# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Mosman Services Pty Ltd (ACN 079 350 744) (Suing in a Representative Capacity as Trustee of the Mosman Services Trust) and Ors v William James McDonald and Ors* [2013] QSC 113 |
| PARTIES: | **Mosman Services Pty Ltd (ACN 079 350 744) (Suing in a Representative Capacity as Trustee of the Mosman Services Trust)**<br>(First Plaintiff)<br>**AND**<br>**Barraigh Pty Ltd (ACN 145 433 272) (Suing in a Representative Capacity as Trustee for the Barraigh Trust)**<br>(Second Plaintiff)<br>**AND**<br>**Terence Kevin Crawford**<br>(Third Plaintiff)<br>**AND**<br>**John Francis MacKinnon**<br>(Fourth Plaintiff)<br>**AND**<br>**William James McDonald**<br>(First Defendant)<br>**AND**<br>**Paul Gerard McDonald**<br>(Second Defendant)<br>**AND**<br>**Fortrus Pty Ltd (ACN 101 141 851)**<br>(Third Defendant)<br>**AND**<br>**Fortrus Resources Pty Ltd (ACN 145 178 070)**<br>Fourth Defendant<br>**AND** |

**MCG Civil Pty Ltd (ACN 099 423 088)**

(Fifth Defendant)

**AND**

**MCG Coal Holdings Pty Ltd (ACN 143 001 825)**

(Sixth Defendant)

**AND**

**MCG Coal Pty Ltd (ACN 142 356 983)**

(Seventh Defendant)

**AND**

**MCG Resources Pty Ltd (In Liquidation) (ACN 129 717 531)**

(Eighth Defendant)

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| FILE NO/S: | BS6242/11 |
| DIVISION: | Trial Division |
| PROCEEDING: | Claim |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 10 May 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 25, 26, 27, 28 March, 3 April 2013 |
| JUDGE: | Byrne SJA |

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – AGREEMENTS NOT INTENDED TO CREATE LEGAL RELATIONS – DOMESTIC, SOCIAL AND OTHER AGREEMENTS – where plaintiffs allege that an oral agreement was reached between themselves and the first defendant concerning directorships – where plaintiffs sue to enforce the agreement – whether conversation took place - whether agreement was reached.

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES- CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – IMPLICATION OF MUTUAL OBLIGATION – where plaintiffs had entered into agreement with first and second defendants for the payment of monies on settlement- where agreement included an implied term that parties would do all things necessary to give the other parties the benefit of

the contract – where duty to co-operate was an implied term of that contract.

TORTS – MISCELLANEOUS TORTS-OTHER CASES-deceit – where first defendant promised plaintiffs that money would be paid to them – whether first defendant intended to fulfil the promise – whether first defendant had formed the relevant intention to pay at the requisite time

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where services agreement interpreted so as to make commercial sense.

*Akron Tyre Co Pty Ltd v Kittson* (1951) 82 CLR 477, cited.
*ANZ Executors & Trustee Company Limited v Qintex Australia Limited* [1991] 2 QdR 360, cited.
*Commissioner for Fair Trading v TLC Consulting Services Pty Ltd* [2011] QSC 233, cited.
*Concrete Pty Limited v Paramatta Design and Development Pty Ltd* (2006) 229 CLR 577, cited.
*Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, cited.
*Elderslie Property Investments No 2 Pty Ltd v Dunn* [2008] QCA 158, cited.
*Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471, cited.
*Grundt v Great Bolder Propriety Goldmines Ltd* (1937) 59 CLR 641, cited.
*Hawley Partners Pty Ltd v Commissioner of Stamp Duties* [1996] QCA 270, cited.
*International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, cited.
*Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd* [2006] QCA 126, cited.
*Murray Goulburn Cooperative Co Ltd v Cobram Laundry Service Pty Ltd* [2001] VSCA 57; cited.
*Permanent Trustee Australia Limited v FAI General Insurance Company Limited (In Liquidation)* (2003) 214 CLR 514, cited.
*Peters (WA) Limited v Petersville Limited* (2001) 205 CLR 126, cited.
*R v Jo* [2012] QCA 356, cited.
*Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, folld.
*Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219, cited.
*Zhu v Treasurer of New South Wales* (2004) 218 CLR 530, cited.

COUNSEL: W Sofronoff QC and G Handran for the Plaintiffs

M. D. Martin for the First to Fifth Defendants

SOLICITORS: Tucker and Cowen Solicitors for the Plaintiffs

M.S. & Cliff lawyers for the First to Fifth Defendants

**Protagonists**

[1] Terence Crawford controls Mosman Services Pty Ltd ("Mosman"). He holds degrees in economics and law. He has had considerable experience in banking over 25 years, including senior positions overseas with HSBC.

[2] John MacKinnon controls Barraigh Pty Ltd ("Barraigh"). An engineer by profession, he has worked for international investment banks and advised in large fund raising efforts by major mining companies.

[3] William and Paul McDonald are brothers.

[4] William controls MCG Civil Pty Ltd ("MCG Civil") and other corporations in his MCG Group. William describes himself as a contractor. MCG Civil's main business is the provision of civil construction services to the mining industry.

[5] Paul controls Fortrus Pty Ltd ("Fortrus").

[6] The brothers own Fortrus Resources Pty Ltd ("Fortrus Resources").

**MDL 162 Venture**

[7] By early 2010, William was keen to venture into mining. He wanted to start by acquiring a mining tenement: MDL 162. The tenement was to be sold by Stanwell Corporation Limited ("Stanwell").

[8] Lacking the knowledge and skill to raise the many millions of dollars needed to buy MDL 162, William wanted to involve others who understood finance markets and fundraising for the resources sector.

[9] In March 2010, Crawford met William at the offices of William's solicitors, Hynes Lawyers ("Hynes"). William told Crawford about his background and ambitions. He said he had a number of companies in his MCG Group, including MCG Civil, and that he wanted to build a mining business. The first step was to acquire MDL 162. William explained that, although the tenement had not reached the "pre-feasibility stage", he was looking to raise $300 - $400M to buy it and needed assistance in attracting funding. He mentioned others involved in the project: Peter Bannister, a mining engineer, and John MacKinnon, who had experience in the resources sector and merchant banking. William asked if Crawford was interested in joining them.

[10] Through Jack McDonald, William's brother, William had met MacKinnon. William told him about his plans for MDL 162. MacKinnon's main role was also to raise money to buy the tenement.

[11] MCG Resources Pty Ltd ("Resources") was the holding company for MCG Coal Holdings Pty Ltd ("Coal Holdings"). Coal Holdings held the issued share capital in MCG Coal Pty Ltd ("Coal"). Coal was to acquire MDL 162.

[12] MacKinnon and Crawford were keen to participate. Negotiations began about their reward. They wanted some "equity share" eventually, as well as an annual salary of $80,000. In the months to come, draft memoranda of understanding about the terms of their engagement were exchanged with William. In the result, none was executed.

**Efforts to raise finance**

[13] Despite the uncertainty about the interests they might take in the project, Crawford and MacKinnon set about attracting funding. They also met with William and his solicitor, Scott Standen from Hynes, Bannister and others to develop what Crawford calls a plausible bid for MDL 162.

[14] Bannister, through his company Banno Investments Pty Ltd ("Banno"), owned 50% of the shares in Resources. In mid-May, William told Crawford that he wanted to get Bannister out.

[15] Crawford and MacKinnon negotiated with financiers in Australia and overseas. They sought out more than 15 prospective funders. William approached an Australian bank for funding, unsuccessfully. So did Paul, whose participation had been encouraged by William, as Crawford understood things, "to give some financial clout to the exercise" because of Paul's considerable wealth.

**Bid succeeds**

[16] Stanwell accepted Coal's bid of $285M for MDL 162.

[17] On 5 July 2010, Stanwell and Coal executed the sale and purchase agreement. The 10% deposit was to be paid three days later, with completion due on 1 September.

[18] The McDonald brothers borrowed the $28.5M deposit from Neil Golding. The loan, and $15M interest, were to be repaid within 90 days. MCG Group Pty Ltd, another of William's companies, and Paul's company, Fortrus, were guarantors. Those companies also promised to grant "mortgages and fixed and floating charges over all their assets…to secure their obligations under the guarantees".

**Shareholdings and Remuneration**

[19] At about this time, William told Crawford that Fortrus Resources had been incorporated. William and Paul governed Fortrus Resources. Fortrus and another of William's companies, B. McDonald Pty Ltd (No 2), each owned 50% of the capital of Fortus Resources. The object of its creation was to give Paul a stake in MDL 162. So shares in Coal Holdings were issued to Fortrus Resources. In that way, Paul acquired a substantial interest in the venture.

[20] In late July, Crawford approached William about remuneration. He sought an upward revision of the $80,000 "salary arrangements" because, he argued, his and MacKinnon's efforts deserved more. William proposed $400,000 annually plus superannuation. Crawford agreed. The same arrangement was put in place for MacKinnon. Consistently with that consensus, when in mid-August Crawford's

salary was next paid, the instalment was calculated at the annual rate of $400,000, plus superannuation[1].

[21] By this time, Resources had three directors: Crawford, MacKinnon and William. It held other mining tenements. Crawford proposed, and William agreed, that another company be incorporated to hold the tenements other than MDL 162. So MCG Exploration Pty Ltd ("Exploration") was established. B. McDonald (No 2) owned 80% of the shares; Mosman and Barraigh, 10% each.

[22] Crawford wanted to put in place a royalty agreement so that the exploitation of MDL 162 would generate income for him and MacKinnon after their equity participation ended. Coal eventually entered into such an arrangement with Pegasus Royalties Pty Ltd ("Pegasus"), as trustee of a unit trust in which Mosman, Barraigh and B.McDonald Pty Ltd (No 2) each held a unit.

**Funding**

[23] The deposit having been procured, Crawford and MacKinnon continued to approach prospective funders, looking for about $360M. They wanted $285M for Stanwell, about $45M to repay Golding, $5M to go to Nomura, investment banking advisers, as their success fee, about $17M for stamp duty and $4M to buy Banno's shares in Resources.

[24] In mid-July, Crawford, Paul, William and others met with representatives of Macarthur Coal Ltd ("Macarthur") including Nicole Hollows, the Chief Executive Officer, to interest Macarthur in funding the acquisition of MDL 162. While Macarthur considered its position, discussions continued with other possible funders.

[25] At about this time, the capital of Resources was restructured. B. McDonald (No 2) came to hold 800,000 shares; Mosman and Barraigh, 100,000 each. By mid-August, Crawford and MacKinnon had been appointed as directors of Resources and Coal Holdings.

[26] As other prospective sources of funding fell away, Crawford returned to Macarthur. In mid-August, Hollows indicated that Macarthur might acquire a 90% interest in Coal Holdings. Meanwhile, MacKinnon explored with Xstrata, a large mining company, funding for the MDL 162 acquisition. Xstrata would not commit.

[27] On 19 August, Hollows emailed Crawford to say that she had her Board's approval to offer $360M for a 90% stake. Crawford told William and MacKinnon the good news.

[28] Crawford met again with Hollows, working towards an arrangement under which Macarthur would provide the $360M. On 20 August, his draft Terms Sheet stipulated that Coal would use the $360M to acquire MDL 162. The document included a warranty that there would be no costs beyond those set out in it. These included approximately $17M in stamp duty, $43.5M for Golding, $5M for Nomura, $4M to pay out Bannister, $1.5M to reimburse Resources for legal costs, and $2.1M to reimburse Resources for expenses for technical consultants,

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[1] According to Crawford, the salary was paid by MCG Civil because MCG Resources did not have the money.

accounting and corporate advisers, which left $1.9M remaining in Coal "as working capital".

[29] William had another idea about using up the $1.9M. He suggested to Crawford that the money be used to buy out Paul. Hollows agreed to applying the $1.9M to have Paul "exit" the venture.

[30] By this time, about five months had passed since Crawford and MacKinnon had started work. But the two men still had no written consensus concerning their stake in MDL 162. With completion due in less than a fortnight, they wanted to finalise their shareholding and remuneration.

**More negotiations about conditions**

[31] Crawford and MacKinnon believed that they had made an enormous contribution to the venture, satisfied that the purchase of MDL 162 would not have been possible without them. They considered that they deserved a substantial share in Coal Holdings.

[32] On Saturday, 21 August, MacKinnon spoke to William, contending for a 2% share in Coal Holdings for himself and for Crawford. William thought that "fair enough".

[33] Soon after, having received Crawford's approval to the text, MacKinnon sent this email to William:

> "In order to avoid confusion I thought I should put in writing our agreement as just discussed such that at completion of the purchase of MDL 162 both Terry and myself, as directors of the MCG Group and MCG Resources, will each be entitled to 2% each of MCG Coal Holdings and/or MCG Coal, 90% will be owned by Macarthur Coal and the balance of 6% to McDonald.
> We also agreed that Terry and myself will continue as directors[2] on an equivalent base salary of $400K plus super to act in our capacities as directors with a view to further assisting you in building the MCG group of companies including MCG Resources, MCG Exploration and MCG Civil as and when required.
> Please acknowledge by return mail."

[34] William did not respond. Nor did Standen, to whom the email was copied. But nobody objected to it as an accurate record of the upshot of MacKinnon's conversation with William.

[35] On 21 August, a final version of the Macarthur Terms Sheet emerged. It stipulated for a warranty that, at completion, there would be no costs other than the $285M, the stamp duty, the money to be paid to Golding and:

> "all other liabilities of Coal and Coal Holdings arising out of commitments entered into before Friday 20 August including the payment to the retiring shareholders [Peter Bannister and Paul

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[2] Crawford and MacKinnon did not expect to remain as directors of Coal Holdings after the Macarthur acquisition of 90% of its issued capital. Crawford testified that he expected to continue on the boards of Resources and Exploration.

> McDonald (Fortrus)], payment to Nomura, legal advisers, technical advisers, corporate and accounting advisers and to the outgoing shareholder in Fortrus".

[36] Paul, however, had decided to remain. The $1.9M earlier earmarked to buy him out was no longer needed for that purpose.

[37] MacKinnon and Crawford turned their attention to how the $1.9M could be used to their advantage. They decided to propose that they would surrender 0.25% of their 2% "stake" in return for half each of the $1.9M. Crawford put that proposition to William, who thought it was a good idea. Crawford reported William's assent to MacKinnon.

[38] By 23 August, with settlement just nine days away, Macarthur had not finished its due diligence investigations. And a lot also remained to be done to complete the documentation.

[39] Crawford kept working towards the acquisition of MDL 162. His contribution to the Macarthur deal was acknowledged by William on 24 August when he rejected a suggestion that a public announcement be made that MCG Group was being advised by Nomura and Hynes. William insisted that his group was instead being "advised by Crawford Incorporated".

[40] On 25 August, Crawford and MacKinnon learned that the Chief Financial Officer of the MCG Group had calculated the costs incurred by William's companies in getting the project to that stage at $3,638,942.

[41] On 25 August, Paul emailed William to propose a restructure of shareholdings. He also suggested that the $1.9M be divided among William, MacKinnon, Crawford and Fortrus. The email invited William to work out the shareholding "fairly for all concerned taking into consideration financial risk, sacrifice and effort by all". Paul was, he wrote, "just glad to be able to help and get out of jail". "Jail" was a reference to the obligations Paul and Fortrus had assumed to Golding in connection with the deposit. His email concluded on this note:

> "Well done to yourself, Terry and John you have all done a fantastic job. If possible but not essential would love for us to all stay together I believe we could achieve a lot have a heaps of fun."

[42] William forwarded Paul's email to Crawford and MacKinnon. They were disappointed by Paul's proposal.

[43] Five days after MacKinnon had recorded William's assent to Crawford and MacKinnon continuing as directors on the $400,000 salary, on 26 August, Ms Christensen, an Associate at Hynes, sent William, Crawford and MacKinnon draft letters for the appointment of Crawford and MacKinnon to the boards of MCG Group Pty Ltd, Resources and Exploration. Her draft provided that the annual base salary of $400,000, plus superannuation, was to be "in aggregate for all Group companies" and "may be apportioned amongst the Group companies in the manner they see fit". More importantly, the draft said that "your employment may be terminated at any time without cause by…giving you [period to be discussed and agreed] notice or by paying you an amount equal to your remuneration in lieu of notice for that period". The solicitor's accompanying email referred to that issue as

one of a few matters that "will need to be discussed and agreed between the three of you".

[44] At 5.21pm on the 26th, William emailed Crawford, MacKinnon, Paul and Jack McDonald about shareholding and future remuneration, proposing:

> "Terry 15% Free Carry, work full time going forward.
> John 15% Free Carry, work full time going forward.
> Paul 10% Free Carry.
> Bill 60%, Cash flow what we doing, work full time."

and invited "thoughts?".

[45] Acknowledging Crawford's contribution, William's email thanked him for "getting this first deal across the line", expressing confidence that "it will be easier next time around".

[46] Crawford understood "work full time going forward" to refer to the $400,000 that he and MacKinnon were to be paid annually as directors.

[47] When MacKinnon saw the proposed restructure, he called Crawford to complain. Crawford was not attracted to it either. The two men agreed that MacKinnon would respond by email, which he did, asking William:

> "What happened to 1.75%! And anyway without cash our agreement was 2%"[3]

inviting William to call him.

[48] William's response asserted that his email was for Paul's consumption.

[49] Next day, Paul complained that 10% for him was "light". He asserted that William had promised him a 15% stake if he found a lender for the deposit, which he did; and he advanced other reasons for recognising his contributions through a more substantial shareholding. His email also addressed ways in which the shareholdings might be restructured, enquiring, for example, "what's the shareholding in Fortrus Resources and what role does that entity play…".

[50] William forwarded Paul's email to Crawford and MacKinnon, inviting their "thoughts?".

[51] Negotiations to resolve shareholdings and remuneration continued.

[52] At 1.40pm on the 27th, William's email to Crawford, MacKinnon and Paul suggested that they "sort out shares ect (sic) ASAP", observing:

> "Where it sits at the moment, of the 10% that we receive under the arrangement with Mac Coal (Terry you have done a great job here),
>
> John 17.5%
> Terry 17.5%

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[3] The 2% "without cash" reference related to the larger stake that Crawford and MacKinnon were willing to accept if they were not to be paid the $1.9M.

> Paul 15%
> MCG 50%
>
> 1.9 million goes to Terry and John split 50/50. 3.6 mill goes back to MCG Civil to cover costs."

[53] William wanted "thoughts" on his suggestion "as we need to finalise today".

[54] Crawford discussed the email with MacKinnon. Hoping to finalise their negotiations with the McDonald brothers, they decided to propose a further 0.25% reduction in their stake.

[55] Crawford and MacKinnon assessed Macarthur's 90% stake, bought for $360M, as valuing the tenement at $400M, which meant that every 0.25% interest was worth about $1M. Their agreed salary was $400,000, plus superannuation. They were also going to extract, in aggregate, $1.9M cash. In the circumstances, for two years remuneration as directors, they would each be willing to accept a further 0.25% reduction to a 1.5% stake.

[56] Before discussing the idea with William, MacKinnon called Paul to find out if he would be content with a 1.5% stake[4]. If they were to surrender a 0.5% stake in favour of Paul, that would increase his interest by 50% from the interest that William had suggested. It would also mean that Crawford, MacKinnon and Paul would have the same stake. Crawford and MacKinnon wanted to be sure that Paul would accept 1.5% before they approached William to negotiate for a two year notice period in the directorships in exchange for a 0.25% reduction in each of their stakes. Paul said that he would be happy with 1.5%[5].

[57] MacKinnon then called William. He spoke about "the numbers", comparing two year's salary to a 0.25% interest. He testified that when he proposed that he and Crawford each forego 0.25% of their stake for a $400,000 salary for the next two years, William "agreed overall".

[58] In March 2011, MacKinnon was to execute a statutory declaration to support a proof of debt for remuneration as a director of Resources. In it, he referred to that episode, declaring:

> "I said to Bill that Terry and I would further reduce our holding to 1.5% each (i.e. a reduction of 0.25% each) to address Bill's concerns about cashflow going forward, in return for the salary of $400,000 per annum plus superannuation, provided that we had a 2 year notice period in our employment agreements which would ensure that we would receive cash in lieu of the equity foregone."[6]

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4 This equated to 15% in the way in which these interests were discussed in the emails, where the percentages were stated as a proportion of the 10% stake in Coal Holdings that would not be taken by Macarthur.

5 MacKinnon did not discuss the two year notice period with Paul. None of his companies could have been affected by that.

6 Later in his statutory declaration, MacKinnon does say: "At no point did Bill or Hynes lawyers say that they disagreed with any of Terry's changes, or that there was any term which remained to be agreed. Bill had already told me on 27 August 2010 that he agreed to Terry and I each being paid $400,000 per annum plus superannuation for a minimum of two years, in return for the further

[59] William remembers MacKinnon telephoning and proposing that he and Crawford continue in their directorships on terms that they would have "two years notice". He responded, he testified, by asking MacKinnon to "put it in writing", not by agreeing to the suggestion.

[60] MacKinnon reported the result of his discussion to Crawford.

[61] That day, according to Crawford, he, too, discussed a two year notice period with William, telling him that, as a gesture in the interest of good relations, he and MacKinnon would offer up a further 0.25%. William shrugged and said "Okay, mate", which Crawford took to be assent.

[62] At 3.11pm, Crawford responded to an email from William offering to help with the documentation needed for settlement. In reply, Crawford wrote: "trust you are happy with proposed SH arrangements as per your conversation with J."[7] There was no reference to directorships.

[63] At 3.39pm on 27 August, MacKinnon emailed William, Paul, Jack and Crawford recording that:

> "Following discussions we have settled on the following ownership structure of the 10% stake in MDL 162. The ownership of MCG Resources and Fortus Resources will need to reflect this within the confines of the ownership of MCG Coal.
>
> Bill 55%
> Paul 15%
> John 15%
> Terry 15%
>
> 1.9 million goes to Terry and John split 50/50. 3.6 mill goes to MCG Civil to cover costs.
>
> The Royalty is split three ways between Bill / John /Terry."

[64] MacKinnon's email made no reference to the directorships.

[65] William asked Paul if he was happy with that proposal. Paul responded that, if Crawford agreed, "let's lock it in", adding that he would "like us all to stay together…". Crawford told Paul that he was content.

[66] At 3.57pm, William forwarded MacKinnon's 3.39pm email to Standen, instructing him to "lock it in".

[67] Shortly after 10.00am the next day, a Saturday, Crawford sent Hynes his version of the three letters of appointment. His covering email, addressed to Christensen, MacKinnon and William, invited attention to "my version incorporating my

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reduction in our proposed equity. I proceeded on the basis that the terms of my employment by MCG Resources had been agreed."

[7] SH must mean shareholder. No doubt J is MacKinnon.

amendments". In one of those amendments, Crawford filled in the blank space in the draft notice period with "2 years"[8].

[68] Although William did not object to the terms Crawford had proposed for the appointments, the letters to make them were never executed.

[69] Paul emailed Crawford to record that the two of them had not discussed the shareholdings proposed by MacKinnon the day before. Paul wrote: "if you agree…let's lock it in. I would like us all to stay together…let's have fun." Crawford replied that he had already agreed and was looking forward to the fun bit.

**Contriving the protagonists' agreements**

[70] William's instructions to his solicitors to "lock in" the proposals in MacKinnon's 27 August email required Hynes to document the deal. The four men, however, had trusts and companies all over the place.

[71] Phillip Keir, an accountant in private practice, was retained by the MCG Group. It fell to him to devise tax-effective mechanisms to implement the consensus.

[72] On Sunday, the 29th, Keir outlined his vision of the several agreements that should be put in place. It proved to be acceptable. Hynes set about the drafting.

[73] Crawford was working at the MCG Group offices at Cannon Hill. By 31 August, he had spoken there with William about the various documents Hynes had composed to implement the deal made a few days earlier.

[74] 1 September was the day for completion of the MDL 162 acquisition, which was to happen at noon at the city offices of Macarthur's solicitors. Early that morning, Crawford, MacKinnon, William, Paul and Standen met at Cannon Hill to sign the documents implementing the 27 August consensus.

**Documents advance consensus**

[75] Several documents were executed by the protagonists that morning.

[76] An agreement between Fortrus, "the Supplier", and Coal Holdings, backdated to 6 July 2010, stipulated:

> "2. The Supplier agrees to provide the Services to the Company for the Fee.
> 3.1 The Company must, in consideration for the Supplier providing the Services, pay the Supplier the Fee.
> 3.2 The Supplier shall submit invoices to the Company in respect of the Fee and the Company shall pay the amount of the invoice to the Supplier immediately upon demand."

[77] The Fee was "$1,725,000 plus GST", which equates to $1,897,500 including GST.

[78] The "Services" were defined to mean:

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[8] In his March 2011 statutory declaration, MacKinnon described this act as "consistent with recent discussions between Terry, Bill and" himself.

> "(a) the services set out in Schedule 2; and
> (b) all services, functions and responsibilities which are not specifically described in this but which are necessary or incidental to this provision of the Services contemplated by paragraph (a) above."

[79] Schedule 2 nominated these "Services":

> "
> - provide all requested advice in relation to the acquisition of MDL 162 by the Company (or its subsidiary);
> - assist the Company in procuring loan funds for the payment of the deposit under the sale and purchase agreement for MDL 162; and
> - provide security for loan funds obtained by the Company for payment of the deposit under the sale and purchase agreement for MDL 162."

[80] Paul signed for Fortrus. William signed for Coal Holdings.

[81] That was the way to get Crawford's and MacKinnon's $1.9M to Fortrus.

[82] In Keir's scheme, the next step was for Fortrus to give Barraigh and Mosman the money. The paperwork to sustain that transaction is an agreement, backdated to 6 July 2010, between Fortus and Barraigh, which stipulates that:

- [Barraigh] agrees to provide the Services to [Fortrus] for the Fee";
- Fortrus "must, in consideration for [Barraigh] providing the Services, pay [Barraigh] the Fee";
- Fortrus "shall pay the amount of the invoice to [Barraigh] immediately upon demand".

[83] The Fee was $862,500.00 plus GST. That amounts to $948,750.00, which is half Fortrus's $1,897,500.

[84] "Services" was defined to mean:

> "(a) all necessary and required advice in relation to the acquisition of MDL 162 by MCG Coal Holdings Pty Ltd (or its subsidiary); and
> (b) all services, functions and responsibilities which are not specifically described in this but which are necessary or incidental to the provision of the services contemplated by paragraph (a) above."

[85] Paul signed for Fortrus. MacKinnon signed for Barraigh.

[86] A consultancy agreement between Fortrus and Mosman in materially identical terms to that concluded with Barraigh was executed by Paul and Crawford.

[87] MCG Group Pty Ltd entered into a services agreement with Coal Holdings, backdated to 9 April 2010. MCG Group was to be paid $6.24M plus GST for Services defined in Schedule 2. The first was to manage all aspects of the

acquisition of MDL 162 by Coal Holdings or its subsidiary. The other two Services were the same as the second and third in the agreement between Coal Holdings and Fortrus.

[88] Terms of the shareholding restructure were set out in a document dated 31 August to which Resources, B McDonald (No 2), Mosman and Barraigh were parties.

[89] No attention was given to the draft letters of appointment of Crawford and MacKinnon to the boards.

**Claiming on the Cannon Hill Agreements**

[90] MacKinnon prepared invoices for Barraigh and Mosman to submit to Fortrus. Barraigh's was "for negotiation, arrangement and advice for financing of Fortrus Pty Ltd on its proposed acquisition", claiming $948,750. Mosman's, also for $948,750, was "for negotiation, arrangement and advice for short-term financing to Fortrus Pty Ltd".

[91] At the Cannon Hill meeting, MacKinnon handed the two invoices to William, who passed them to Paul, describing them as the invoices to be paid out of the money that was coming later that day.

**Mixed Feelings**

[92] Macarthur had a foreign state-owned enterprise as a shareholder and could not take its 90% in Coal Holdings without Foreign Investment Review Board approval. No such approval had been obtained by 1 September. So Macarthur initially was a lender, advancing the $360M pursuant to a loan facility agreement[9] to which Coal Holdings, Coal, Resources, Fortrus Resources and Macarthur were parties. Several companies within the MCG Group guaranteed the obligations of Coal Holdings under the loan facility agreement. So did Fortrus.

[93] The acquisition of MDL 162 was completed at about lunch time. Macarthur paid its $360M. The tenement was acquired from Stanwell. Through Pegasus, William, Crawford and MacKinnon were to derive royalties from exploitation of the coal. Through their companies and trusts, the four men retained a 10% stake in Coal Holdings. More than $50M was deposited into Hynes's trust account: a few million dollars were to be paid out to their companies. Crawford and MacKinnon were delighted. For William, the day was marred by an apprehension that he might not extract as much cash as he had expected.

[94] That morning, William did a "back of the envelope" estimate of what would remain of the $360M after paying Stanwell, Golding, Nomura's fee, stamp duty, and GST. His rough calculation indicated a risk that there might not be enough left to give Crawford and MacKinnon their $1.9M as well as get $3.6M to MCG Civil.

[95] William mentioned that prospect to Crawford and MacKinnon in a conversation that MacKinnon characterised as "animated". MacKinnon believed that the GST would be "coming back" and that there would be enough to pay everybody. He told William that. Crawford made it plain that he and MacKinnon wanted their entire $1.9M: William would be the one to suffer any "shortfall".

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[9] Crawford had a hand in negotiating the terms of that facility and an ancillary guarantee.

[96] William was annoyed by Crawford's and MacKinnon's indifference to his plight.

[97] Concerned about the possibility of a shortfall, on the Wednesday afternoon, William telephoned Keir and sought his advice.

**Action by Protagonists**

[98] Consistently with the agreements that Mosman and Barraigh had with Fortrus, and that Fortrus had with Coal Holdings, the first step in getting the $1,897,500 to Crawford's and MacKinnon's companies was for Coal Holdings to pay Fortrus.

[99] Standen prepared a form of authority to be signed by William, Crawford and MacKinnon, as the three directors of Coal Holdings, authorising Hynes to disburse $1.9M from the firm's trust account to Fortrus.

[100] In the early afternoon of 1 September, Crawford emailed Elisha Williams, Paul's personal assistant, asking for Fortrus's account details so that Hynes could transfer the $1.9M to Fortrus. Crawford expected that Fortrus would then distribute the money to Barraigh and Mosman.

[101] At 12.27pm, MacKinnon emailed Simon Tozer, who worked for Nomura. Tozer suspected that there might be an attempt to re-negotiate Nomura's fee. He emailed MacKinnon expressing a reluctance to adjust it. MacKinnon forwarded that to Crawford and William seeking their "thoughts?".

[102] At 1.16pm, William emailed MacKinnon and Crawford to ask: "What happens if we are $500k short…?"

[103] Without responding to William's question, MacKinnon sent him an email asking him to sign the authority so that the $1.9M could find its way to Fortrus. A few minutes later, Crawford sent William the Fortrus bank account details received from Elisha Williams.

[104] Standen emailed William, MacKinnon and Crawford a new trust account authority for payment of expenses. William still had not authorised disbursement of $1.9M for Fortrus. This latest draft authority did not do that either.

[105] William emailed the new form of authority to Crawford and MacKinnon and asked them to sign it.

[106] The omission of the $1.9M for Fortrus was not accidental.

[107] At 4.17pm, William emailed Crawford and MacKinnon to say that he wanted to put a hold on any further payments from Hynes until "we know where we are going to land with Nomura and the $700k"[10].

[108] That email was copied to Standen, who emailed Crawford and MacKinnon to seek their permission to make the payments mentioned in the draft authority that William had asked them to sign.

[109] Crawford called Standen about the omission of the $1.9M. Standen said that Crawford would need to sort that out with William.

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10 The $700k was a prospective stamp duty liability.

[110] About 5.30pm, MacKinnon emailed Standen to ask whether the payments to Fortrus had been made and, if not, "can you or Bill follow up".

[111] Standen's reply revealed that he had not received a direction to distribute funds to Fortus, adding that, as soon as he received such a direction, he would have the money paid.

[112] That afternoon, Crawford and MacKinnon met Hollows. She wanted their help in devising a description of the benefits of the acquisition of MDL 162 so that Macarthur could promote them to market analysts. Crawford and Hollows also discussed the possibility that MCG Group might assist Macarthur in exploiting the resource.

[113] On Thursday, 2 September, William emailed Crawford and MacKinnon to say that Nomura was seeking a $5.39M payment, asking, "What do you want to do, appears to have gone up?"[11]. A minute later, he asked them to authorise Standen to release the Golding money.

[114] Standen encouraged William to negotiate with Nomura for a lower success fee. William was willing to do that.

[115] At about 9.30am on the Friday, Standen suggested to William, MacKinnon and Crawford the text of an email to go to Nomura proposing immediate payment of a success fee calculated on a $329M base. At about that time, Standen emailed the three of them to explain that he was being chased by Golding's lawyer and sought consent to disburse the deposit loan repayment and interest.

[116] At 11.06am, William asked Standen to draw another payment sheet so that "we can get funds moving to bank accounts".

[117] William emailed Crawford and MacKinnon at 11.19am to say that they would need to leave about "$5,500,000 (plus the $700k stamp)" to allow for "Nomura and anything else". That arrangement, he wrote, "should allow MCG Civil to receive $2,600,000 to cover costs". He asked whether Crawford and MacKinnon approved of that.

**Absolute Assurance and Aftermath**

[118] William called Crawford and asked him to approve the Golding payment. Crawford wanted to know about "our 1.9". William replied that he would make sure that "you get the 1.9". The two men discussed the day of settlement. William said that "we" – a reference to himself and Paul – were not happy that Crawford and MacKinnon had sought the authority to pay Fortrus the $1.9M so soon after settlement. Appreciating that Fortrus was Paul's company, Crawford asked: "How do we know that Paul's going to pay the 1.9". William answered that he had spoken to his brother about it: "he's fine", William said, adding: "You have my word that you will get the money". Crawford pressed for an "absolute assurance" that that would be done. William gave it.

[119] At 11.28am, William emailed Elisha Williams and Paul (copying the communication to Crawford, MacKinnon and Standen) to say:

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[11] A reference to an earlier anticipation that Nomura would be getting $5M.

> "Elisha, I believe Paul has gone to Perth, I don't know whether he has spoken to you, you will need to get him to approve this I imagine.
> There will be $1,900,000 paid into the Fortrus account tonight, could you please pay these two invoices from that, can you let Erik know as well please so he can claim the GST back ASAP.
> As my understanding is, Fortrus do not have to raise an invoice for this payment, therefore it will not have to pay the GST on the money coming in and therefore have to pay it out again."

[120] The accompanying invoices were the two for Mosman and Barraigh that MacKinnon had handed over two days earlier.

[121] Four minutes later, Standen sent William, Crawford and MacKinnon a new trust account authority. It included provision for a disbursement to Fortrus of $1.9M. It did not authorise any large payment to MCG Civil.

[122] At 11.37am, William sought approval from Crawford and MacKinnon to pay MCG Civil its $2.6M. Standen amended the authority to provide for that and asked the three directors to sign it.

[123] At 11.52am, seemingly concerned to get the $1.9M to Fortrus, William asked Elisha Williams for the "bank account details of Fortrus again so I do not get it wrong".

[124] At 11.58am, William sent Crawford and MacKinnon an email headed "Tax Advice", which read:

> "I have received tax advice, the GST components from both Fortrus and MCG Resources will have to be passed on to a third party, therefore no GST will stay in either of those companies."

[125] Keir, presumably, was the source of that advice.

[126] Shortly after midday, William asked Crawford and MacKinnon to agree to the trust account disbursement that would see $1.9M paid to Fortrus and $2.6M paid to MCG Civil.

[127] Just before 1.00pm, Crawford forwarded to Standen the bank account details for Fortrus that he had obtained from Elisha Williams two days earlier.

[128] At 1.06pm, Crawford authorised Standen to release the disbursements. Soon after, MacKinnon also authorised that course.

[129] At 4.41pm, by email, Standen sent Crawford and MacKinnon a copy of a bank deposit slip showing that $1.9M had been deposited in Fortrus's bank account.

[130] The $1.9M[12] did not get beyond Fortrus.

[131] Crawford had sent Bannister an email telling of his meeting with Hollows about ongoing services. William had not been a recipient of that email initially. Bannister

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12 The evidence does not reveal why $1.9M rather than $1,897,500 was passed to Fortrus.

sent it to him that Friday night. William's terse response on hearing of Crawford's initiative was: "Fuck him".

[132] Some time on the Friday or the Saturday, Keir told William that the GST would not be coming back. That disappointing news was not what Crawford and MacKinnon had led him to expect. And, if correct, it meant that there would be about $1M less than the $5.5M needed to pay the $1.9M and the $3.6M.

[133] William asked Keir to put his pessimistic assessment about GST in writing.

[134] On Monday, 6 September, at 8.30am, Keir wrote an email to William (copies to MacKinnon and Crawford) canvassing the tax invoices to be raised. His email also discussed GST implications. He concluded on the note:

> "No one gets to keep the GST in these transactions, it all nets off."

[135] William understood Keir to be saying that a shortfall would eventuate.

[136] At 8.45am, William emailed Keir. This email, copied to Crawford and MacKinnon, recorded that he had been told that the "GST refund could be kept" – a reference, it seems, to advice from Crawford or MacKinnon – but that his understanding of Keir's advice was that that was "not the case".

[137] William promptly sent Keir's advice to Crawford and MacKinnon, asking:

> "Terry/John, there will be a short fall in funds to MCG Group out of the transaction, going forward, how do you propose to alleviate this situation?".

[138] Crawford saw that as an invitation to contribute from their $1.9M. Neither he nor MacKinnon responded.

[139] At night, on Tuesday, Crawford asked Standen whether the Fortrus payment would be made the next day.

[140] On the Wednesday, Hynes asked Crawford and MacKinnon to execute a directors' resolution to enable the share restructuring of Resources that would give Mosman and Barraigh a "1.5% effective interest MCG Coal". Crawford and MacKinnon signed the resolution.

[141] Later that day, Nomura invoiced Resources for $5,451,439.86.

[142] At about 2.00pm, MacKinnon emailed Paul about the $1.9M "which should by now be cleared in Fortrus's bank account". He asked that Mosman and Barraigh be paid "as per invoices" before Elisha Williams returned in about a week's time.

[143] Paul did not reply.

[144] When no payment had been made to Mosman or Barraigh by that afternoon, Crawford emailed William:

> "Do you plan to honour your word given to me unequivocally last Friday and ensure that the Fortrus monies (transferred from MCG Coal Holdings Pty Ltd direct to the account of Fortrus Pty Ltd last

> Friday by bank cheque) that are due and payable immediately to Mosman and Barraigh are paid into their respective accounts forthwith?"

[145] William did not respond.

[146] On the Friday, Paul sent Crawford's 8 September email to his brother. William sent it to Glen Vassallo, a partner at Hynes, asking him to "please call". That afternoon, Vassallo emailed the three Coal Holdings directors proposing "an outcome to the impasse that has arisen". His email records his impression of an irretrievable breakdown in their relationship.

[147] After deciding not to honour his assurance, William prevailed upon Paul to withhold the $1.9M from Barraigh and Mosman. Both men thereby prevented complete implementation of the 27 August consensus and the Cannon Hill services agreements[13].

[148] On 16 September, MacKinnon distributed notices convening meetings of the boards of Coal Holdings, Resources and Exploration for Friday, the 24th. One item of business was "Remuneration and management roles for each Director".

[149] On 21 September, William wrote to Bannister reflecting on developments. Things were getting very messy, he said, adding "I cannot forget what they did two weeks ago holding everyone's money out until they tried to get theirs…".

[150] Crawford and MacKinnon were refused access to records and accounts of Resources, and their attempts to hold Board meetings were frustrated by William. On their initiative, Resources, though solvent, was wound up.

**Directorships**

[151] Crawford and MacKinnon claim damages for breach of a contract concerning directorships alleged to have been made between William and MacKinnon on 27 August.

[152] There are reasons to be cautious about accepting MacKinnon's account of the conclusion of his conversation with William about the notice period for termination of the directorships, prominent among them that:

- MacKinnon emailed William to record their discussion about shareholdings on both 21 and 27 August. No email to record a consensus about the two year notice period was sent;
- The notion that that omission is explicable by a concern not to tell Paul[14] is unappealing. For one thing, such a consensus could easily have been recorded in a separate email that was not copied to him;

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13 It is not, however, alleged that they breached an implied "negative covenant not to hinder or prevent the fulfilment of the purpose of the express promises made": see *Peters (WA) Limited v Petersville Limited* (2001) 205 CLR 126, 142, [36]; cf *Concrete Pty Limited v Paramatta Design and Development Pty Ltd* (2006) 229 CLR 577, 628, [156]; and K Lewison and D Hughes, *The Interpretation of Contracts in Australia*, (2012), [6.12].

14 In his March 2011 statutory declaration, MacKinnon gave a different reason. There he said that his email did not refer to the salaries "because Bill's earlier email had not referred to them". He cannot recall why his email did not refer to the consensus about the two years. He thinks it was "probably just an oversight", although "perhaps…it wasn't really for Paul's eyes".

- MacKinnon did nothing about the letters of appointment. He did not contact Hynes to say that William had agreed to a two year notice period. Nor did he advert to the appointments on 1 September;
- It is not altogether implausible that, as William testified, MacKinnon and Crawford were content to accept a 1.5% stake because Paul would not agree to their getting more[15].

[153] Crawford's account of his conversation with William about directorships[16] was not contested in cross-examination or in William's testimony. And it is consistent with MacKinnon's having secured William's assent to two years notice. There is, however, some cause to reflect before accepting Crawford's evidence in this respect. His recall generally looks to be somewhat selective. More pointedly:

- He made no record that William had agreed to the two year notice period;
- When MacKinnon emailed William at 3.11pm on the 27th, he had already told Crawford about his conversation with William. Yet Crawford's email refers to shareholdings: it says nothing about directorships;
- When Crawford sent his version of the letters of appointment to Hynes with "my amendments", his covering email did not suggest that a two year notice period had been discussed, let alone agreed, with William.

[154] Other factors deserve consideration:

- William had no pressing reason to reject two years notice in exchange for a 0.5% reduction in the stakes of Crawford and MacKinnon. With no prejudice to his stake, that brought Paul's interest into line with theirs. Paul wanted more than the 1% he had been offered. Appeasing him made sense, personally and from a business perspective. Moreover, on 27 August, relations among the four men were comfortable and productive; and they all expected Crawford and MacKinnon to continue as directors of MCG companies[17]. Two years notice would have involved Resources in a substantial liability if Crawford or MacKinnon were ever to be dismissed without cause. But that prospect was not on anybody's mind at the time;
- MacKinnon was anxious that he be compensated for a reduction in his stake. It is unlikely that he would have settled for a 1.5% interest unless William had agreed to two years notice;
- MacKinnon is not the kind of man to have fabricated his story; and had William told him to put the two year notice proposal in writing, MacKinnon, in my assessment of him, would have done that;
- The reliability of William's "put it in writing" version needs to be evaluated in the light of his standards. And it is money that matters to him, not his integrity, as his behaviour reveals.

[155] All considered, it is more probable than not that William did agree, in effect, that two years could be inserted into the letters of appointment as the notice period left blank in Christensen's drafts.

[156] Despite that, the claim in respect of directors' remuneration fails.

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15 And they suspected that William, who had not acknowledged MacKinnon's 21 August email, was looking to renegotiate the shareholding split recorded in it.

16 See [61].

17 Resources and Exploration at any rate.

[157] The statement of claim alleges:

> "During a conversation with William on 27 August 2010 Mackinnon, on behalf of himself and Crawford, offered to William to reduce their respective interests to 1.5% in consideration of William agreeing to cause Resources to pay them directors fees in the sum of $400,000 per annum each plus superannuation for at least the following two years. [And] William accepted the offer."

[158] William was not asked to commit Resources to paying salaries for two years come what may. What was under discussion with MacKinnon was something materially different: the period of notice to terminate a directorship without cause.

[159] The case pleaded has not been proved.

**Implied obligation to co-operate**

[160] Claims are made by Crawford and MacKinnon against William and Paul[18] for $950,000 damages for breach of the 27 August email consensus.

[161] The statement of claim alleges:

> "By an agreement made on 27 August 2010 by an exchange of emails, Crawford, MacKinnon, William and Paul…agreed as follows:
>
> (a) The Shareholdings in Resources and in Fortrus Resources would be such that:
>
> (i) Interests associated with William would enjoy a 5.5% interest in Coal;
>
> (ii) Interests associated with Paul would enjoy a 1.5% interest in Coal;
>
> (iii) Interests associated with Crawford would enjoy a 1.5% interest in Coal;
>
> (iv) Interests associated with MacKinnon would enjoy a 1.5% interest in Coal;
>
> (b) The sum of $1.9 million, being part of the moneys advanced by Macarthur …, would be paid to Crawford and MacKinnon (being 50% each to them respectively);
>
> (c) …"

[162] That is admitted. It is also common ground that the consensus constitutes a contract between Crawford, MacKinnon, Paul and William[19].

[163] The pleading continues:

> "It was an implied term of the said agreement that each party would do all things necessary to give the other parties the benefit of the contract, including by doing all things reasonable and necessary to cause the sum of $1.9M to be paid to Crawford and MacKinnon (or

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18 "jointly", as the prayer for relief in the statement of claim puts it.

19 It is not suggested that the consensus did not give rise to a contract because, for example, the parties did not intend to be bound until a more formal record was signed.

> as they directed[20]) from the moneys advanced by Macarthur and which would be paid on settlement."

[164] The McDonalds' only defence[21] is that no such term would be implied. Their contention is that there is no obligation on any party to the contract "to do anything", and "in the absence of such obligations no term would be implied compelling the party to cause a payment to be made". Accordingly, to succeed on this damages claim, the plaintiffs need only establish the implied term alleged.

[165] The 27 August contract expressly required things to happen[22]: shares had to be issued to give effect to the agreed restructuring; and the $1.9M had to be "paid to Crawford and MacKinnon". Those promised, fundamental outcomes could not be achieved without action by the parties.

[166] In these circumstances, the applicable principle is that stated by Mason J[23] in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*[24] in this way[25]:

> "…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."
>
> 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*:

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20 In testifying, William accepted that the money was to be paid to Crawford and MacKinnon or, if they preferred, their companies. Consistently with this, it is not suggested that any significance attaches to the circumstance that the Cannon Hill agreements had the money going to Mosman and Barraigh.

21 It is not suggested that the 27 August contract was discharged in any respect by the mere execution of the Cannon Hill agreements: contrast *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471, 484; cf N C Seddon, R A Bigwood, M P Ellinghaus, *Cheshire & Fifoot, Law of Contract*, 10th Aust ed., (2012), pp 410-412. Nor is it suggested that (i) the money could have reached Crawford and MacKinnon or their companies without Paul's co-operation; or (ii) William did all that was required of him by getting the $1.9M as far as Fortrus. A pleaded allegation that payment of the $1.9M was dependent on a $5.5M "surplus" being available for distribution "between (sic) MacKinnon / Crawford / McDonald" was abandoned.

22 cf *Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd* [2006] QCA 126, [52]-[54].

23 Gibbs, Stephen and Aickin JJ agreeing.

24 (1979) 144 CLR 596, 607.

25 Omitting footnotes.

> "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."

[167] So this claim succeeds.

**Deceit?**

[168] Each plaintiff claims against William $948,750 as damages for deceit.

[169] This fraud case is, in substance, that when William gave his "absolute" assurance that the $1.9M would be paid to Mosman and Barraigh, he had not formed an intention to do that. So the focus is on William's state of mind when, at about 11.00am on Friday, 3 September, he spoke to Crawford[26].

[170] William was asked whether, when he promised Crawford that the $1.9M would be paid, he intended to do his "best to get Fortrus to Pay". He answered: "Yes". His explanation for Fortrus's failure to pay Barraigh and Mosman is that he changed his mind. He did so, he testified, after Crawford and Mackinnon did not respond to his email on 6 September asking what they proposed to do to "alleviate" the "short fall in funds to MCG". He then decided not to honour his "absolute assurance" because, he testified, "there is a dispute over the money because there is a million dollars missing" – a reference to MCG Civil getting only $2.6M. And he anticipated that withholding the money would bring Crawford and MacKinnon to the negotiating table.

[171] What, if any, intention had William formed when he gave his assurance?

[172] By the Friday, William was not well disposed to Crawford or MacKinnon. He was upset by their indifference to the risk that MCG Civil would not get its $3.6M if they got their $1.9M. His attitude is understandable.

[173] Before the 27 August consensus, the three men knew that:

- the MCG Group's CFO had estimated that William's companies had spent about $3.64M on the venture;
- $1.9M was the figure that Crawford and MacKinnon calculated would remain after expenses were met, including $3.6M for William's companies[27];
- William had not been alerted to a risk that $5.5M might not remain for distribution to the three men (or their companies) after other payments were made from the $360M;

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[26] It is not pleaded that William is guilty of fraud on the basis that, having received Keir's advice after giving the assurance, he changed his mind but did not tell Crawford or MacKinnon before they acted on the assurance to authorise the disbursements: cf *Permanent Trustee Australia Limited v FAI General Insurance Company Limited (In Liquidation)* (2003) 214 CLR 514, 534, [38].

[27] The 20 August draft Terms Sheet anticipated that $3.6M would go to Resources.

- they had not talked about adjustments to shareholdings or cash should there not be enough money left to pay MCG Civil its $3.6M were Crawford and MacKinnon to take $1.9M.

[174] Against this background, it is no surprise that Crawford's and MacKinnon's unwillingness to bear any of the burden of the shortfall angered William.

[175] In an affidavit in other proceedings, William deposed:

> "…I did state to Crawford that the $1.9 million would be paid by Fortrus Pty Ltd and I did so in emphatic terms. But I did this in order to obtain Crawford's agreement to the immediate payment to Golding and Bannister…I required Crawford's and MacKinnon's agreement for those payments (they had to sign documents authorising the payment as directors of MCG Coal Holdings Pty Ltd) and Crawford had said things to the effect that no such authorisation would be forthcoming until he and MacKinnon had been paid the $1.9 million. I couldn't justify an internal dispute delaying payment to Golding and Bannister, so I told Crawford that he and MacKinnon would get the $1.9 million."

[176] William resented seeing MacKinnon and Crawford get their way and the $1.9M. But his pronounced lack of enthusiasm for giving effect to the assurance does not necessarily mean that he did not intend to fulfil it when he so reluctantly gave it.

[177] MacKinnon had advised William on 1 September that the GST, thought to be roughly $1M, would come back. William was, as he testified and I accept, willing to wait an expected 90 days or so for that eventuality. MCG Civil would then get the rest of its $3.6M.

[178] Keir's advice[28] that the GST was not coming back put a new complexion on things. It was one thing to wait for the GST to return; another to lose it altogether. William could not accept that MCG Civil would forego about $1M while Crawford and MacKinnon lost nothing. That is why, on 6 September, when transmitting Keir's advice, William asked Crawford and MacKinnon what they proposed to do to "alleviate" the "situation".

[179] The contemporaneous documents matter.

[180] William sent his 11.58am email less than an hour after he gave his assurance. His email does advert to GST. It is not clear, however, that he was referring to advice that the GST would not be coming back. Even if he is, there is no adequate foundation for an inference that Keir gave his advice before William gave his assurance. Indeed, such evidence as there is points in a different direction.

[181] Straight after William gave the assurance, he emailed[29] Elisha Williams asking that Paul approve payment of the Barraigh and Mosman invoices. The second and third paragraphs refer to GST. But these references look to reflect MacKinnon's advice about eventual return of the GST, not an assumption that the GST would not be

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28 Keir, presumably, has records that would show what advice he gave and when. Neither side called him. No records of his are in evidence.

29 The email was copied to Crawford and MacKinnon but not to Keir.

coming back. Moreover, the next email William sent, at 11.52am, also conforms with an intention on his part to facilitate payment to Fortrus so that it could pay Barraigh and Mosman.

[182] The plaintiffs contend that William's 11.28am email was a ruse, designed to comfort Crawford and MacKinnon that he was giving effect to his assurance when he was not fully committed to that outcome. Such an inference is not warranted.

[183] William's testimony does need to be approached cautiously[30]. But in relation to the assurance and his change of heart, his account is plausible. It fits with records. And it is not in disconformity with other evidence[31].

[184] It has not been proved that William did not intend to adhere to his assurance when he gave it[32].

[185] The deceit claim fails.

**Services Contract**

[186] Barraigh's claim[33] for its $948,750 "Fee" under its 1 September agreement[34] with Fortrus is resisted on these grounds[35]:

- Fortrus never requested Barraigh…to provide consultancy services;
- Barraigh had to provide "services" as defined in the agreement before becoming entitled to be paid the consultancy fee and did not do so.

[187] The first of those contentions may be shortly disposed of: the 1 September agreement itself is, or at least evidences, the request for services.

[188] The second defence merits discussion.

[189] The Services Agreement stipulated that Barraigh "agrees to provide the Services to the Company for the Fee". The "Company" is Fortrus. "Services" means "all necessary and required advice in relation to the acquisition of MDL 162 by" Coal

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30 See [154].

31 The evidence does not reveal when Keir told William that the GST would not be coming back or when William asked Paul to retain the $1.9M in Fortrus.

32 A controversial element of the fraud case is proved: action in reliance on William's implied representation as to his state of mind. Had Crawford not received the assurance that Fortrus would pay (and seen William's email to Elisha Williams), he would not then have approved those payments.

33 In debt and, alternatively, for damages. Incidentally, the plaintiffs do not propound an estoppel by convention founded on the notion that the Cannon Hill agreements reflect a shared assumption that "services" had been supplied to Fortrus at its request: cf *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, 244; *Grundt v Great Bolder Propriety Goldmines Ltd* (1937) 59 CLR 641, 676 ("Parties may adopt as a conventional basis of a transaction between them an assumption which they know to be contrary to the actual state of affairs"); and K. R. Handley, *Estoppel by Conduct and Election*, (2006), Chapter 8.

34 It is common ground that the agreement sets out a genuine consensus intended to create enforceable contractual relations. In other words, the parties agree that it is not a sham. cf *Commissioner for Fair Trading v TLC Consulting Services Pty Ltd* [2011] QSC 233, [43]; *R v Jo* [2012] QCA 356, [23]; and Michael Kirby, "Of Sham and Other Lessons for Australian Revenue Law", (2008) 32(3) *Melbourne University Law Review* 861.

35 It is not suggested that MacKinnon's services were not Barraigh's.

Holdings as well as "necessary or incidental" "services, functions and responsibilities".

[190] William testified that no services were provided to Fortrus by Crawford or MacKinnon. He accepted, however, that Coal Holdings paid Fortus $1.9M because Fortrus had the right to that money under its Services Agreement with Coal Holdings. Fortrus, however, had no such entitlement unless it had provided its agreed "Services"[36] to Coal Holdings. And Fortrus did not supply such services unless it did so by making available to Coal Holdings services that Crawford or MacKinnon had supplied to it. But that William is inconsistent[37] concerning the rights of Barraigh and Fortrus is by the way. The question is whether Barraigh earned its fee by performing its side of the bargain with Fortrus.

[191] Until the Agreement was made, Fortrus had not requested MacKinnon to provide "services". William, not Paul, had retained MacKinnon; and he had worked for William's companies. Crawford testified, however, that he and MacKinnon "provided very critical services to Fortrus and others". Through their labours, Fortrus:

- got a stake in a valuable mining tenement by its shareholding in Fortrus Resources[38];
- would not be called on to honour its guarantee to Golding.

[192] MacKinnon's work between 6 July and 1 September[39] fell within the definition of those "services"[40] that needed to be performed for Barraigh to earn its "Fee".

[193] On the defence case, however, Fortrus is not liable because such services were not supplied "to" it.

[194] On the face of the agreement, "to…" does look to signify a direct connection rather than an attenuated relationship where "the Company" just happens to benefit from services given to others. But this commercial contract requires a businesslike interpretation[41]. And its apparent object and the surrounding circumstances known to the parties point to an interpretation of "to" that comprehends "services" delivered primarily for William's companies.

[195] On 1 September, all concerned knew:

- what Crawford and MacKinnon had done, and what little remained for them to do, in connection with MDL 162;

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36 See the definition of "Services" in [78].

37 William was asked why he did not tell Crawford that the $1.9M would not be paid to Barraigh and Mosman because they had not provided services. He answered: "I don't know".

38 The benefits may sustain committing Fortus's assets to the payments: see, generally, *ANZ Executors & Trustee Company Limited v Qintex Australia Limited* [1991] 2 QdR 360.

39 Completion of the acquisition of MDL 162 took place a few hours after the agreement was signed. During that time, MacKinnon provided "services": he played a small part in superintending execution of the documentation. Later, he facilitated disbursement of the $360M. As the claim succeeds in respect of pre-1 September "services", it is unnecessary to decide whether what MacKinnon did on and after 1 September suffices to sustain Barraigh's claim.

40 See [84].

41 cf *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, [8]; see also *Elderslie Property Investments No 2 Pty Ltd v Dunn* [2008] QCA 158, [20]-[21]; and *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219, [25]-[27].

- the genesis of the agreement in Keir's advice;
- the purpose intended to be served by the document; and
- the commercial advantages that Fortrus had derived from Crawford's and MacKinnon's work.

[196] An interpretation of "to…" that confined its reach to services supplied directly to Fortrus would not give effect to those considerations.

[197] Moreover, the parties backdated the agreement to July, which manifests an intention that it was to apply to services supplied before execution[42]. The backdating was pointless unless it implicitly acknowledged that Barraigh had provided "services" to Fortrus.

[198] In these circumstances, to make commercial sense[43] of the agreement, "to [Fortus]" must comprehend "services" benefiting the company.

[199] Such services were supplied.

[200] Barraigh's claim therefore succeeds.

[201] Mosman's claim raises no different consideration. Its claim for $984,750 succeeds.

**Disposition**

I will hear the parties concerning the form of order, including as to costs, interest and any significance that attaches to success against Paul and William on the 27 August contract as well as against Fortrus in relation to the Cannon Hill agreements.

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42 cf *Murray Goulburn Cooperative Co Ltd v Cobram Laundry Service Pty Ltd* [2001] VSCA 57, [16]. As to the retroactive effect of such backdating, see *Akron Tyre Co Pty Ltd v Kittson* (1951) 82 CLR 477, 488; *Hawley Partners Pty Ltd v Commissioner of Stamp Duties* [1996] QCA 270, pp 5-6; and J. L. Kwall and S. Duhl, "Backdating", (2008) 63 *The Business Lawyer* 1153, 1169.

43 cf *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530, 559, [82]; and Lewison and Hughes, *op cit*, [2.06] – [2.07].