# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Supangat v Byrnes* [2010] QCA 176 |
| PARTIES: | **NANANG SUPANGAT**<br>(plaintiff/respondent)<br>**v**<br>**TENNYSON BYRNES**<br>(defendant/appellant) |
| FILE NO/S: | Appeal No 14584 of 2009<br>SC No 8537 of 2005 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 16 July 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 23 June 2010 |
| JUDGES: | Chief Justice and Chesterman JA and Atkinson J<br>Separate reasons for judgment of each member of the Court, Chief Justice and Chesterman JA concurring as to the orders made, Atkinson J dissenting |
| ORDERS: | **1. Appeal allowed;**<br>**2. the judgment entered and orders made in the Trial Division on 4 and 23 December 2009 be set aside;**<br>**3. the respondent's claim in the proceeding be dismissed;**<br>**4. the respondent pay the appellant's costs of and incidental to the trial and the appeal, to be assessed as necessary on the standard basis.** |
| CATCHWORDS: | CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – AGREEMENTS CONTAINED IN CORRESPONDENCE – where appellant sought to gain control of a granite quarrying venture conducted by the parties jointly – where parties entered into negotiations for the appellant to acquire the respondent's share in the venture – where respondent resigned as director but did not transfer interest in the venture to the appellant – where respondent claimed $450,000 from the appellant for breach of the alleged contract – where trial judge found that emails between appellant and respondent constituted an agreement – whether the emails constituted the pleaded agreement – whether the |

emails were capable of constituting the agreement upon which the respondent sued – whether the agreement was void for uncertainty – whether there was a common mistake of fact made by the parties as to the subject matter of the contract – whether a binding promise to pay $450,000 arose in the manner alleged by the respondent – whether the emails constituted the sole contract between the parties – whether the parties had abandoned any agreement between them

*Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435; [1946] HCA 25, applied
*Bellamy v Debenham* [1891] 1 Ch 412, applied
*Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600; [1982] HCA 53, cited
*Butt v M'Donald* (1896) 7 QLJ 68, applied
*Godecke v Kirwan* (1973) 129 CLR 629; [1973] HCA 38, cited
*Kaneko v Crawford* [1999] 2 Qd R 514; [1995] QCA 384, cited
*Masters v Cameron* (1954) 91 CLR 353; [1954] HCA 72, cited
*McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377; [1951] HCA 79, cited
*Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451; [2004] HCA 35, applied
*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, [2004] HCA 52, applied

COUNSEL: J Griffin QC, with I Klevansky, for the appellant
N J Thompson for the respondent

SOLICITORS: Blake Dawson for the appellant
Woods Prince Lawyers for the respondent

**Introduction**

[1] **CHIEF JUSTICE:** The appellant appeals against a judgment in the respondent's favour that the appellant pay the respondent the sum of $450,000 as an amount payable under an agreement. The respondent had claimed the amount as a debt or alternatively, damages for breach of the agreement. At trial, the appellant contended there was no binding agreement obliging him to pay that amount. The agreement found by the learned trial Judge was constituted by emails passing between the parties dated 9, 15, 17, 30 December 2004, and 7 January and 2 February 2005. They were exchanged at a time when the appellant was seeking to gain control of a granite quarrying venture hitherto conducted by the parties jointly: the appellant was to repay the respondent for the respondent's advances to the project, in a sum of $450,000, and gain control of the venture company and acquire the respondent's share in that venture.

[2] A company named Eastern Stone and Minerals Pty Ltd (ESAM) held the mining lease over the granite deposit. Its shareholders were Park Pacific Investments Pty Ltd and Malcolm Payne and Associates Pty Ltd. The appellant and the respondents

became interested in purchasing the shares in ESAM, and developing the quarry on the basis of a joint venture. In anticipation of the grant of an option to purchase the mining lease, the appellant and the respondent, with the agreement of ESAM, commenced the mining of the quarry in about April 2004, for a consideration of $10,000 per month.

[3] The appellant's solicitor, Mr Enslin, prepared documentation for the acquisition of the shares in ESAM. For tax considerations, he developed a structure whereby the operating company (Pacific Rim Management Pty Ltd) was owned by a New Zealand trust company (Felgate Holdings Pty Ltd) pursuant to a discretionary trust (The Felgate Investment Trust), the two classes of beneficiary being the respective families of the appellant and the respondent. The respondent was the sole director of Pacific Rim.

[4] By an agreement of 15 September 2004, Pacific Rim agreed to purchase all the shares in ESAM from Park Pacific and Malcolm Payne, for a consideration of $3.5 million. The appellant and the respondent guaranteed Pacific Rim's performance.

[5] Disagreements arose from December 2005, between the appellant and the respondent, as to the direction of the venture, leading to the communications and, as Her Honour found agreement, reflected in the critical emails.

**Agreed facts**

[6] More detail of these arrangements may be gathered from a statement of agreed facts placed before the primary Judge:

> "1.1 Pacific Rim Management Ltd ('Pacific Rim') is a company at the centre of the dispute …, a company:
>
> (a) incorporated in the British Virgin Islands;
>
> (b) of which the plaintiff was a director during the period 7 September, 2004, to 30 May, 2005;
>
> (c) which had agreed to purchase all the shares in Eastern Stone and Minerals Pty Ltd ('ESAM') pursuant to a Share Sale Agreement dated 15 September, 2004, entered into with Park Pacific Investments Pty Ltd ('Park Pacific') and Malcolm Payne and Associates Pty Ltd ('MPAPL') and which, during the period 15 September, 2004, to 25 May, 2005, was permitted, pursuant to the terms of that agreement, to operate ESAM's granite mine at Mundubbera on the basis of a payment to Pacific Rim of $10,000.00 per month;
>
> (d) in which the one issued share, at all material times, was held by Felgate Holdings Ltd ('Felgate Holdings') as corporate trustee for the Felgate Investment Trust ('Trust') and in which neither the plaintiff nor the defendant held any share or shares;
>
> (e) which has had no assets since it returned all the shares in ESAM to Park Pacific and MPAPL pursuant to Clause 2.2 (resolute condition clause) of the Share Sale Agreement.

1.2 Pacific Rim is a wholly owned subsidiary of Felgate Holdings, a company:

(a) incorporated in New Zealand;

(b) of which the directors, at all material times, have been and are Nicholas Shepherd and Michael Reynolds;

(c) all the shares of which at all material times have been and are held by Anchor Investment Holdings Limited ('Anchor') a company incorporated in New Zealand;

(d) in which neither the plaintiff nor the defendant had any interest.

1.3 ESAM was a company:-

(a) incorporated in Queensland, Australia;

(b) of which the plaintiff and defendant were directors commencing from 8 May, 2004, but resigned as directors on 30 May, 2005, when Pacific Rim elected not to proceed with the Share Sale Agreement;

(c) which held a 100% interest in the mining lease in respect of the granite mine.

1.4 The Trust is a trust settled in New Zealand. Pursuant to the Trust Deed dated 1 September, 2004:-

(a) Felgate Holdings stands possessed of the Trust Fund irrevocably (clause 3);

(b) there are two classes of beneficiaries being described as the Byrnes Family Beneficiaries and the Supangat Family Beneficiaries, each class having a 50% entitlement;

(c) apart from the initial sum settled of $10, the only asset of the trust was Pacific Rim's interest under its contract relating to ESAM.

1.5 In fact and in law, during the relevant period:-

(a) all the shares in Pacific Rim were held by Felgate Holdings Ltd as trustee for the Trust;

(b) the beneficiaries of the Trust included Dr Supangat and Mr Byrnes;

(c) neither the plaintiff nor the defendant owned any shares in Pacific Rim, Felgate Holdings, or Anchor;

(d) neither the plaintiff nor the defendant nor their respective nominees nor their respective representatives had an interest in or control over the shares in Pacific Rim, Felgate Holdings, or Anchor.

1.6 The plaintiff and the defendant agreed in about October 2003, to operate the granite mine together and obtain the agreement of Park Pacific and MPAPL to do so prior to the Share Sale Agreement being executed. The plaintiff and the defendant agreed to do so pursuant to an oral joint venture agreement, on a 50/50 basis. All expenses and profits were to be shared equally between them. It was agreed that the

> necessary staff could be engaged and production brought into effect as soon as possible."

**The alleged agreement**

[7] In para 50 of her reasons, the learned Judge says that in the further amended statement of claim the respondent pleaded the agreement in these terms:

> "8. To resolve their differences about the way in which ESAM should be managed the parties agreed (the transfer agreement) that the plaintiff should transfer shares in Pacific Rim Management Ltd controlled by him or his representatives or nominees and the defendant should pay the plaintiff the sum of $450,000.00 payable by instalments by an initial payment of $150,000 (by transfer to the plaintiff's account in the first week of February 2005) with the balance to be transferred monthly thereafter in $50,000 instalments."

[8] The learned Judge held that the parties entered into a binding agreement "substantially" as alleged.

[9] Her Honour actually thereby reproduced para 7 of the amended statement of claim. Paragraph 8 of the further amended statement of claim reads:

> "…8. To resolve their differences about the way in which ESAM should be managed, the parties agreed ('The transfer agreement') that:
>
> (i) the plaintiff should withdraw from further participation in the management of ESAM and relinquish any right to control ESAM to the defendant;
>
> (ii) the plaintiff should do all that was necessary to procure the transfer of the interests held by the Supangat Family Beneficiaries ('the Supangat interests') pursuant to the Deed of Trust to the defendant (or as he should direct or require) so as to thereby exclude any interest (including the Supangat interests) held directly or indirectly by the plaintiff in ESAM in favour of the defendant in order that he and/or the Byrne Family Beneficiaries might have the benefit of the Mining Lease and control Pacific Rim:
>
> …
>
> (iii) the defendant should pay to the plaintiff … the sum of $450,000.00 payable in instalments by an initial payment $150,000.00 (by transfer to the plaintiff's account in the first week of February 2005) with the balance to be transferred monthly thereafter in $50,000.00 instalments. …"

[10] I surmise the Judge intended to insert the later amended pleading. She was aware of points of difference. For example, in para 56 of her reasons, she says the pleaded

agreement obliged the respondent "to do all that was necessary to procure the transfer", which is the language of para 8 of the further amended statement of claim.

[11] Her Honour reached her conclusion on the basis of the six emails exchanged between December 2004 and February 2005.

[12] The relevant emails are particularized in the further amended statement of claim in this way:

> "(b) On 9th December 2004 the defendant (the appellant) suggested in an email to the plaintiff (the respondent) that he buy the plaintiff's interests in ESAM.
>
> (c) In response on the 15th December 2004 the plaintiff by email to the defendant stated that he was prepared to transfer his interests in ESAM to the defendant for the sum of $450,000.00.
>
> (d) The defendant by an email dated 17th December 2004 to the plaintiff accepted the price of $450,000.00 offered for the plaintiff's interest in ESAM in exchange for the plaintiff resigning as a director and transferring his shares in the holding company to the defendant.
>
> (e) The plaintiff by an email dated 30th December 2005 to the defendant accepted the proposals of the defendant referred to in the defendant's email dated 17th December 2004.
>
> (f) The defendant by an email dated 7th January 2005 to the plaintiff offered to pay a first instalment of $150,000.00 by transfer to the plaintiff's account in the first week of February 2005 with the balance to be transferred monthly thereafter in $50,000.00 instalments and stated that he would instruct his lawyers to document the plaintiff's resignation and arrange that the share sale agreement be modified to discharge the plaintiff's guarantee of the share sale agreement.
>
> (g) The plaintiff by an email dated 2nd February 2005 agreed with the proposals of the defendant referred to in the defendant's email dated 7th January 2005 and reaffirmed his willingness to finalise the transfer of his interest in ESAM to the defendant."

**The six emails held to constitute the agreement**

[13] It is necessary now to set out the emails or the relevant parts of them. I add some brief commentary to aid understanding of subsequent analysis of the grounds of appeal.

*9 December 2004*

[14] In this email to the respondent, the appellant said:

> "There are a few things we do agree on.
>
> 1. The granite is good and of high quality
> 2. The quarry is a very difficult one to operate

3. A quarry master is a necessity. As a consultant to show where to cut the next block. We do not need one to stand and watch the drilling and diamond wiring.

I do not believe we should stop the operation as that will put us further behind. As overburden has still to be removed and the current plan of block cutting is just a continuation of Sergio's plan that has been reassessed by Peter Boles and Seppo who operates granite quarries.

The other consideration is if we cease operations our workforce will quit and all the training and experience will be lost and that would be a disaster.

My position is we should continue as I do not believe what Sergio said is achievable and he would not deliver any of his promises. He would cost us many 1000's of dollars to add to the many he has already cost and the time he wasted.

*With this in mind I think it may be better to split. I will continue on my own or alternatively you might want to continue on your own. If you think your plan can succeed I am quite happy for you to take over my only concern is the machinery that my company has just purchased it would have to be transferred and paid for.*

*Come back to me with what you would like to do and we can discuss it*." (emphasis added)

*Comment*

The appellant raised the prospect of one of them taking over the other's interest in the venture; and if the respondent, the need for him to pay for the machinery he would acquire.

*15 December 2004*

[15] In this email, the respondent said to the appellant:

"Following our conversation yesterday herewith I would to reconfirm our position for ESAM.

After a serious discussion with Pak Edi, we finally agreed that I and Edi Could not continue the mine operation as it is and we also agree to give you the priority to continue the way it is by taking over our share for AUD $450,000, which is the amount of money we sent to your account.

However, if you decided to pull out for any reason we are ready to take over your share with the same arrangement.

In any situation, we believe our relationship went well and would like to keep this relationship for future business opportunity which benefits both of us. We will always be ready for you for any assistant you might think we can do."

*Comment*

The respondent refers to one taking over the other's "share", susceptible of interpretation as referring to shares in the venture rather than shares in a corporation. The proposed price is specified.

*17 December 2004*

[16] In this email, the appellant said this to the respondent:

> "After much analysing of the quarry and its operations I have decided to continue on with the mine and the direction and path that I have set it on.
>
> With this as the case I will have to get you to resign as a director and a shareholder of the holding company that we established which would then remove your obligations in regard to settlement with the previous owners.
>
> I too agree that our relationship went well and look forward to exploring other business opportunities that will benefit us both."

*Comment*

The appellant confirms he wishes to continue, which will involve extricating the respondent. The reference to the respondent's holding shares in the holding company is an error consistent with the parties' limited knowledge of what Mr Enslin had set in place.

*30 December 2004*

[17] In this email, the respondent said this to the appellant:

> "My apology for not informing you earlier regarding the ESAM partnership status due to the holiday season and discussion among the Indonesian partners.
>
> We finally made our decision to take the first option, which is to support you to take full control of ESAM. We believe this option is better and simpler for the smooth operation of ESAM to achieve the objective. I am now ready to hand over the same and resign from the Director position of the company. We also agree with the instalments you have offered, those are $150,000 now plus $50,000 monthly instalments for 6 months with a total payment of $450,000. This figure is the same total amount transferred to your account.
>
> Please don't hesitate to ask me anything in assisting you and Matthew for the success of the mine operation.
>
> I thank you for your kind attention and cooperation and I am flexible with the timetable to see you in Melbourne to transfer the ownership of ESAM to you officially."

*Comment*

The respondent accepts the appellant's offer to "take full control", for $450,000. The respondent tells of transferring "the ownership of ESAM", the company which effectively owned the mining venture.

*7 January 2005*

[18] In this email, the appellant said this to the respondent:

> "Thank you for your email regarding ESAM. I have just returned from the holiday season myself and I am off to Singapore next week and do not return until the 20/1.

> I then have to go to Qld until the 3/2. I will talk to the lawyers who set up the structure to organise the resignation from the directorship and get the sale agreement modified to remove your guarantees. I will transfer 150 k first week of Feb then 50k per month after that. Thank you for your best wishes and I wish you every success for your other ventures."

*Comment*

The appellant confirms the payment schedule, and mentions having lawyers organize the mechanics.

*2 February 2005*

[19] In this email, the respondent said this to the appellant:

> "I hope you are well …
>
> I plan to go to Australia in the third week of February and hope that I can finalize the legal paper works to transfer my share of ESAM to you by the end of February.
>
> You could transfer the instalments of the share as agreed to my bank account number as follows:…"
>
> (then follows the name of customer, name of bank, and account number)

*Comment*

The respondent refers to "legal paper works" for the transfer of his "share", and provides his bank details in respect of the payment.

**The primary Judge's reasoning**

[20] Her Honour first rejected the contention that any agreement was uncertain because it referred to the transfer of a share, in circumstances where the only share in Pacific Rim was held by Felgate Holdings. She said:

> "The clear effect of the emails was that Supangat's interest in the venture would be transferred to the Byrnes' interest. While the mechanics of this remained to be worked out, there is no suggestion that either party had any difficulty understanding the proposal. Neither Byrnes nor Supangat had a clear understanding of the structures which had been put in place by Enslin. … Byrne's attitude to the word 'share' was the same as Dr Supangat's. Such usage of the word 'share' was a short but compendious expression to describe the interest held by Dr Supangat and his family."

[21] In relation to the mechanics of any transfer, Her Honour held it "very unlikely that any of the Supangat beneficiaries would oppose" the transfer. She expressed the view that the respondent was probably the agent of those beneficiaries "in which case, they could be ordered to do what was necessary to surrender their interests in the Trust, or to give effect to the agreement".

[22] Her Honour rejected a contention that the respondent had agreed to do no more than exercise his best endeavours to transfer the interest: the agreement found by Her Honour was that the respondent would "do all that was necessary to procure the transfer".

[23] She also rejected a contention that the agreement was infected by mistake. Her analysis follows:

> "The mistake is said to be as to the subject matter of the contract, namely, a holding in Pacific Rim: they proceeded on the basis that each owned a shareholding in Pacific Rim. In my view, that was not the subject matter of the contract. In my view, that was the interest in the venture held by those associated with Supangat. That was the 'share' which was to be transferred."

[24] Her Honour rejected a number of other contentions, to which brief reference may now be made. They were that the promise to make payments on the specified dates was not supported by consideration (the Judge relied on the respondent's promise to transfer the interest); that the respondent did not accept the payment schedule (the Judge relied on the respondent's subsequent provision of his bank account details); that the respondent's offer after 2 February 2005 to sign documentation introduced a new proposed term (the Judge held it was merely attention to a clerical or mechanical issue, which is plainly right); that the respondent's subsequent conduct told against the existence of a binding agreement (the Judge held that while there was some ambiguity about that conduct, the respondent, significantly, maintained that the appellant had entered into a binding agreement which the appellant had not performed); and that the parties had abandoned any agreement (the Judge regarded the respondent's participation in the process of withdrawal from the venture as referable to his having been a director of ESAM).

**The appellant's alternate contention**

[25] The appellant contended that the emails did not constitute a binding agreement. The appellant relied on an alleged oral agreement into which the parties entered in Melbourne in December 2004. It is convenient to record Her Honour's treatment of that allegation by reproducing this part of her reasons.

> "[20] The parties agree that there was a meeting between the parties in Melbourne after these emails but shortly before Christmas in December 2004, where three options were discussed in relation to the management of the mine. The first was that Byrnes would take it over and run it, the second was that Supangat would take it over and run it and the third was running it together. During his testimony, Byrnes said the following in relation to this Melbourne Airport meeting:
>
> > 'Well, the understanding was that I would continue the mine running it my way.
> > All right?--- and, you know, that was the first priority and then he had the option of running the mine his way.
> >
> > … that was the third option, both staying together
> >
> > All right. Well, did you agree as to what would happen in the immediate future; that is, the – from then on, from that point onwards?-- Yeah, it was – I would – I would fund the mine and run it.
> >
> > On what ----?-- In my direction, the direction I'd set it on.

> Yes. And then do you have any further agreement as to what could happen after that?-- Yeah, he could – he could take it over.
>
> In what circumstances?-- Well, if I decided – I couldn't achieve it, he could take it over and do it himself.
>
> And was that up to you to decide whether you – you gave it away or not?-- Yes, it was.
>
> All right. And then – so if you decided not to continue with it, he could do the same thing?-- Yes.
>
> All right. And then what if it happened that neither ended up achieving that?-- We'd have to hand back the mine to the owners or Pacific Rim.
>
> All right. Well, now, what about the operation of the mine from then on? I think you have said that it was agreed that you would – you would be the first person to operate it on your own; is that right?—'

[21] Dr Supangat, in his evidence about the Melbourne meeting, agreed to the following scenario.

> 'I suggest to you that at the Melbourne Airport you agreed along these lines: first of all one of the two of you would take over. Do you agree with that?-- Yes. We – we – in Melbourne Airport we discuss three options.
>
> Yes. Let's take it bit by bit. Did you agree that one or the other would take over?-- Yes. You know, the three options it's been agreeable by both of us and-----
>
> And did you agree that the person that would take over first would be Mr Byrnes?-- Yeah, he – he will make the choice. We give him the priority.
>
> Yes. And do you agree that it was agreed that he would – that he did take over as at that time?-- And – and, you know, in the discussion I always put – whatever we discuss and agree, I put it in writing. That's why-----
>
> Would you just pay attention to the questions that I'm putting to you?-- Yes.
>
> Do you agree that it was agreed between you that he would take over as from that time?-- Yes.
>
> Okay. And then it was also agreed that he would subsequently – he could subsequently buy you out?-- Yes.
>
> Okay. And that the price for that would be $450,000?-- - That's correct.
>
> Okay. But he could resile from the agreement at any time?-- He can dissolve-----

> He can resile. Do you know what the word 'resile' means? He could withdraw, he could pull out for any reason?-- No. I mean, the deal is fixed and the deadline for payment is fixed.
>
> This is a business deal. We give him something, the opportunity, and he – he's taking the opportunity and he want to make an offer to me, that's fine.
>
> All right?-- And see whether – the situation – the arrangement is the same or not."

[26] Her Honour approached this evidence on the basis the events occurred in the context of negotiations which thereafter continued, with any final agreement resulting only on 2 February 2005 with the sending of the final email relied on to constitute the agreement.

[27] While the appellant spoke of his taking over the operation, with the respondent possibly succeeding him at the respondent's option should the appellant withdraw, and with the mine possibly ending up back with Pacific Rim; the respondent appears to speak in that evidence of an agreement to give the appellant the option to take over which, if exercised, would oblige the appellant to pay out the respondent. That "agreement", if properly so styled, was superseded by the agreement which subsequently crystallized in the emails, which was different.

[28] The later agreement obliged the appellant to buy out the respondent's interest. It went beyond according the appellant an option to do so.

[29] That development in the negotiations lends weight to Her Honour's approach to the dealings in Melbourne, as amounting to but a step in negotiations which relevantly continued thereafter.

[30] It is interesting to set out the appellant's pleading of the alleged Melbourne Agreement. The pleading illustrates how for his part, the appellant has sought to express more precisely obligations rather generally agreed upon, rather as has the respondent in its approach to a comparably broad agreement:

> "8. The defendant admits that, in the period of late 2004 and early 2005, the plaintiff and the defendant agreed on certain matters relating to ESAM and further admits the emails referred to therein, but the defendant otherwise denies the allegations contained in the said paragraph on the basis that the true facts are:
>
> (a) In or about December 2004, the plaintiff and the defendant entered into an oral agreement in Melbourne (Melbourne agreement), the terms and conditions of which were that:
>
> (i) either one of them, to the exclusion of the other, would in the future conduct the mining of the Granite Deposit;
>
> (ii) if the plaintiff became the party who conducted the mining of the Granite Deposit:
>
> A. the defendant would transfer his shares in Pacific Rim to the plaintiff and would resign as Director of ESAM;

B. the plaintiff would in that event repay to the defendant an amount equal to the amount the defendant had expended on the mining of the Granite Deposit to date, being $450,000;

C. the plaintiff would take all reasonable steps to assist the defendant in obtaining a release of his obligations under the guarantee referred to in paragraph 5(a)(vi) hereof;

(iii) if the defendant became the party to conduct the mining of the Granite Deposit in the future:

A. the plaintiff would transfer his shares in Pacific Rim to the defendant and would resign as director of ESAM and Pacific Rim;

B. the defendant would repay to the plaintiff an amount equal to the amount the plaintiff had expended on the mining of the Granite Deposit to date, being $450,000;

C. the defendant would take all reasonable steps to assist the plaintiff in obtaining a release of his obligations under the guarantee referred to in paragraph 5(a)(vi) hereof;

(iv) if the party conducting the mining of the Granite Deposit should for any reason decide not to continue mining the Granite Deposit, the other party could take over the conduct of the mining of the Granite Deposit on the same basis as set out in paragraph 8(a)(ii) or (iii) hereof, whichever the case may be;

(v) if a party elected not to take over the conduct of the mining of the Granite Deposit as referred to in paragraph 8(a)(iv) hereof, the parties would revert back to the position they were in prior to entering into the Melbourne Agreement, and they would cause the handing back of the shares in ESAM to Park Pacific and MPAPL pursuant to the provisions of the Share Sale Agreement, and would resign as director from ESAM, or Pacific Rim, or both ESAM and Pacific Rim, depending on what directorship or directorships each party held at the time."

**The grounds of appeal**

[31] The substantial ground is that Her Honour erred in concluding from the six critical emails that the parties entered into the alleged agreement, an agreement binding in law.

[32] The grounds do however raise a multiplicity of issues bearing upon that, so that it is useful to set them out in full.

> "1. The learned judge erred in fact and in law in holding that the six emails exchanged between the parties dated 9, 15, 17, 30 December 2004, 7 January 2005 and 2 February 2005 ('the Emails') established the agreement pleaded by the respondent in the Further Amended Statement of Claim.
>
> 2. The learned judge erred in fact and in law in holding that the Emails were capable of constituting, and did constitute, the agreement upon which the respondent sued and should have held that, as the respondent owned no share or shares, the content of the emails was in any event insufficient to create a contract and the parties had not, by the emails, sufficiently articulated an agreement between the parties.
>
> 3. The learned judge erred in law in holding that the Emails established an agreement, the terms of which are certain, and should have held that any agreement was void for uncertainty.
>
> 4. The learned judge erred in fact and in law in failing to hold that the parties did not make an effective contract by reason of the common mistake of fact made by the parties as to the subject matter of the contract.
>
> 5. The learned judge erred in fact and in law in holding that the 'promise' by the appellant in his email of 7 January 2005 to pay the sum of $450,000.00 by specified payments at nominated times created a binding contractual obligation as such to that effect in the absence of consideration for the alleged promise, without it having been unconditionally accepted, irrespective of performance by the respondent, and in circumstances in which the evidence showed that the parties did not treat it as such.
>
> 6. The learned judge erred in fact and in law in holding that the content of the Emails constituted the sole contract between the parties.
>
> 7. The learned judge erred in fact and in law, upon finding that the Emails constituted a contract between the parties, in not holding that the plaintiff and the respondent abandoned any such contract.
>
> 8. The learned judge erred in fact and in law in failing to hold that the promise to pay the sum of $450,000.00 only had legal effect if and when it was in fact paid.

9. The learned judge erred in her reasoning in support of her finding at [51] that

> 'the parties entered into a binding agreement, substantially as alleged in para 8 of the Further Amended Statement of Claim. I consider that to be the true effect of the emails on which the plaintiff relies'

because Her Honour failed to have regard to –

(a) the agreement as pleaded in paragraph 8 of the further Amended Statement of Claim;

(b) the wording of the Emails;

(c) the respondent's evidence as contained in paragraphs 9 and 19 of his affidavit sworn on 10 April 2006;

(d) the Further and Better Particulars provided by the respondent;

(e) paragraphs 8.8 and 8.9 of the Reply dated 8 June 2006.

**Ground 1: whether the six emails constituted the pleaded agreement**

**Ground 2: the circumstance that the respondent did not own a share**

[33] It is convenient to deal with these grounds together.

[34] As already recorded, the agreement was pleaded in the further amended statement of claim as follows:

> "…8. To resolve their differences about the way in which ESAM should be managed, the parties agreed ('The transfer agreement') that:
>
> (i) the plaintiff should withdraw from further participation in the management of ESAM and relinquish any right to control ESAM to the defendant;
>
> (iii) the plaintiff should do all that was necessary to procure the transfer of the interests held by the Supangat Family Beneficiaries ('the Supangat interests') pursuant to the Deed of Trust to the defendant (or as he should direct or require) so as to thereby exclude any interest (including the Supangat interests) held directly or indirectly by the plaintiff in ESAM in favour of the defendant in order that he and/or the Byrne family Beneficiaries might have the benefit of the Mining Lease and control Pacific Rim:
>
> …
>
> (iii) the defendant should pay to the plaintiff … the sum of $450,000.00 payable in instalments by an initial payment $150,000.00 (by transfer to the plaintiff's

> account in the first week of February 2005) with the balance to be transferred monthly thereafter in $50,000.00 instalments. …"

[35] Counsel for the appellant submitted that neither of the terms numbered (i) or (ii) above appears in the emails, which refer to "a simple share transfer in exchange for payment". Neither did the emails reflect the procuring of another person to secure any transfer. The parties did not, it was submitted, agree on what was necessary to secure whatever goal they may have had in mind.

[36] Counsel made reference to cases including *Masters v Cameron* (1954) 91 CLR 353, 362; *Godecke v Kirwan* (1973) 129 CLR 629, 639; *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600, 604.

[37] The emails were written by businessmen with apparently limited knowledge of the legalities of the precise ownership arrangement. They were motivated to secure a particular outcome; the transfer by one of his interest in the venture to the other, with the former removed in all respects, for a consideration of $450,000. That meant, though not specified, that the respondent would no longer participate in the control of the holding company and his family would withdraw as beneficiaries under the trust. These were the necessary outcomes of what they had in broad terms agreed. That the delineation of the mechanics to secure that necessary outcome may be reserved for subsequent action on the part of the parties' lawyers does not render uncertain any agreement under which the parties had settled the essential terms, which were the transfer of one's entire interest and role to the other, and the consideration.

[38] When in the email of 15 December the appellant refers to "taking over our share", he is to be taken to be referring to his share in the overall venture, not in a technical sense, the share in Pacific Rim.

[39] If one reads the emails in a composite way, they evidence the parties' agreement that the respondent would relinquish his share or interests in the mine venture in favour of the appellant as well as any right to participate in managing the mine, for a price, and that price would be $450,000, payable in accordance with the agreed schedule of instalments.

[40] For these reasons, these grounds were not made out.

**Ground 3: uncertainty**

[41] Counsel for the appellant submitted that any arguable agreement is uncertain because the parties fail to specify the particular means by which the outcome was to be achieved, and it could be achieved in a number of ways, affecting persons and entities other than the appellant and respondent. Further, the respondent could not secure the agreed outcome, because to do so he would have to rely on actions on the part of persons and entities he did not control. They submitted that the learned Judge ended up impermissibly composing for the parties a contract upon which they had not agreed.

[42] In my view it is a sufficient answer to these contentions that the respondent was to do "all that was necessary" to secure the outcomes. That undertaking may reasonably be drawn from the emails. It fell to the respondent to secure the agreed

outcome, by whatever means he may employ. It was achievable because of the foreseeable cooperation of his family members, but if not, he would breach his contract.

[43] Counsel for the appellant point out that the terms "all that is necessary" do not appear in the emails, and rely on the respondent's having limited himself to the emails. Once one concludes the parties undertook particular obligations, then, "as a general rule applicable to every contract" (*Butt v M'Donald* (1896) 7 QLJ 68, 70-1; *Secured Income Real Estate (Australia) Ltd v St Martin's Investments Pty Ltd* (1979) 144 CLR 596, 607) each was obliged to do all that was necessary to fulfil his obligation.

[44] The appellant additionally contended that "the proper interpretation of the documentation is that agreement was one whereby one or the other could proceed to take over, but without legal effect on proprietorship".

[45] In support of that contention, Counsel for the appellant relied on conduct of the respondent subsequent to early February 2005.

[46] That is not a permissible source of reference in aid of the construction of the documents said to constitute the contract, being the emails. The emails provide no basis for concluding that the contemplated transfer was merely optional.

**Ground 4: common mistake of fact**

[47] Counsel for the appellant relied on these alleged mistakes: that "they both believed that they each held a share or shares whereas there was only one share, which was owned by Pacific Rim. They also both believed that they could effect the transaction themselves." Compare *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, 405-6.

[48] I accept the submission made by Counsel for the respondent, that "properly understood, what the contract between the parties…provided for was transfer of ownership (as it was understood in the context of the arrangements Mr Enslin had established) and managerial control to Mr Byrnes, not the transfer of a Supangat company 'share' in a narrow sense". Also, the parties were not mistaken as to the means by which the transaction would be effected. They were content to leave the devising of the necessary process to the respondent.

[49] It may be the parties believed (mistakenly) that the respondent would have the capacity to accomplish the transfer without dependence on the cooperation of others. Because of the approach I take to the following ground of appeal, ground 5, and because this particular view was not promoted at trial or on appeal, I need not discuss that possibility further.

**Ground 5: whether a binding promise to pay $450,000 in the manner alleged**

[50] Counsel for the appellant submitted that an agreement to pay $450,000 arose prior to the email of 7 January 2005, at the prior meeting in Melbourne, so that the consideration relied on for the undertaking by email was spent; and further, that the payment schedule was not in any event agreed.

[51] The agreement found by Her Honour arose from the emails. Those email communications were interrupted by the Melbourne meeting. But the overall

agreement did not crystallize until the sending of the last email on 2 February 2005. The additional matter dealt with after the Melbourne meeting was the program for payment. Reading the emails together with the evidence of what occurred in Melbourne, it is clear the negotiation continued thereafter, and it is likely additionally, that the parties were working on the basis of agreeing in writing, as they did via the trail of emails.

[52] I accept the submission by Counsel for the respondent that "the agreement reached in the emails was rooted in personal negotiations which took place in Melbourne. The issues dealt with in the negotiations in Melbourne were not distinct from those in the email. They led to the one agreement. It is artificial and fallacious to separate the two and claim there were two agreements not one. If there is one agreement, it cannot be said there is no consideration for the sale price of the Supangat interests."

[53] The reason assigned by the learned primary Judge, in relation to the issue of acceptance of the payment schedule (the provision of the bank details), provides a sufficient answer to the appellant's contention in that regard.

[54] Counsel for the appellant submitted that "the proper interpretation of the documentation is that the agreement is one whereby one or the other could proceed to take over, but without legal effect on proprietorship until payment and the other necessary steps had in fact occurred. In other words, until one had paid and the other had transferred the 'share', ownership remained in both of them." While that view may have been open at the early stage where the identity of the transferor and the transferee had not been settled, it was not a tenable view once agreement had been reached that the appellant would in effect purchase the respondent's interest, with the date for payment of the price being set.

[55] There is however a difficulty arising from the circumstance that the respondent did not carry out his part of the agreement. He did resign as director of Pacific Rim, and the respondent acquiesced in the appellant's assumption of the management of the quarry, but the respondent "did not procure the transfer of the interests of the Supangat Family Beneficiaries" (para 4(i) reply). It is inconceivable that the parties contemplated other than that these were mutually conditional or interdependent obligations, with the obligation to pay the substantial sum of $450,000 conditional upon the respondent's performance of his obligation of transfer. The character of the obligations is that described by Dixon J in *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435, 463-4:

> "In certain forms of executory contract where the promise of one party is to pay the other money in consideration of his transferring property…the money to be paid is regarded as the price of…the property…when and so often as the transfer…affords an executed consideration. In these contracts the promise to pay the price…is not construed as a simple obligation to pay a sum or sums at a future date supported solely by a consideration consisting in the corresponding promise to transfer the property…so that a mere readiness and willingness on the one side…to perform his part is enough to entitle him to the payments, notwithstanding that, whether owing to the fault of the former, or without fault on either side, the property is not transferred…. The most familiar example is that of the sale of goods. There the common understanding of an agreement to sell is that it is

> the goods and not the promises to deliver that are to be paid for. The result is that, if the seller tenders goods in accordance with his contract that the buyer rejects them in breach of his contract, the seller cannot sue for the price; his remedy is for unliquidated damages for non acceptance…"

[56] I refer also to *Kaneko v Crawford* [1999] 2 Qd R 514, where a purchaser of land agreed to pay the vendor a sum of money forthwith in consideration of the vendor's extending the time for completion. The Court of Appeal saw the respective obligations as interdependent (pp 515-6):

> "Counsel for the appellant…contended that the agreement of 16 July was not such as to create any immediately enforceable obligation, but depended entirely on payment of the $677.97. The argument was that payment of the $677.97 was a condition precedent. It should not be overlooked that there is a distinction between an event or obligation which constitutes a condition precedent to the existence of a contract, and one which constitutes a condition precedent to performance, the latter being ordinarily the construction which should be adopted: *Perri v Coolangatta Investments Pty Ltd* (1982) 149 C.L.R. 537 at 552. One reason for that preference is that ordinarily parties who have made a conditional contract may be presumed to have intended that obligations, even if conditional ones, would flow from it immediately. But the question is always one of construction of the particular contract, against the background of the circumstances which gave rise to it. The critical point in the present case is: what were the parties' mutual obligations in the period between the making of the agreement for extension of 6 July and payment of the $677.97? The choice is between interpreting the arrangement as one under which the vendor agreed to an extension in exchange for the mere promise to pay the money, and interpreting it as one in which the vendor was not bound at all until the money was paid. If the former view is correct, the purchaser was immediately indebted in the sum of $677.97. The latter view appears to accord better with the language used and with what one would expect the parties to have intended."

[57] Here, the parties should be taken to have regarded transfer and payment as concurrent and interdependent obligations. Particularly where the parties agreed in such broad terms, it is as I have said inconceivable they contemplated the appellant's being obliged to pay that comparatively substantial amount even though the promised transfer had not been made.

[58] I say this notwithstanding the specification in the agreement of a program for payment by instalments. The inferred intention was nevertheless that the monies be payable in exchange in effect for the transfer of the share in the full sense.

[59] Counsel for the respondent referred to the appellant's email of 7 January 2005, in which he said he would pay the sum of $150,000 in the first week of February, and attend to the registration from the directorship and cancelling certain guarantees upon his return to Queensland on 20 February, as supporting the view that meeting the obligation to pay did not depend on performance on the other side. That those two particular aspects (the directorship and the guarantees) may have been deferred

to that extent does not justify a conclusion that the significant aspect of the beneficiaries foregoing their interests did not have to be attended to before the appellant was obliged to make any payment. In his email of 2 February 2005, the respondent spoke of transferring his share by the end of February. The respondent did not assert, in that email, that the appellant nevertheless remained obliged to pay the first instalment, of $150,000, in the first week of February, even though the "share" would not by then have been transferred.

[60] In my respectful view Her Honour erred in giving judgment effectively for the amount of a debt where the respondent had not performed his relevant obligation. Accordingly the judgment should be set aside. It follows that in not making payment, the appellant did not breach the contract, so no entitlement to damages arose.

[61] I need refer only briefly to the additional grounds of appeal.

**Ground 6: emails did not amount to the "sole contract" between the parties**

[62] This depended on the conclusion that the parties reached an instrumental agreement orally in Melbourne, one which was itself unenforceable.

[63] The Judge was entitled to conclude that the parties chose to determine any agreement by means of the critical email communications. It seems clear that the Melbourne negotiations occurred in the course of that, and that it was through the email communications that the parties determined to express any agreement which they might reach.

**Ground 7: abandonment**

[64] Counsel for the appellant submitted as follows:

> "In June 2005, the respondent and the appellant, having agreed not to exercise their right to continue with the share sale agreement, acted in cooperation to terminate it. Following the termination, Pacific Rim was an empty shell with no business, which resulted in the resignation of the respondent as director and the intended appointment of a corporate director resident in a foreign jurisdiction. The whole process does not support any proposition that the appellant was or remained indebted to the respondent – in fact, the contrary appears from the respondent's letter dated 24 May 2005 (raising a proposal that the respondent take over the mine). 'If I am successfully operating the mine with good results, I will pay your investment of $450,000 in stages. This is in line with what we have discussed in December 2004'. This letter shows not only the terms on which the respondent was seeking to run the mine for a period, but also demonstrates the correctness of the appellant's evidence as to the broad agreement made by the parties in Melbourne in December 2004- the context was not one in which liability could be expected to arise in respect of any apparent promise to make a payment in regard to the takeover of the other party's interests in the mine."

[65] I accept the responding submission advanced on behalf of the respondent, in these terms:

> "[Such] paragraphs contend that because the respondent did not always actively pursue his rights under the parties' agreement…his rights to payment were somehow thereby lost. The process by which this occurs is not clearly explained. For example…the appellant relies on the parties exercising their rights to terminate the share sale agreement at the appellant's suggestion as evidence to support his interpretation of events. At that stage, the respondent would have been financially at risk had he not agreed to the appellant's suggestion. This exposure is something the appellant had agreed to guard against in his email of 7 January 2005."

[66] It is significant that the respondent throughout maintained the appellant's obligation to pay him the amount of $450,000. This continued until late in the piece. For example on 3 June 2005, the respondent's solicitors were writing in these terms to the appellant's solicitors:

> "Mr Byrnes has agreed to repay to our client the sum of $450,000.00 by making payments in the sum of $150,000.00 in the first week of February and $50,000.00 per month thereafter. He has not made such payments and our client will if necessary take proceedings to enforce same."

**Ground 9: suggested erroneous reasoning in support of finding of agreement**

[67] I need not add to what I have said already in relation to grounds 1, 2 and 3.

**Conclusion and orders**

[68] Because of the approach I take to ground 5, the appeal should in my view be allowed.

[69] The primary judgment was given on 4 December 2009, and on 23 December 2009 Her Honour made consequential orders as to interest and costs.

[70] I would order that the appeal be allowed and the judgment entered and orders made in the Trial Division of this court on 4 and 23 December 2009 set aside, and that the respondent's claim in the proceeding be dismissed, with an order that the respondent pay the appellant's costs of and incidental to the trial and the appeal, to be assessed as necessary on the standard basis.

[71] **CHESTERMAN JA:** I agree that the appeal should succeed on the ground identified by the Chief Justice.

[72] The agreement, which the learned trial judge found to have been made, should be construed as the Chief Justice has indicated. The consideration for the payment of $450,000 was the transfer to the appellant of what has been called the "Supangat Family Interests" in the quarry. To construe the contract differently, as the learned trial judge preferred, so as to regard the consideration for the payment as the respondent's promise to transfer those interests, would make the consideration illusory.

[73] The respondent had nothing which he could himself transfer in exchange for the payment. He had no proprietary, contractual or equitable interest in the quarry itself or in the companies which owned and operated it. The very elaborate structure set up by Mr Enslin produced the result that any capital or income produced by the quarry venture formed the trust estate of the Felgate Investment Trust.

[74] By the terms of the Trust Deed the trustee had an "absolute and uncontrolled discretion" to "pay or apply all or any part of the net income … to … one or more of the Discretionary Beneficiaries … ", provided that "the Discretionary Beneficiaries of each Class … shall not become entitled to more than one half of the income … during any income year." Likewise the trustee could pay or apply "all or any part of the capital … to or for … one or more of the Discretionary Beneficiaries …" with the same proviso as to equality between classes of discretionary beneficiary. There was a similar discretion to distribute the trust fund on the vesting day and with the same obligation to achieve equality. In the event that there had not been a valid distribution to the discretionary beneficiaries then the unappointed portion was to go to the default beneficiaries of whom there was one for each class.

[75] Schedules 2 and 3 to the Trust Deed respectively identified the A and B class beneficiaries. The latter were the "Supangat Family Interests". The identified primary beneficiary was Mrs Kusmali, the respondent's wife. The other B class discretionary beneficiaries were the respondent; Mrs Kusmali's children and their descendants; and a number of what I assume to have been Indonesian proprietary companies and one Australian proprietary company. The default beneficiary was the Royal Children's Hospital, Adelaide.

[76] If the appellant were to obtain full ownership of the quarry the respondent's kin and the companies had to relinquish their interests as beneficiaries in the discretionary trust, or assign them to the appellant.

[77] The trust being a discretionary one, none of the beneficiaries had any beneficial interest in any part of the trust estate. Their only interest was to have the trust properly administered, which is to say they had an interest in the trustee honestly exercising his discretion, but no more.

[78] The respondent could have transferred his own interest as discretionary beneficiary to the appellant, or at his direction, but he could not transfer the interests of his wife or children or the companies.

[79] As the trial judge noted the most convenient way of assuring the appellant that the A class beneficiaries would be the only ones to benefit from the trustee's discretion would be for the B class beneficiaries to relinquish their rights under the Trust Deed. Clause 11.3 provided for this:

> "Any person who is a Beneficiary may in writing signed by himself and delivered to the Trustee declare himself … irrevocably to be excluded as one of the Beneficiaries forever … ."

[80] A man may, of course, contract to sell property which he does not have and which he cannot compel the owner to transfer to him. See e.g. the discussion and cases referred to in Stoneham, *Vendor and Purchaser* para 209. Such a contract is valid but if the purchaser should discover the vendor's lack of title he may immediately rescind the contract. See *Bellamy v Debenham* [1891] 1 Ch 412; *Pearce v Stevens* (1904) 24 NZLR 357 at 383-4. If the purchaser does not rescind, but allows the day for completion to arrive, and the vendor then has obtained title to the property he must complete and pay the purchase price in exchange for the property. If the vendor does not then have title the purchaser does not have to pay the price. If he does pay he may recover the money as paid for a consideration which wholly failed. (In this context where the subject matter of the contract is the sale of goods the rights and obligations of the parties are regulated by ss 8, 9 and 10 of the *Sale of Goods Act* 1896).

[81] No doubt it was considerations such as these which led the respondent, eventually, to plead his case, not in terms that he would transfer shares in one or other of the companies, but that he would "do all that was necessary to procure the transfer of the interests held by the Supangat family beneficiaries" to the appellant.

[82] Such a promise carries with it a hint of unreliability. The respondent could not himself transfer the interests of others, nor could he compel those others to transfer their interests, or execute an irrevocable exclusion as beneficiary. (It may be noted that the trial judge thought it likely that the respondent contracted as agent for the members of his family and the companies but the emails do not contain any hint that the respondent was not acting as principal, and no version of the Statement of Claim alleges agency.) The result is that the respondent's promise contained an incipient warning that it may go unperformed.

[83] With due respect, therefore, to the trial judge who thought otherwise, it is not a likely construction of the agreement between appellant and respondent that the obligation to pay, even the first instalment of $150,000, should arise before the seller got in the property to be transferred and paid for. It is, I think, much more likely that payment would only be required when the respondent had done all things necessary and could effect the transfer.

[84] Whether the consideration was the promise to do all that was necessary to transfer the B class beneficiaries' interests, or the transfer of those interests, is a question to be answered by discerning what the parties intended. Their intention is to be judged objectively by reference to the words they used when forming their bargain, and the surrounding circumstances known to both.

[85] The words used by the parties in their email negotiation do not point clearly in either direction. One notes however that in the email of 2 February 2005 the respondent said he hoped to "finalise the … paper works (sic) to transfer my share … by the end of February", the month when the first instalment of the purchase price was to be paid. Earlier, on 15 December 2004 the respondent had proposed to the appellant that he take "over our share for … $450,000 … ." There is a slight indication in these exchanges that the payment was for the transfer.

[86] However the circumstances point overwhelmingly to the conclusion that the parties must have intended payment to be in exchange for the interest. There is, in fact, only one circumstance and that is the nature of the interest to be transferred. Given (i) the respondent had only his own interest to transfer and (ii) the risk that he might not obtain what was to be transferred, the parties must have intended payment to be in exchange for the "interests", when transferred.

[87] The result is that the appellant was not obliged to make the payments in accordance with the instalment plan fixed by the exchange of emails. Payment was, as the Chief Justice describes it, concurrent and interdependent with the transfer of the B class beneficiaries' interests. The time for payment did not arrive because the interests were not assigned to the appellant, nor on the evidence, did the respondent have them available to assign (or have relinquished). Non-payment did not therefore constitute a breach of contract. The agreement remained on foot, unaffected by the subsequent negotiations to vary it, which came to nothing. The respondent could have given notice fixing time for payment had he been in a position to effect the transfer. As, on the evidence, he never was, the time for payment never arose before events supervened and the vendors of the quarry reclaimed it.

[88] The preceding discussion has proceeded on the basis of construing the agreement objectively. In *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 the High Court pointed out (462):

> "The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction." (footnotes omitted)

Later in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 the court said (179):

> "This Court … has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. … What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. … The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction." (footnotes omitted)

[89] The most significant circumstance which was objectively knowable by appellant and respondent was the nature of the consideration for the payment, and the terms of the respondent's promise, to do all things necessary to effect a transfer of the interests of others to the appellant. It is these factors which have convinced me that the agreement should be construed to make payment and performance concurrent and interdependent.

[90] If, however, one views the parties' communications from their subjective points of view it becomes extremely doubtful that either understood the subject matter of their bargain, or what they had to buy and sell.

[91] The discussion thus far has proceeded on the basis of the respondent's promise as finally pleaded and found by the trial judge. That was the promise to do all things necessary to effect the transfer of the family's and companies' interests under the Trust Deed. The promise carries with it the implication that the parties understood that the respondent had himself nothing, or not much, to transfer.

[92] Neither the evidence nor the pleadings justify the acceptance of the premises.

[93] The statement of claim initially pleaded that:

> "… the parties agreed that the (respondent) should transfer his shares in Pacific Rim Management Pty Ltd for the sum of $450,000 payable in installments (sic) … ."

The Amended Statement of Claim pleaded that:

> "… the parties agreed … that the (respondent) should transfer shares in Pacific Rim Management Ltd controlled by him or his representatives or nominees and the (appellant) should pay the (respondent) the sum of $450,000 … in installments (sic) …".

It was the Further Amended Statement of Claim which pleaded that:

> "The parties agreed … that:
>
> (i) the (respondent) should withdraw from further participation in the management of ESAM and relinquish any right to control ESAM to the (appellant);
>
> (ii) the (respondent) should do all that was necessary to procure the transfer of the interests held by the Supangat Family Beneficiaries … pursuant to the Deed of Trust to the (appellant) (or as he should direct or require) so as to thereby exclude any interest (including the Supangat interest) held … by the (respondent) in ESAM in favour of the (appellant) … ."

[94] The final version of the agreement was articulated three years after the action commenced. Prior to that it is apparent that the respondent (and his advisors) considered that the agreement was one by which he had agreed to transfer property or some interest in property which he owned or controlled.

[95] The same understanding emerges from the emails. On 15 December 2004 the respondent spoke of the appellant "taking over our share". In his reply of 17 December 2004 the appellant said he would have "to get (the respondent) to resign as a director and a shareholder of the holding company …". On 2 February 2005 the respondent said in an email to the appellant that he hoped to "transfer my share of ESAM to you by the end of February." On 8 April 2005 (which is after the agreement had been concluded but during negotiations for a new agreement) the respondent noted that they had "agreed in last December that we let you take our share and you will pay us in instalments (sic) … ." On 18 April 2005 the respondent again emailed to assert to the appellant that "you have purchased my share and agreed to pay $150,000 in February 2005 … ."

[96] The emails do not contain a glimmer of understanding in either man as to what had to be done to make the appellant, or interests associated with him, proprietor of the quarry venture to the exclusion of the respondent and his family and companies. The trial judge found that the parties did not understand the corporate and trust structure which had been erected over the joint venture. It is apparent from what they wrote to each other that they did not understand that the respondent did not have any proprietary or contractual interest in the quarry or the companies. They negotiated on the basis that there was some such right of property, or contract, which the respondent had and which he could make over to the appellant in exchange for the purchase price.

[97] The exchange of emails reveals that both men laboured under the same misapprehension. They were dealing on the basis of a common, false, assumption that there was some property which the respondent had which he could assign to the appellant. It was that assumed property which was the subject of their bargain.

[98] It did not exist, though both appellant and respondent believed it did. This was therefore:

> "… a case in which the parties can be seen to have proceeded on the basis of a common assumption of fact so as to justify the conclusion

> that the correctness of the assumption was intended by both parties to be a condition precedent to the creation of contractual obligations."
>
> Per Dixon and Fullager JJ in *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 409.

[99] This point was taken by the respondent at the trial and was dealt with in written submissions. It was dealt with briefly by the trial judge who rejected the submission on the basis that the subject matter of the contract "was the interest in the venture held by those associated with (the respondent)".

[100] In my opinion the parties negotiated on the basis of a common mistake as to the property which was to be transferred and paid for, and for that reason their agreement was not enforceable.

[101] I would allow the appeal on this ground also.

[102] **ATKINSON J:** I have had the advantage of reading the Chief Justice's reasons and agree with all that his Honour says with regard to each of the grounds apart from ground 5 concerning the effect of the respondent's failure to transfer his interests in the joint venture after the appellant failed to pay the first instalment of $150,000.

[103] As his Honour has observed, the emails between the parties evinced a concluded agreement between them. This was a commercial arrangement reached by two business people, not lawyers, who reached a concluded agreement. There was, as Dr Supangat said in his email of 2 February 2005, still legal paper work to be concluded but an agreement for Dr Supangat to give up his interests in what was essentially the joint venture for the granite quarrying venture[1] had been struck. An analysis of the agreement show that these were its terms and the order in which those terms were to take place:

1. Mr Byrnes would transfer $150,000 in the first week of February 2005 to Dr Supangat;
2. Mr Byrnes would instruct the lawyers who set up the structure of the joint venture to organise Dr Supangat's resignation from the directorship of Pacific Rim and "get the sale agreement modified to remove [his] guarantees";
3. Dr Supangat hoped to finalise the legal requirements to transfer his share of the joint venture to Mr Byrnes by the end of February;
4. Mr Byrnes would transfer $50,000 per month from March 2005 until the remaining $300,000 had been paid, a period of six months.

[104] The agreement which had been made was that Dr Supangat and Mr Byrnes agreed that the Supangat interests in the joint venture would be transferred to Byrnes or his interests in return for $450,000 payable by an initial payment of $150,000 in the first week of February and $50,000 monthly instalments for six months.

[105] In pursuance of the agreement, Dr Supangat relinquished any control over the operation of the joint venture. That agreement was breached, however, when

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[1] The structure of the joint venture prepared by the appellant's solicitor was unnecessarily complicated. As was conceded by senior counsel for the appellant, this was a tax avoidance measure.

Mr Byrnes failed to transfer $150,000 to Dr Supangat in the first week of February. On 17 February 2005 he told Supangat he was not in a position to make the payment. In my view Supangat's contractual obligations to arrange transfer of his interests to Byrnes and his interests was dependent on Byrnes' obligation to make payment of the first instalment of $150,000.

[106] It was, to use the language of the Court of Appeal in *Kaneko v Crawford*,[2] not a condition precedent to the coming into existence of the contract that the first payment of $150,000 be made, but it was a condition precedent to performance by the other party of his obligations under the contract. That is, as the Court said, ordinarily the construction which is to be preferred. Clear words would be needed to make such a term a condition precedent to the contract's existence rather than a condition precedent to performance by the other party. As Mason J explained in *Perri v Coolangatta Investments Pty Ltd*:[3]

> "Generally speaking the court will tend to favour that construction which leads to the conclusion that a particular stipulation is a condition precedent to performance as against that which leads to the conclusion that the stipulation is a condition precedent to the formation or existence of a contract. In most cases it is artificial to say, in the face of the details settled upon by the parties, that there is no binding contract unless the event in question happens. Instead, it is appropriate in conformity with the mutual intention of the parties to say that there is a binding contract which makes the stipulated event a condition precedent to the duty of one party, or perhaps of both parties, to perform. Furthermore, it gives the courts greater scope in determining and adjusting the rights of the parties. For these reasons the condition will not be construed as a condition precedent to the formation of a contract unless the contract read as a whole plainly compels this conclusion."

[107] The contract was breached by the appellant's not making the payment he had agreed to make under the contract which preceded temporally, and was a pre-condition of, the obligation by the respondent to transfer his share in the joint venture to the appellant. The measure of damages for that breach was the loss to the respondent caused by the breach of contract. In this case, as the parties' shares in the joint venture are now worthless, that loss was the $450,000 awarded by the learned trial judge.

[108] I would therefore dismiss the appeal with costs.

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2 [1999] 2 Qd R 514 at 516-517.

3 (1982) 149 CLR 537 at 552.