permissible circumstance is where the parties have considered and rejected the suggested implication. Although cl 4.2(2)(b)(iii) of the Tenement Sale Agreement did not provide that the original agreement was still in force for a reasonable time, in my view, the deletion of that paragraph without any further express term being agreed on the subject matter, is inconsistent with the implication of a reasonable time for which the plaintiffs contend.[71]

[122] Accordingly, in my view, the plaintiffs' alternative case must fail.

Damages

[123] Because the plaintiffs have failed to establish that there was either a breach of the duty of cooperation or that the detailed and reliable exploration program term was an implied term of the final contract, the defendants must succeed on the claim in the proceeding for damages for breach of contract. Against the possibility of error being established on appeal, it is nonetheless appropriate to make brief findings on the issue of damages.

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[71] Compare *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 352-353.

[124] The plaintiffs' case is that they suffered damages measured by a range of percentages of the value of the Third Tranche Shares and the Third Tranche Options. There is no dispute that the value of the Third Tranche Shares and Third Tranche Options was $2,540,607 at the date of the alleged breach of contract. There are two variables in the range of the damages claimed: first, the quantity of the Measured Mineral Resource that the Competent Person might have assessed as existing at or before the Third Milestone Date, from a minimum of 40 Mt to a maximum of 100 Mt, applied pro rata to the relevant value; second, the degree of the possibility that a particular quantity would have been assessed. The claim is accordingly made as follows:

Quantity	Percentage possibility	Amount
40Mt	100	$1,106,242
50Mt	95	$1,206,788
60Mt	90	$1,371,927
70Mt	85	$1,511,611
80Mt	80	$1,625,988
90Mt	75	$1,714,909
100Mt	70	$1,778,424

[125] The plaintiffs submit that they are entitled to damages assessed by reference to the valuable commercial opportunity to receive the issue of the Third Tranche Shares and the Third Tranche Options that they would have received had the defendants performed the final contract and complied with the duty to cooperate, or observed the detailed and reliable exploration implied term. Accordingly, the value of the opportunity as at the date of the alleged breach of contract, at about the time of the expiration of the five year period is the amount of their damages.

[126] It is not in dispute that had the plaintiffs established a breach of contract, they would have been entitled, as the party injured, to an award of damages so as to put them in the same or an equivalent position as they would have been in if the contract had been performed.[72] It is also not in dispute that the damages in a case for loss of valuable commercial opportunity are

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72 *Clark v Macourt* (2013) 253 CLR 1, 6 at [7]; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 286 at [13].

to be assessed by reference to the principles established in *Sellars v Adelaide Petroleum NL*,[73] as recently applied in *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd*.[74]

[127] The defendants' written submissions contend that the evidence does not establish the existence of the loss of a valuable commercial opportunity or its value, relying on *Prosperity Advisers Pty Ltd v Secure Enterprises Pty Ltd t/as Strathearn Insurance Brokers*[75] and *Longdon v Kenalda Nominees Pty Ltd*.[76] But in oral final submissions, the defendants conceded that the plaintiffs' lost commercial opportunity had some value. However, the extent of the value was strongly contested on the evidence.

[128] Relevant evidence was called from three expert witnesses. The plaintiffs rely upon the expert reports and evidence of Mr Turner, a geologist with over 20 years' experience, covering exploration resource geology and operations for coal and industrial minerals, including coal geology expertise and mining business management knowledge. The defendants rely on the expert reports and evidence of Mark Noppe, a geologist also of wide experience over 25 years, who has published in the area of ore reserve estimates and reporting. They also rely on James Knowles, a geologist of 21 years' experience in management and consulting roles, also with significant experience in coal resources and mining. In all, Mr Turner produced three reports, Mr Knowles produced two reports and Mr Noppe produced one report. As well, there were two joint expert reports, the first involving all three experts, and the second Mr Turner and Mr Knowles.

[129] Summarising and simplifying, Mr Turner's opinions began in his first report with his conclusion that there were no deficiencies he had identified in the October 2013 Inferred Mineral Resource estimate of 364.1 Mt announced on the ASX by the second defendant on 29 October 2013. He estimated that at the time of his first report, the defendants had spent $2.837 million on exploration and development, against the commitment of the work program under the EPC 1802 of $0.625 million over four years. He concluded that there is currently insufficient geological data, and the POBs are too widely spaced, to provide enough geological confidence for any higher level mineral resource classification other than an inferred mineral resource, but that if funding were made available and another exploration program was carried out, a substantial Measured Mineral Resource could then be estimated in the form of conversion of part of the Inferred Mineral Resource located in the Yellow Jacket area into a Measured Mineral Resource in the North-Western of EPC 1802.

[130] To do that, as set out previously, Mr Turner opined that the 21 hole exploration program is the exploration that would be needed to inform a Measured Mineral Resource of approximately 100 Mt. That would involve 21 core holes to be used as valid POBs, drilled over 21 open rotary holes required as initial pilot holes. As previously mentioned, he estimated a budget of between $0.73 million and $1.1 million would be needed and a period of 70 days of

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73 (1994) 179 CLR 332.

74 [2017] QCA 254, [12]-[13].

75 [2012] NSWCA 192.

76 [2003] VSCA 128.

exploration field work would be required, followed by a further 90 days of laboratory analysis and geological modelling.

[131] Alternatively, to inform a Measured Mineral Resource of approximately 40 Mt, he proposed an exploration program comprising six core holes to be used as valid POBs, drilled over six open rotary holes required as initial pilot holes. The budget for that work was between $250,000 and $350,000 over a period of approximately 20 days of exploration field work followed by a further 50 days of laboratory analysis and geological modelling.

[132] He produced a proposed exploration plan showing the relevant area, identified as the 100 Mt polygon, and an alternative 40 Mt polygon over the Yellow Jacket area of EPC 1802.

[133] Again summarising and simplifying, by his second report, Mr Turner concluded that given that the existence of an Inferred Mineral Resource of 364.1 Mt was currently estimated for EPC 1802, it is highly likely that at least 100 Mt of measured mineral resource would exist after satisfactory exploration is completed. He based that opinion on the "geostatistical" analysis of the data from the existing drill holes that had been completed and modelled as part of the Inferred Mineral Resource estimate of 364.1 Mt. He carried out a review of the seam thickness variations to determine variability of the seam thicknesses, relied on information from adjacent or nearby deposits, and assessed the geological data using the Isatis computer program or programs in respect of 34 holes located in the current defined Inferred Mineral Resource area. He summarised the results in Table 1.1 in his second report, setting out thickness and relative density information about each of the plies for the seams that he identified as the C and D coal seams.

[134] Mr Noppe concluded that the work outlined in Mr Turner's second report did not clearly establish that completion of the 21 hole exploration program in the 100 Mt polygon would result in the determination of at least a 100 Mt Measured Mineral Resource or that the alternative, smaller exploration program in the 40 Mt polygon would result in the determination of a 40 Mt Measured Mineral Resource. In his view, the results of the geostatistical spatial analysis within Mr Turner's second report did not provide reasonable support for the drill hole spacing proposed in Mr Turner's first report. However, subsequently, he agreed that the 21 hole exploration program was a reasonable first proposal.

[135] However, Mr Noppe did not agree with the conclusions in Mr Turner's second report that if a more detailed field exploration drilling program were completed, it could be clearly established that a Measured Mineral Resource of 100 Mt would be identified or that given that an Inferred Mineral Resource of 364.1 Mt is currently estimated for the whole of EPC 1802, it is highly likely that at least 100 Mt of Measured Mineral Resource would exist after satisfactory exploration was completed. Again simplifying, Mr Noppe's concern stemmed from the variability of the coal quality attributes of the seams and the absence of geological evidence for a Measured Mineral Resource assessment sufficient to confirm geological and grade (or quality) continuity between the POBs. As he viewed it, Mr Turner's second report was concerned only with seam thickness variability, but made no mention of and drew no distinction as to whether the POBs were determined from holes drilled specifically for coal quality. In his opinion, the experiment undertaken by Mr Turner in his second report on the minimum, mean and maximum results set out in Table 1.1 was not indicative of industry practice for estimating a coal or mineral resource and was of little consequence.

[136] In his first report, Mr Knowles concluded that the classification criteria, drill hole spacing and estimation of any future Measured Mineral Resource in Mr Turner's first and second reports were not valid, because they were not supported by a high level of confidence in an understanding of the geology and controls of the coal deposit and provided no assessment or discussion of the reasonable prospects for eventual economic extraction or the technical and economic factors likely to influence the prospect of economic extraction, including approximate mining parameters.

[137] Mr Knowles also opined in his first report that the 21 hole exploration program presented in Mr Turner's first report was not sufficiently supported by technical specification to reasonably expect that on completion it will result in the estimation of a measured coal resource of 40 Mt, 100 Mt, or any tonnage. Subsequently, Mr Knowles has agreed that the 21 hole exploration program was a reasonable first proposal.

[138] In expanding upon those points in his first report, Mr Knowles made a number of additional observations. They included that when estimating a measured mineral resource, it is normal to include a discussion regarding the proposed mining method in relation to the assessment and the reasonable prospects of eventual economic extraction. If the method is open cut, the analysis would apply minimum seam thickness cut-offs and consider strip ratio cut-off, so as to take into account reasonably justified economic extraction criteria. From an open cut mining perspective, minimum seam thickness cut-offs for coal resources are normally between 0.3 and 0.5 metres, which might partially exclude plies C1 and C3 and D1 and D2 of the nominated C and D seams. He estimated that the strip ratios for the bore holes under the existing exploration information showed that in the Yellow Jacket area proposed for the 21 hole exploration program in the 100 Mt or 40 Mt polygons, the strip ratios would be a challenge to mining economically using open cut methods, as detailed in Figure 1 in Mr Knowles' first report.

[139] In Mr Knowles' opinion, pre-empting a future outcome such as defining the criteria for the drill hole spacing required to achieve a Measured Mineral Resource based on low confidence data is unreasonable. He did not agree that it is inevitable (or likely) that the outcome of drilling the proposed 21 hole exploration program would be a Measured Mineral Resource.

[140] The first joint expert report resulted in agreement among the experts that the proposed drill spacing for the 21 hole exploration program was a reasonable approach to a first stage of drilling with the intention to define a Measured Mineral Resource. As well, the experts agreed:

> "While it would be reasonable to expect that the majority of the inferred mineral resources would be upgraded to measured mineral resources with continued exploration, due to the uncertainty of inferred mineral resources, it should not be assumed that such upgrading will always occur. There is therefore no certainty that the results from the proposed exploration program will result in the determination of a measured mineral resource from the current inferred mineral resource of at least 100,000,000 tonnes from the area of the proposed 21 hole exploration program or at least 40,000,000 from the alternative smaller area."

[141] The experts further agreed in the first joint expert report that the final determination of a Measured Mineral Resource will include the assessment to provide the required confidence in

the quantity (thickness, volume, tonnage), grade (coal quality) and physical characteristics of the mineral resource. They further agreed that the final determination of any category of mineral resource, by a Competent Person, includes satisfaction of the requirement that there are reasonable prospects of eventual economic extraction and, that a summary of the assumptions applied is provided. That includes all matters likely to influence the prospect of economic extraction, including the approximate mining parameters. In Mr Knowles' opinion, the assumptions relating to the reasonable prospects for eventual economic extraction, including approximate mining parameters, will likely impact a future estimate of a measured mineral resource. However, in Mr Turner's opinion, those assumptions will only potentially impact the estimate.

[142] Mr Turner's third report addressed the likelihood of a Measured Mineral Resource of at least 40 Mt and up to 100 Mt being estimated, if the 21 hole exploration program were carried out. He expressed his opinion of those likelihoods in Table 1 to that report, which accords with the first two columns of the table of the plaintiffs' claim for damages set out above. Although he identified a number of different sources of information on which he relied in expressing those opinions, he accepted that the assessment was a subjective one. It is not an assessment made in accordance with the JORC codes, whether 2004 or 2012. It is not an assessment made in accordance with any industry standard or recognised method and, to that extent, is subjective.

[143] In Mr Knowles' second report, he opined that the opinions expressed in Mr Turner's third report are not supported by any process or analysis, and are highly subjective. He expressed the view that they did not reasonably consider the geology of EPC 1802. He further pointed out that, taking the Yellow Jacket area of the proposed 21 hole exploration program, approximately 100 Mt of the total Inferred Mineral Resource of 364.1 Mt for EPC 1802 was attributable to that area, so that converting that Inferred Mineral Resource to a Measured Mineral Resource of 40 Mt was a conversion rate of 33 percent for the relevant area, and converting it to a Measured Mineral Resource of 100 Mt was a conversion rate of 83 percent. In his opinion, those conversion rates were too high. Instead, he would have applied conversion rates of 10 percent, 20 percent or 30 percent as a reasonable range of possible outcomes.

[144] Curiously, Mr Knowles' second report also challenged all the conclusions of the experts that had gone before on a new ground, namely that, the assumptions of an Inferred Mineral Resource of 364.1 Mt for EPC 1802 as a whole and 120 Mt for the Yellow Jacket area of the 100 Mt polygon respectively, were too high. In paragraphs 31 to 32, he expressed the view that they should be downgraded, and in paragraph 33 he introduced a further downgrade of the resource because of his view of the increased risk of coal weathering, resulting in a further potential loss of Inferred Mineral Resource of 20 percent. There was no satisfactory explanation given by Mr Knowles as to why he undertook this new exercise, which challenged one of the starting points of Mr Turner's first report and the reports that followed thereafter, including Mr Knowles' report and the first joint expert report. This is a significant point, in my view, given that in paragraph 51(b) of Mr Knowles' first report, he stated that he had made all enquiries that he considered appropriate and had referenced all matters that he considered significant. Reluctantly, I must take into account the possibility that in these circumstances, Mr Knowles has slipped into the role of advocate for the party for whom his reports were prepared, and I am not prepared to give the same weight to his re-assessment of the quality of

the assessment of the Competent Person in October 2013 that the Inferred Mineral Resource was 364.1 Mt.

[145] In the second joint expert report, Mr Turner and Mr Knowles confirmed that it was agreed that the 21 hole exploration program is a reasonable first stage in attempting to define a Measured Mineral Resource. It was also agreed that, of the approximately 120 Mt of coal estimated to be contained in the Yellow Jacket area for the 100 Mt polygon, if a 40 Mt measured mineral resource were inferred, that would be a conversion rate of 33 percent, and if a 100 Mt measured mineral resource were inferred, that would be a conversion rate of 83 percent. Lastly, it was agreed that the E and F seams found in EPC 1802 exhibit increased variability when compared to the other seams in the relevant coal seam sequence such as the B, C and D seams.

[146] As to areas of disagreement, Mr Knowles stated that a conversion rate of between 20 and 30 percent is appropriate for the relevant area, whereas Mr Turner stated that a conversion rate of 33 percent to 83 percent was achievable. As for the percentage likelihood of defining a Measured Mineral Resource, Mr Turner relied on the table set out in his third report (as summarised in the first two columns of the table of the damages claimed set out above) whilst Mr Knowles was not willing to attempt any comparative exercise, on the ground that the assessment would be subjective.

[147] This brief summary of the evidence and differences in the expert evidence, although I fear it is overly long already, illustrates weaknesses in the reports and opinions on both sides of the arguments as to the expert questions to be answered. In particular, on Mr Turner's side, it has been accepted that his ultimate opinions as to the likelihood of converting the inferred mineral resource in the Yellow Jacket area of the proposed 21 hole exploration program into a 40 Mt measured mineral resource, or more, up to 100 Mt, is subjective and involves what appear to be fairly high conversion rates from the Inferred Mineral Resource assessment. However, on Mr Knowles' side, there seems to be an unwillingness to accept that anything other than a compliant JORC assessment of a Measured Mineral Resource could ground a finding of a significant possibility of achieving a measured mineral resource of 40 Mt or more.

[148] In the result, I do not accept that there is a 100 percent probability of a conversion of the coal resource in the area of the 21 hole exploration program into a Measured Mineral Resource of 40 Mt or that there was a 70 percent chance of converting the coal resource in that area into a Measured Mineral Resource of 100 Mt. But I also do not accept that Mr Knowles' conversion ratios of 20 to 30 percent provide a reasonable range of possible outcomes (let alone 10 percent). Even if the assessment of the prospects of achieving particular outcomes made by Mr Turner were halved, the plaintiffs have lost a valuable commercial opportunity of a significant value.

[149] Because the evidence does not supply any reliable or useful methodology for further analysis, it seems to me that this is a case where the value of the possibilities should be assessed on a global basis.

[150] Accordingly, I have come to the view that the amount of damages should be assessed in the sum of $750,000, reflecting that approximately 120 Mt of the Inferred Mineral Resource is located in the 100 Mt polygon of the Yellow Jacket area and as stated in the first joint expert

report, it would be reasonable to expect that the majority of the Inferred Mineral Resource would be upgraded to a Measured Mineral Resource with continued exploration.