SUPREME COURT OF QUEENSLAND

CITATION:	*Qld Alumina Ltd v Alinta DQP P/L* [2007] QCA 387
PARTIES:	**QUEENSLAND ALUMINA LTD** (plaintiff/appellant) **v** **ALINTA DQP PTY LTD (FORMERLY DUKE QUEENSLAND PIPELINE PTY LTD)** ACN 083 050 284 **& ALINTA DEQP PTY LTD (FORMERLY DEI QUEENSLAND PIPELINE PTY LTD)** ACN 083 050 104 (defendants/respondents)
FILE NO/S:	Appeal No 361 of 2007 SC No 5274 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	23 May 2007; 24 May 2007
JUDGES:	McMurdo P, Holmes JA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. Set aside the judgment given for the respondents and substitute judgment for the appellant in an amount to be determined, with costs of the trial and of the appeal** **3. Should consent orders not be filed within 21 days to reflect agreement as to the amount of judgment, remit the issue of quantum to the Trial Division for determination in accordance with these reasons**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where the appellant operates an alumina refinery – where the appellant entered into a Gas Transportation Agreement (GTA) with the respondent to supply natural gas to the refinery via a pipeline – where the GTA, in the form of a Transportation Service Agreement (TSA), contained Access Principles which set the tariffs and transportation costs chargeable by suppliers – where the rate cap and tariffs contained in the Access Principles were set in

Australian dollars – where the TSA contained a clause fixing payment in US dollars and stipulated an exchange rate which was fixed for the duration of the agreement – where the appellant argued at trial that there was an inconsistency between the rates of payment set by the TSA and the maximum tariff and rate cap prescribed by the Access Principles – whether this resulted in a shortfall in the respondents' payment of rebates for charges exceeding the rate cap – whether the terms of the agreement were internally inconsistent

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where the legislative scheme governing pipeline access changed in 2000 when the *Gas Pipelines Access (Queensland) Act 1998* (Qld) came into effect – where the new legislative scheme required access arrangements to be established – whether the agreement was varied by the change in legislative scheme and incorporation of the access arrangement into the Access Principles

RESTITUTION – MISTAKE: RESTITUTION ARISING FROM A PLAINTIFF'S MISTAKEN ACTIONS – RECOVERY OF MONEY PAID UNDER MISTAKE – THE NATURE OF THE MISTAKE – IN GENERAL – where the appellants became aware that payments exceeded the Maximum Tariff under the Access Principles – where the appellant's in-house counsel formed a preliminary view that the money was being paid in error – where subsequent legal advice was obtained – where a letter of demand was sent to the respondents some time later – whether *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 was correctly interpreted – whether the payment of the money that exceeded the Maximum Tariff was voluntary

ESTOPPEL – ESTOPPEL IN PAIS – THE REPRESENTATION – BY CONDUCT – IN GENERAL – where the respondent pleaded at trial that the appellant had represented that Part VI cl 1(a) of the TSA was legal and binding and not inconsistent with any other part of the agreement – where the respondent contended at trial that the appellant was estopped by representation – whether a "clear and unambiguous" representation was made out

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – POINTS AND OBJECTIONS NOT TAKEN BELOW – WHEN ALLOWED TO BE RAISED ON APPEAL – OTHER MATTERS – LEGAL GROUND APPEARING ON EVIDENCE – where the respondent on appeal sought to amend the defence to argue estoppel by convention – where the respondent on appeal argued that the underlying considerations for estoppel by convention and

estoppel by representation are identical – whether it is just to allow reliance on estoppel by convention on appeal

Acts Interpretation Act 1954 (Qld), s 23, s 24AA
Gas Pipelines Access (Queensland) Act 1998 (Qld), s 60
Petroleum Act 1923 (Qld), s 108(3), s 112(2), s 114, s 114A, s 123
Petroleum Amendment Act 1995 (Qld), s 4(1), s 61I(3), s 61O, s 61X(2)(a)

David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353, applied
Coulton v Holcombe (1986) 162 CLR 1, considered
Foran v Wight (1989) 168 CLR 385, considered
Moratic Pty Ltd v Gordon [2007] NSWSC 5, considered
Thompson v Palmer (1933) 49 CLR 507, considered
Water Board v Moustakas (1988) 180 CLR 491, considered

COUNSEL: W Sofronoff QC, with D Kelly, for the appellant
P L O'Shea SC, with A M Pomerenke, for the respondent

SOLICITORS: Corrs Chambers Westgarth for the appellant
Freehills for the respondent

[1] **McMURDO P**: Holmes JA has set out in her reasons the relevant facts, legislation and issues at the heart of the dispute arising out of the complex contractual arrangements between the appellant and the respondents under their Gas Transportation Agreement. My reasons (largely agreeing with her Honour's reasons) for allowing the appeal can be briefly stated.

[2] This agreement comprised the Transportation Service Agreement, Access Principles, a Rate Schedule and Transportation General Terms and Conditions. I agree with her Honour's reasons for concluding that under this agreement the charges the respondents were entitled to make pursuant to Pt VI cl 1 Transportation Service Agreement were subject to the Maximum Tariff set out in the Access Principles. This conclusion is to be preferred to the respondents' contentions. It is consistent with Transportation Service Agreement Pt I cll 1 and 2, Pt VI cl 3, and cl 27 of the Transportation General Terms and Conditions. It follows that cl 4.4 Access Principles sets out the maximum tariffs and charges payable by the appellant to the respondents under their agreement. The learned primary judge erred in concluding that cl 1(a) of Pt VI Transport Service Agreement can be read together with cl 4.4 of the Access Principles. These provisions are inconsistent. Clause 27 Transportation General Terms and Conditions requires that cl 4.4 of the Access Principles prevail. The agreement should be interpreted accordingly.

[3] I also agree with Holmes JA's reasons for concluding that the 2001 Access Arrangement did not relevantly affect the terms of the agreement between the parties.

[4] It follows that, subject to any successful defence or counterclaim, the appellant is entitled to restitution of the amount overpaid to the respondents whilst acting under a mistake as to the effect of the agreement.

[5] The next issue is at what date the appellant's claim for restitution ends because payments were made with knowledge of the mistake and were therefore voluntary. The resolution of this issue requires an analysis of the relevant facts and law. The appellant's contention on appeal was that it was making payments to the respondents under a mistake as to the effect of their agreement until it sent the respondents a letter of claim on 26 November 2003. The respondents contended that any restitutionary claim ended on 22 July 2002 when the appellant's employee, Mr Mouna, was sent the following email by the appellant's in-house legal counsel, Ms Baker:

> "Clearly regardless of the provisions in the Agreement there appears to be no power to charge a rate higher than that contained in the Pipeline Access Principles. If the conversion of the $US rate exceeds the rate within the Pipeline Access Principles then PGTQ will have breached the provisions of the Agreement and the loss suffered by QAL would be that amount paid over and above the maximum rate as outlined in the Pipeline Access Principles."

[6] Mr Mouna was the appellant's Principal Buyer-Raw Materials and Energy. He had a background in manufacturing, management and purchasing. He was not a lawyer. Ms Baker's conclusion in her 22 July email was qualified by the following statement in the introductory paragraph:

> "Please note that whilst I have reviewed the documentation you have provided, this advice is qualified in that the documentation is a looseleaf photocopy only and accordingly it is not clear whether it is an accurate reflection of what was agreed."

[7] In her evidence at trial, Ms Baker said that her view expressed in the email was preliminary only and that she made this clear to Mr Mouna. Ms Baker's evidence was supported by Mr Mouna's subsequent email to the appellant's Peter Odgers on 25 July 2002 which referred to Ms Baker's "preliminary advice" and continued:

> "The issue is complicated because my understanding is that [the appellant] requested [the respondents] to invoice in US dollars and [the appellant] has been paying the invoices as the exchange rate changed without question which indicated [the appellant's] acceptance that we were being charged the correct amount. Considering the amount of money involved I have requested [Ms Baker] to get [the appellant's solicitors] to independently review our documentation, contract and the Access Principles to ensure we are correct; …
>
> I am concerned that we may have either made an error, an out of date set of Access Principles or there is something we have missed; therefore an independent review is a must.
>
> In the meantime, I have not pursued this issue with Duke at all because we are entering negotiations re transport of gas in the first week of August. If we are correct about the overpayment, I don't want Duke to use the negotiation for gas transport as an offsetting process to minimise financial impact on Duke.
>
> I will keep you advised."

[8] In cross-examination, Mr Mouna maintained that at that time he was still in doubt as to whether the appellant had made an overpayment.

[9] On 25 July 2002 Ms Baker wrote to the appellant's solicitor in terms which included:

> "Whilst it's not abundantly clear it is our view that the terms of the Gas Transportation Agreement cannot override the Pipeline Access Principles (see cl VI(3) of the Agreement and cl 27 of the Transportation General Terms and Conditions).
>
> We would ask that you review the documentation with a view to advising [the appellant] as to whether [the respondent] is empowered to set a maximum Rate Cap that is higher than the maximum rate cap outlined in the Pipeline Access Principles. …"

[10] On 15 August 2002 the appellant received its solicitor's considered eight page response which included the following summary:

> "A case by [the appellant] that the Rate Cap mechanism should be based on the Australian dollar amount not the US dollar amount is not without merit but should be approached with caution. We would be happy to assist you in formulating your approach on this including the drafting of any initial correspondence with [the respondents]. However, before taking further action, we think it is important to review the available records of [the appellant] relating to the negotiation of the [agreement] and to have the benefit of the recollection of [the appellant's] personnel involved in the negotiation of the matter. Although this material may not be admissible for the purpose of interpreting the agreement, it would be useful in better understanding the intended positions of the parties before initiating any action."

[11] Almost a year later on 11 August 2003 Mr Mouna emailed Ms Baker stating that he would like to re-open the issue and develop a strategy to recover moneys paid in excess of the cap specified in the Access Principles. Ms Baker responded that it would be best to discuss the matter with the appellant's solicitor and ask for an advice on prospects of success.

[12] The appellant's solicitor emailed Ms Baker and Mr Mouna on 23 September 2003 in the following terms:

> "Following our meeting earlier this month I have further reviewed the advice given in our letter of 15 August 2002 in relation to the Gas Transportation Agreement (GTA) with Duke.
>
> I remain of the view that the GTA evidences a clear intention on the part of [the appellant] and [the respondents] that all rates relevant to the Gas Transportation Service, including the Rate Cap were to be expressed in US$. While there may be grounds for arguing that the Rate Cap mechanism should operate on the basis of the A$ amount (and not the US$ amount) the better view is that the US$ rates and Rate Cap would prevail .
>
> …"

[13] The following day the appellant's solicitor gave a further advice which concluded that there was "… scope for [the appellant] to argue that the Rate Cap mechanism should take effect on the basis of the A$ amount and override the inconsistent provisions of the GTA."

[14] On 12 November 2003 the appellant's solicitor prepared a draft letter of claim to be sent to the respondents. That letter was sent on 26 November 2003. It claimed an entitlement for the repayment of moneys overpaid by the appellant under the Gas Transportation Agreement.

[15] The respondents in support of their contention emphasise a passage in the majority decision of the High Court (Mason CJ, Deane, Toohey, Gaudron, McHugh JJ) in *David Securities Pty Ltd v Commonwealth Bank of Australia*,[1] set out later in this paragraph. That passage was also relied on by the primary judge in accepting the respondents' contention. To be properly understood, the passage should be considered in its full context. Their Honours were discussing the proposition that payment made in settlement of an honest claim is irrecoverable as a mistake[2] and observed that *Bilbie v Lumley*[3] became recognised as authority for the broad proposition that recovery will not be ordered of moneys paid under a mistake of law. Their Honours went on to consider three cases: *Werrin v The Commonwealth*,[4] *South Australian Cold Stores Ltd v Electricity Trust of South Australia*[5] and *J & S Holdings Pty Ltd v NRMA Insurance Ltd*.[6] Their Honours continued:

> "*An important feature of the relevant judgments in these three cases is the emphasis placed on voluntariness or election by the plaintiff. The payment is voluntary or there is an election if the plaintiff chooses to make the payment even though he or she believes a particular law or contractual provision requiring the payment is, or may be, invalid, or is not concerned to query whether payment is legally required; he or she is prepared to assume the validity of the obligation, or is prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment.* We use the term 'voluntary' therefore to refer to a payment made in satisfaction of an honest claim, rather than a payment not made under any form of compulsion or undue influence. If such qualifying, factual circumstances are considered relevant, the sweeping principle that money paid under a mistake of law is irrecoverable or even the Federal Court's modification of that principle to the effect that mistake of law does not on its own found an action for the recovery of money paid is broader and more preclusive than is necessary. As the authorities cited earlier in explanation of the term 'mistake of law' make clear, the concept includes cases of sheer ignorance as well as cases of positive but incorrect belief. To define 'mistake' as the supposition that a specific fact is true, as Parke B. did in *Kelly v. Solari*, which was a mistake of fact case, leaves out of account many fact situations. A narrower principle, founded firmly on the policy that the law wishes to uphold bargains and enforce compromises freely entered into, would be more accurate and equitable." (footnotes omitted, *my emphasis*)

[16] The emphasised passage is that relied on by the respondents and by the primary judge to conclude that the appellant's payments under the agreement after Ms

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1 (1992) 175 CLR 353, 373-374.
2 Above, 371.
3 (1802) 2 East 469, 102 ER 448.
4 (1938) 59 CLR 150.
5 (1957) 98 CLR 65.
6 (1982) 61 FLR 108; 41 ALR 539; 6 ACLR 803.

Baker's email of 25 July 2002 were voluntary and therefore not recoverable as payments may by mistake.[7] In my view their Honours were not intending in that passage to necessarily preclude reliance on mistake where payments were made after parties become aware they may have been acting under a mistake and whilst further investigating their concerns. To succeed in its claim for restitution the appellant must demonstrate it was acting under a mistake which caused it to make the payments it now seeks to recover.[8] At what point did the appellant understand it had made the payments under a mistake so that any subsequent payments made by it were not made under a mistake but voluntary? A party in forming a preliminary view that it may have been acting under a mistake as to its contractual obligations but which then seeks legal advice on the issue and in the meantime continues to meet its obligations under the contract as if there was no mistake, is not necessarily making those subsequent payments voluntarily. Determining at what point payments initially made under a mistake become voluntary payments is a question of fact which will always turn on the individual circumstances of each case.

[17] In the present factual scenario the answer is not straight forward. It is clearly distinguishable from those cases referred to by the majority in *David Securities*,[9] where a payment is made by way of compromising a claim. The appellant was in a difficult position. It could not lightly refuse to make the payments it had long been making under the contract. Because the respondents had at all times acted honestly, for the appellant to raise an uncertain claim for restitution of payments perhaps made by it under a mistake as to the effect of the agreement would put in jeopardy the supply of gas needed to operate its large alumina refinery.

[18] Ms Baker and Mr Mouna reached a *preliminary* view that the appellant had overpaid the respondents because of its mistaken view as to the effect of the agreement. That preliminary view was further qualified by Ms Baker's concern that she may not have reviewed all the correct documentation. Mr Mouna was concerned that the view was wrong or that he had missed something. He maintained that, after receiving Ms Baker's advice, he was still in doubt as to whether the appellant had made an overpayment. The appellant quite reasonably sought an independent opinion from its solicitor. That opinion received on 15 August 2002 was that the appellant's claim of mistake was "not without merit but should be approached with caution" and "before taking further action … it is important to review the available records … relating to the negotiation … and to have the benefit of the recollection of [the appellant's] personnel involved in the negotiation". This legal advice was not especially encouraging of the appellant's prospects of success in any prospective claim against the respondents. The appellant certainly took its solicitor's advice to proceed cautiously for it seems nothing was done for about a year until the matter was revived by Mr Mouna. Ms Baker then sought an advice on prospects of success from the appellant's solicitor. That advice received on 23 September 2003 was, on balance, contrary to Ms Baker and Mr Mouna's preliminary view formed in July 2002. It was, however, followed the next day by further advice from the solicitor that there was scope for arguing their preliminary view. This was the first time the appellant had independent legal advice sufficiently supportive of a claim for restitution of overpayments made by mistake to persuade it to proceed with a claim against the respondents. Matters then

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7 *Queensland Alumina Ltd v Alinta DQP Pty Ltd and Anor* [2006] QCS 391 [115], [125]-[126].

8 Goff and Jones, *The Law of Restitution*, Sweet & Maxwell 1998, p 180, 192, 199.

9 (1992) 175 CLR 353, 373. See also Goff and Jones, above, 234-235.

proceeded within a reasonably appropriate time frame. The appellant's solicitor prepared a draft letter of claim on 12 November 2003 which was sent to the respondents on 26 November 2003.

[19] The date from when I would consider that any subsequent payments became voluntary in the sense discussed by the majority in *David Securities*[10] is 26 November 2003. In this I differ from Holmes JA and from the learned trial judge. In my view, only payments made to the respondents after 26 November 2003 were voluntary.

[20] I agree with Holmes JA's reasons for concluding that the respondents have not demonstrated an estoppel by representation. That conclusion is even clearer on my view of the facts, that the appellant was making payments to the respondents under a mistake until late 2003 when it received solicitor's advice that justified its claim for restitution against the respondents.

[21] Finally I turn to the respondents claim by way of an estoppel by convention raised for the first time during the appeal hearing, long after the conclusion of a four day trial conducted on pleadings which did not raise it as an issue. It is sufficient for me to say only that I agree with Holmes JA on this aspect of the appeal. The appellant may well have conducted its case differently at first instance if estoppel by convention had been an issue at trial: *Water Board v Moustakas*,[11] *Suttor v Gundowda Pty Ltd*[12] and *Coulton v Holcombe*.[13] I would refuse the respondents' leave to amend their defence for that purpose.

[22] It follows that I would allow the appeal. I agree with the orders proposed by Holmes JA. I note, however, that I differ from Holmes JA in that I consider that any payments made by the appellant to the respondents became voluntary only after 26 November 2003.

[23] **HOLMES JA**: The appellant, Queensland Alumina Ltd, operates an alumina refinery in Gladstone, for the purposes of which it receives natural gas by a pipeline running from Wallumbilla. Until 2006, the appellant's gas was transported through the pipeline under an agreement made on 27 June 1996 with the pipeline's then operator, a company called PGT Australia Pty Ltd, which had purchased the pipeline from the State of Queensland in 1995. The Gas Transportation Agreement ("GTA") between the appellant and PGT was made in the form of a Transportation Service Agreement which incorporated by reference three further instruments: Access Principles, a Rate Schedule and Transportation General Terms and Conditions. By deed of assignment dated 14 July 1998, PGT assigned its rights under the GTA to the respondents.

[24] In 2005, the appellant sued the respondents, claiming restitution of amounts mistakenly paid under the GTA and damages for its breach. It asserted that there was an inconsistency between the rates of payment set by the Transportation Service Agreement and a maximum tariff and rate cap prescribed by the Access Principles, which had resulted firstly, in its payment of charges levied above the maximum tariff and the consequent unjust enrichment of the respondents, and

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10 Above at 373-374.
11 (1988) 180 CLR 491, 497.
12 (1950) 81 CLR 418, 438.
13 (1986) 162 CLR 1, 7.

secondly, in a shortfall in the respondents' payment of rebates for charges exceeding the rate cap. The learned judge at first instance found that no such inconsistency existed; that in any event, the Access Principles were replaced as part of the agreement by an Access Arrangement which came into effect on 19 November 2001; and that the appellant could not rely on mistake after 22 July 2002, the date on which its in-house counsel gave her opinion that the relevant inconsistency existed. He found it unnecessary to reach a concluded view on a defence of estoppel by representation mounted by the respondents, although he did remark that it seemed to him better argued as estoppel by convention.

[25] Here, the appellant appealed against each of his Honour's findings in respect of inconsistency, mistake and the effect of the 2001 Access Arrangement, while the respondents supported those findings and in addition asserted, by notice of contention, that the judgment could be affirmed on the basis of estoppel.

The GTA and its context

[26] In 1995, when the pipeline was privatised, the *Petroleum Amendment Act 1995* (Qld) was passed. It inserted, inter alia, Part 6A, "Provisions about access to facilities", (later renumbered as Part 8 of the consolidated Act) in the *Petroleum Act 1923* (Qld). Division 2 of Part 6A governed the licensing of pipeline operators. Section 61I(3)[14] required an applicant for a pipeline licence to give the Minister proposed "access principles" for the facility. "Access principles" is an expression defined in s 4(1) of the *Petroleum Amendment Act*; it means "tariff setting principles, indicative tariff schedule and indicative access conditions." PGT duly submitted access principles to the Minister which were approved and gazetted, and its licence to operate the pipeline was granted. There was no dispute that those Access Principles constituted a statutory instrument within the meaning of the *Statutory Instruments Act 1992* (Qld).

[27] The approved Access Principles contained an indicative tariff schedule which by cl 4.2(1) provided for a "Maximum Tariff", encompassing:

> "all the tariffs and charges which may be levied by an access provider on a facility user for access to the Pipeline."

That clause largely repeated the content of the definition in cl 1.3 of the Access Principles:

> "'Maximum Tariff' means the maximum tariffs and charges which may be levied by an access provider on a facility user for access to the Pipeline under an access agreement."

Clause 4.2(3) allowed negotiation of charges and tariffs, within bounds:

> "(3) Subject to sub-clause (1) and the other provisions of these Access Principles and to the limits of the Maximum Tariff, tariffs and charges under access agreements are a matter for negotiation between the relevant parties to each access agreement."

Clause 4.2(5) obliged an access provider which agreed to charge a particular user less than the Maximum Tariff to charge the same reduced tariff and charges under any other access agreements which provided for "similar access". "Similar access" for the purpose of sub-cl (5) meant –

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[14] Renumbered in the consolidated *Petroleum Act* as s 108(3).

> "the terms and conditions for access under the relevant access agreements (including … payment provisions, and currency risk allocation)".

[28] For the pipeline access provided in this case, cl 4.4(1)(a) of the Access Principles set a Maximum Tariff consisting of two charges:

> "(i) a capacity reservation charge equal to the Capacity Reservation Rate multiplied by the relevant facility user's MDQ; and
> (ii) a distance reservation charge equal to the Distance Reservation Rate multiplied by the Distance Component multiplied by the relevant facility user's MDQ;…".

"Capacity Reservation Rate" and "Distance Reservation Rate" were terms defined in cl 1.3 of the Access Principles as, respectively, A$0.50 per gigajoule and A$0.000943 per gigajoule. The "MDQ" was the maximum quantity of gas which the access provider had to deliver. The "Distance Component" was the distance between receipt point and delivery point on the pipeline.

[29] As well as the constraint of the Maximum Tariff, cl 4.4(3) provided a rebate mechanism:

> "If the average capacity reservation charge and distance reservation charge as determined under Clause 4.4(l)(a) actually charged to a facility user per GJ of MDQ per Day by the access provider in any year commencing on 1 July exceeds the applicable Rate Cap, then the access provider will rebate such excess to that facility user".

"Rate Cap" was defined in cl 1.3 as meaning A$0.795 per gigajoule.

[30] The Rate Schedule which formed part of the agreement provided for a capacity reservation rate and a distance reservation rate in accordance with a Statement of Maximum Rates and Charges, which replicated those charges as defined in the Access Principles. Part VI of the Transportation Service Agreement also dealt, inter alia, with rates of payment. Clause 1 of Part VI required payment in accordance with the Rate Schedule, but cl 1(a) added this proviso:

> "(a) before the Expansion Date, the Capacity Reservation Rate shall be US$0.39 per GJ of MDQ/day instead of A$0.50 and the Distance Reservation Rate shall be US$0.000726 per GJ of MDQ/day/km instead of A$0.000943 with the Rate Cap being US$0.612 per GJ instead of A$0.795 …".

(An exhibit to the Transportation Service Agreement set the MDQ at 40,000 gigajoules a day and identified the points of receipt - two junctions on the Wallumbilla pipeline - and delivery, at Gladstone.)

The clause concluded:

> "The above rates are not subject to future adjustment because of changes in exchange rates".

[31] The Capacity Reservation Rate set in Part VI cl 1(a) of the Transportation Service Agreement in US dollars reflected a conversion of A$0.50 at an exchange rate of US$0.78 cents to A$1.00, while the Distance Reservation Rate and the Rate Cap were converted at roughly US$0.77 to A$1.00. The official exchange rate on the day the agreement was executed was US$0.79 to A$1.00, so that the Capacity

Reservation Rate and Distance Reservation Rate set by cl 1(a) were slightly lower than those rates as defined in the Access Principles. Correspondingly, the sum of the capacity reservation charge and the distance reservation charge also fell below the Maximum Tariff, to the advantage of the appellant. The Rate Cap, similarly, was set at a figure in US dollars which, converted at US$0.79 to A$1.00, was less than the A$0.795 Rate Cap prescribed by the Access Principles.

[32] Part VI cl 3 of the Transportation Service Agreement incorporated the Pipeline Access Principles, the Rate Schedule and Transportation General Terms and Conditions, to which it was expressed to be subject "in all respects". The last of those instruments, the General Terms and Conditions, contained two clauses of present relevance. Clause 11.1, dealing with payment, provided as follows:

> "… Any Shipper may, with the consent of PGT, pay to *or* upon the order of PGTQ [PGT's agent] an equivalent amount in lawful money of the United States of America at PGTQ's office in Brisbane Queensland. The foreign currency exchange rate to be utilized in such transactions shall be such rate as is determined by PGTQ and the Shipper electing this payment option as provided for in the applicable Transportation Service Agreement."

Clause 27 was in these terms:

> "The parties are bound by the Pipeline Access Principles and if at any time there is any inconsistency between this Indicative Tariff or a Transportation Service Agreement and the Pipeline Access Principles, then the Pipeline Access Principles shall prevail and the Indicative Tariff and Transportation Service Agreement shall be deemed amended to the extent of any inconsistency."

"Pipeline Access Principles" was defined in cl 1.22 of the General Terms and Conditions as meaning:

> "The Access Principles applicable to the Pipeline and applicable to all services rendered under this Indicative Tariff, as varied from time to time".

The term "Access Principles" was not defined, but cl 1 of the General Terms and Conditions provided that the same meaning was to be given to a term as was ascribed to it in the *Petroleum Act* or the Pipeline Access Principles.

[33] From the time of the respondents' assuming the operator's rights under the agreement, the appellant made payments in US dollars to them in accordance with cl 1(a) of Part VI. Over that period, the Australian dollar seldom rose as high as US$0.77 (the conversion rate originally used for the Distance Reservation Rate and Rate Cap in cl 1(a)). At one point it reached a low of US$0.489.

The inconsistency argument at trial

[34] The appellant's case at trial was that the agreement to make payment in US dollars was inconsistent with the Access Principles because, depending on the exchange rate, the Capacity Reservation Rate and the Distance Reservation Rate as calculated using the amounts set in US currency could produce a Maximum Tariff in excess of that provided for by the Access Principles; as indeed occurred almost constantly over the period from mid-1998, when the respondents became the pipeline operators. The Rate Cap set by the Access Principles was also subject to being

exceeded because of the substitution of the US dollar figure. Effect should be given to cl 27 of the General Terms and Conditions, which in the event of inconsistency with the Access Principles deemed the Transportation Service Agreement amended to the extent of any inconsistency.

[35] The learned trial judge did not accept that any such inconsistency was shown. Although the Transportation Service Agreement was expressed to be subject to the Rate Schedule and the General Terms and Conditions, it was impossible to conclude that they were to apply so as to prevent the express provisions of cl 1(a) of Part VI from having effect; rather, that clause was intended to qualify the manner in which the payment provisions of the other instruments operated. Evidence as to the background negotiations to the entering of the agreement, the "commercial circumstances", established that the parties were concerned to establish that payment would be made in US dollars at a fixed exchange rate.

[36] There was, the learned judge observed, a distinction between inconsistency between contractual terms and mere modification by one term of the effect of another. In his view, cl 1(a) of Part VI accepted the rates provided for in the Access Principles and the Rate Schedule, but allocated the risk attaching to exchange rate fluctuations by fixing the applicable rate of exchange between the US and Australian dollars. Clause 4.2(5) of the Access Principles, in its reference to "currency risk allocation", implicitly recognised the possibility that such agreement could be made. It would be no different, his Honour said, had the parties agreed that the rates be converted to American dollars at a given fixed exchange rate; say, A$1.00 equating to US$0.77. If that had been done, the appellant could not have argued that the Access Principles had been varied.

Submissions on inconsistency on appeal

[37] But counsel for the appellant contended that its argument would have remained the same had that occurred, because the clause would still have been inconsistent with the Access Principles. The Transportation Service Agreement did not in fact accept the rates set by the Access Principles; rather it substituted a different rate expressed in US dollars. It permitted the levying of charges beyond the Maximum Tariff and in excess of the Rate Cap. And on any view, the Access Principles did not provide for negotiation of the Rate Cap.

[38] The appellant urged the examination of the Access Principles in their statutory context. Because the objects of Part 6A of the *Petroleum Amendment Act* included facilitation of competitive markets in the petroleum industry for the benefit of the public and industry and the provision of access to facilities on fair commercial terms, it was to be inferred that the interests to be protected by the Access Principles were not limited to those of the parties to the transportation arrangement. The mechanism of the Maximum Tariff was designed to place an upper limit on the charges that could be made for the transportation of gas so as to prevent the price increases that might result from private ownership of a monopoly asset. The Maximum Tariff was the benchmark for all users; if altered, other users were entitled to similar advantages, by virtue of cl 4.2(5). That underlying competitive philosophy would have been undermined if a particular user were able to set a different and unique tariff.

[39] The appellant relied on two sections of the *Petroleum Amendment Act* to reinforce its arguments as to the significance of the Access Principles. Section 61O[15] provided that within six months after access principles were notified, the parties to an access agreement inconsistent with those principles were required to amend it (contemplating, it would seem, the position where an access agreement pre-existed the access principles) and s 61X(2)(a)[16] prohibited the making of an access agreement which provided for access in a way inconsistent with the access principles for the facility.

[40] Clause 11.1 of the General Terms and Conditions was designed to allow agreement from time to time as to the exchange rate, provided that it was subject to the limits of the Maximum Tariff: that was the effect of cl 4.2(3) of the Access Principles. Any right of negotiation in relation to "currency risk allocation" conferred by cl 4.2(5) similarly existed subject to the limits of the Maximum Tariff. The agreement ought, accordingly, to be read as permitting conversion of the amount to be paid into US currency equivalents only within the Maximum Tariff in Australian dollars.

[41] The respondents countered that cl 1(a) did not purport to vary the Access Principles. Rather, it constituted an agreement between the parties that the Australian dollar amounts set by the Access Principles would be regarded as equivalent to the US dollar amounts prescribed in the Transportation Service Agreement; that is to say, for example, that the US$0.39 capacity reservation charge was equivalent to the A$0.50 charge. Clause 11.1 of the General Terms and Conditions allowed a pipeline user, with the consent of PGT, to meet charges by payment of an equivalent amount in US currency at an agreed rate, and cl 4.2(5) of the Access Principles recognised the possibility of currency risk allocation by negotiation of charges in foreign currencies.

[42] The learned trial Judge, the respondents said, properly had regard to extrinsic evidence demonstrating the commercial object of the agreement. The option of payment in United States dollars had been attractive to the appellant because it provided a hedge against foreign exchange currency risks relating to the sale of its alumina in US dollars. It had contracted for payment in US dollars at fixed rates in the knowledge of the risk of exchange rate fluctuations which might be in its favour or against its interests. At the time the agreement was entered, the tariffs set in US dollars, if reconverted to Australian dollars at the prevailing exchange rate, were slightly lower than the Maximum Tariffs provided for by the Access Principles. The contract was to be interpreted as at the date it was executed, and exchange rates subsequent to the date of the agreement were irrelevant. The evidence showed that the Rate Cap provision was inserted to limit the disadvantage that transportation costs imposed on gas producers in the Wallumbilla region in competition with producers closer to customers for gas. Whether a rebate was payable should not depend on currency fluctuations.

[43] The respondents referred to a number of authorities for the proposition that contracts should be interpreted so as to give effect to all their clauses. The fact that one clause might qualify or modify another did not amount to inconsistency unless there was such a conflict between them that effect could not fairly be given to both.

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15 Renumbered as s 114.

16 Renumbered as s 123(2)(a).

Particular reliance was placed on the decision of the English Court of Appeal in *Pagnan SpA v Tradax Ocean Transportation SA*,[17] which, like this case, involved the construction of a contractual condition on its face at odds with a condition in a document incorporated into the contract by reference. The Court there held that the apparent conflict could be reconciled by reading the first condition, imposing an apparently absolute obligation, as qualified by the other, providing for excuse from liability in some circumstances.

Conclusions - Inconsistency

[44] The respondents did not dispute that the parties were obliged to observe the Maximum Tariff set by cl 4.4 of the Access Principles. But cl 1(a), if given the reading for which the respondents contend, is inconsistent with that obligation. Clause 1(a) did more than merely fix an exchange rate by deeming US$0.39 to equate to A$0.50, US$0.000726 to equate to A$0.00943 and US$0.612 to A$0.795. It actually fixed the US currency amounts as the relevant Rates, substituting them for those prescribed by the Access Principles, thus altering the calculation of the Maximum Tariff and potentially resulting in the levying of charges in excess of it. The position is even starker in respect of the Rate Cap which, as the appellant pointed out, had nothing to do with any mechanism for payment, but simply fixed a limit.

[45] This is perhaps best explained by a small example, based on the figures in this case but assuming transport over a fixed distance, 350 kilometres, so that the figures for a single day can be taken as representative of the year's average. Using the Access Principles figures, the capacity reservation charge would be A$20,000; the distance reservation charge for a distance of 350 kilometres, A$13,202, resulting in a Maximum Tariff of A$33,202. The average charge would be A$0.83 per gigajoule, giving rise to a rebate of A$0.035. The capacity reservation charge calculated as per cl 1(a) would be US$15,600, the distance reservation charge, US$10,164; giving a total of tariffs levied of US$25,764 or, converted at US$0.78 to A$1.00, $33,030.77, just below the Maximum Tariff for transportation over 350 kilometres. The average charge per gigajoule would be US$0.6441, producing a rebate of US$0.0321, or converted at the US$0.78 rate, A$0.04115, a slightly better result for the payer than applying the Access Principles Rate Cap.

[46] But if the exchange rate were to fall so that one Australian dollar was worth only US$0.62, the figure of US$25,764, representing the sum of the capacity reservation charge and the distance reservation charge as per cl 1(a), would now equate to A$41,554.83, over the Maximum Tariff by $8352.83. The rebate of US$0.0321 would convert, at the US$0.62 exchange rate, to A$.052. In contrast, if the average charge were calculated on the total charges levied in Australian dollars, it would be A$1.039, and the rebate, using the A$0.795 Rate Cap, A$0.244. The fixing of the relevant rates in US dollars in that instance has two effects: the amounts actually paid by way of capacity reservation charge and distance reservation charge when converted into Australian dollars are much greater than the amounts arrived at by applying the rates set by the Access Principles, and the Maximum Tariff is correspondingly exceeded; and the Rate Cap under cl 1(a), converted back to Australian dollars is now A$0.987, instead of A$0.795 as set by the Access Principles.

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17 [1987] 3 All ER 565.

[47] The respondents say, correctly, that the question of inconsistency should be determined as at the date of the contract; but as at the date of contract, cl 1(a) set rates which could produce charges exceeding the Maximum Tariff set in the Access Principles. The parties could, by virtue of cl 4.2(3) of the Access Principles, negotiate the charges to be imposed, but only within the limits of the Maximum Tariff. One cannot sensibly read cl 4.2(3) as being concerned to ensure that the charges were to be negotiated so as to observe the limits of the Maximum Tariff only at the date of the contract's taking effect, rather than over the life of the agreement.

[48] So far as the Rate Cap is concerned, the issue is not whether the rebate payable could fluctuate with the exchange rate; the real mischief is that the substitution of an American currency figure meant that the Rate Cap itself, meant to be a fixed measure at A$0.795, now floated with the exchange rate, so that the prescribed limit could vary enormously.

[49] In determining whether inconsistency exists between the relevant clauses, one has, as the respondents pointed out, to consider "whether the provisions can sensibly be read together; whether a reconciliation of the provisions can conscientiously and fairly be achieved".[18] So far as the Maximum Tariff is concerned, one can arrive at that result by reading cl 1(a) as qualified by cl 4.4 of the Access Principles; so that the US currency rates could apply, subject to their not exceeding the Maximum Tariff. That reading is more obvious in this case than in *Pagnan SpA v Tradax Ocean Transportation SA*: there, it was a special condition which was to be regarded as modified by a more general condition in an incorporated document, in circumstances where the only indication of an order of precedence for the respective clauses was a provision that in the event of inconsistency, the special terms were to prevail. In the event, the Court held that there was no necessary inconsistency between the special and general conditions.

[50] Here, the position is much clearer, because Part VI, cl 3 of the Transport Service Agreement specifically rendered it subject to the Access Principles. If there were any inconsistency, it was the latter which, by virtue of cl 27 of the General Terms and Conditions, would prevail; an order of priority consistent with the importance accorded the Access Principles in the *Petroleum Amendment Act*. And this was not a case of a general term taking precedence over a specific condition; both cl 4.4 and cl 1(a) addressed the particular issue of what tariffs were to be levied.

[51] There is every reason, therefore, to suppose that the provisions of the Transportation Service Agreement are properly to be regarded as qualified by the Access Principles. In any case, the end result is the same whether one so interprets the clauses in order to give effect to both of them, in the manner described by Sedley LJ in *Goldmile Properties Ltd v Lechouritis*;[19] or regards cl 1(a) as inconsistent and therefore, by virtue of cl 27 of the General Terms and Conditions, amended by cl 4.4 to the extent necessary to resolve that inconsistency. On either approach, the charges which the respondents were entitled to make using the cl 1(a) rates were subject to the Maximum Tariff arrived at by applying the formula in cl 4.4(1)(a), including the rates as defined in Australian dollars.

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18 *Taylor v Rive Droite Music Ltd* (2006) EMLR 4, at 13.

19 [2003] 2 P & CR 1, at [8].

[52] However, the reconciliation approach cannot assist in relation to the substitution of a replacement figure for the Rate Cap. There could be only one Rate Cap: the one set by the Access Principles. Clause 1(a) was without any doubt inconsistent insofar as it purported to set a different figure. That being the case, cl 4.4(3) of the Access Principles must prevail. The appellant was entitled to a rebate when, according to the formula in that clause, the capacity reservation charge and distance reservation charge averaged over a year exceeded the Rate Cap of A$0.795.

[53] The result of thus reading the contract is undoubtedly unsatisfactory for the respondents. It means that they bore the loss if the US dollar fell, but had little to gain if the Australian dollar fell. That was the practical consequence of setting the charges so close to the Maximum Tariff in the first instance. But a less favourable result than anticipated cannot overcome a proper reading of the contract as requiring observance of the Maximum Tariff and Rate Cap in the Access Principles.

The 2001 Access Arrangement

[54] The legislative scheme governing pipeline access changed when the *Gas Pipelines Access (Queensland) Act 1998* (Qld) came into effect on 18 May 2000. It is not necessary to explore the details of the legislative change; it suffices to say that a "National Third Party Access Code for Natural Gas Pipeline Systems" in Schedule 2 to the Act became part of the statutory regime with application to specified pipelines, one of which was the respondents'. Section 2 of the Code required a service provider such as the respondent to establish an access arrangement, a "statement of the policies and basic terms and conditions which apply to third party access to a Covered Pipeline" to the satisfaction of the regulator, the Australian Competition and Consumer Commission. The "Service Provider" and "User or Prospective User" were free to agree to terms and conditions different from those in the access arrangement.

[55] Section 60 of the *Gas Pipelines Access Act* provided for the continuing application of Part 8[20] of the *Petroleum Act* to the pipeline only until the regulator approved the access arrangements for it. (Subsequently, the *Gas Supply Act 2003* (Qld)[21] amended the *Petroleum Act* by removing the definition of "access principles" from s 2 of the principal Act.) By way of transition, s 58(2) of the Act provided for the Minister to approve a tariff arrangement for the pipeline. By virtue of s 58(3), that tariff arrangement was taken to be approved under the Act as the Reference Tariff and Reference Tariff Policy for the access arrangement to come into being. A tariff arrangement was duly approved and gazetted, and later became the Reference Tariffs Schedule (Schedule 5) to the Access Arrangement.

[56] The Australian Competition and Consumer Commission approved the access arrangement for the pipeline on 1 November 2001, with effect from 19 November 2001. That approved Access Arrangement, consistently with s 2 of the Code, described its purpose as setting out polices, terms and conditions for third party access to pipeline services. It provided in cl 3 a procedure for a Prospective User to make, and the Service Provider to consider, a "Service Request" for access to the pipeline. Clause 4.3 provided that before the Service Provider became obliged to provide a service, a "User or a Prospective User" was required to enter into an

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[20] Formerly Part 6A as inserted by the *Petroleum Amendment Act 1995* (Qld).

[21] Section 373.

access agreement specifying the service and its quantity in accordance with the Access Arrangement. "Access Agreement" was defined in cl 2.1 as:

> "An executed written agreement between the Service Provider and a User for the provision of a Service in relation to the Pipeline including but not limited to the Terms Sheet and the Service providers' Standard Terms and Conditions of Service."

[57] Clause 5.2 identified the terms and conditions of the access agreement for the relevant pipeline service as those set out in a schedule to the Access Arrangement, in a template document entitled the "Firm Forward Haul Service Access Agreement Terms Sheet". Clause 7.1 noted that a tariff arrangement had been approved for the pipeline and was contained in Schedule 5. Schedule 4 to the Arrangement set out General Terms and Conditions, including this clause:

> "22.7 US$ option
> The Service Provider may agree to accept payment under this agreement in US$. You must agree a conversion rate with the Service Provider if you want to make payments in US$. If the Service Provider agrees to accept payment of a charge in US$, all components of the Service Charge, include the Reference Tariff, the Service Charge, the distance fee, the escalation amounts and the Rate Cap, will be converted to US$ at the agreed conversion rate. Once a conversion rate is agreed, the rate will not change with changes in exchange rates for the period of the agreement."

[58] Schedule 5 to the Access Arrangement (the tariff arrangement approved by the Minister under s 58(3)) was headed "Reference Tariffs for the Queensland Gas Pipeline, Pipeline Licence No. 30". The learned trial judge observed that the original Access Principles were "reproduced, with immaterial wording changes" by Schedule 5.[22] Clause 2.1(6) of the Schedule provided:

> "The Reference Tariffs encompass all the tariffs and charges which may be levied by the Service Provider on a User for the Reference Services."

Schedule 5 set tariffs for the pipeline services which were in turn similar to the formula for the Maximum Tariff. Relevantly, where there was an access agreement for a service of the kind provided by the pipeline here, the reference tariff was, as set by cl 2.1(1)(a), –

> "…
> (i) a Capacity reservation charge equal to the Capacity Reservation Rate multiplied by the relevant User's MDQ; and -
> (ii) a distance reservation charge equal to the Distance Reservation Rate multiplied by the Distance Component multiplied by the relevant User's MDQ".

It also contained a clause providing for a rebate where the average capacity reservation charge and the distance reservation charge in any year exceeded the applicable Rate Cap. "Capacity Reservation Rate", "Distance Reservation Rate" and "Rate Cap" were all defined as amounts in cents identical to those in the Access Principles.

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22 *Queensland Alumina Ltd v Alinta DQP Pty Ltd & Anor* [2006] QSC 391, at [133].

The argument at trial on the 2001 Access Arrangement

[59] At trial, the appellant contended that the 2001 Access Arrangement had no effect on existing contractual arrangements; the parties had made no agreement for any variation of their contract. The respondents pleaded, and argued, that the 2001 Access Arrangement now constituted the Access Principles as defined in cl 1.22 of the General Terms and Conditions: it had become "the Access Principles applicable to the Pipeline and applicable to all services rendered under this Indicative Tariff, as varied from time to time", which in turn, adopting the *Petroleum Act* definition of Access Principles, meant "Tariff Setting Principles, Indicative Tariff Schedule and Indicative Access Conditions". Clause 22.7 of Schedule 4 expressly contemplated arrangements of the type provided in cl 1(a).

[60] The learned trial judge accepted the latter argument. He reasoned that once approval was given to the Access Arrangement by the Australian Competition and Consumer Commission, the Access Principles approved under Part 8 of the *Petroleum Act* ceased to have effect as the Access Principles applicable to the pipeline. Instead the 2001 Access Arrangement now became the Access Principles referred to in the agreement, and the Code made it plain that the parties were free to agree on terms and conditions different from those in the Access Arrangement. Clause 22.7 of Schedule 4 expressly contemplated arrangements of the type provided in cl 1(a). The coming into force of the access arrangement did not, therefore, assist the appellant.

Submissions on appeal on the 2001 Access Arrangement

[61] The appellant contended that once the 2001 Access Arrangement was approved, the statutory concept of access principles was defunct, but the Access Principles approved under the *Petroleum Act* remained the instrument incorporated by reference into the contract. Nothing in any statute or any agreement between the parties had altered that state of affairs. The repeal of the *Petroleum Act* and the passing of the *Gas Pipelines Access (Queensland) Act* had no direct bearing. There was no statutory provision for incorporation of the Access Arrangement into the GTA; and an Act was not to be taken as altering existing rights without an express statement or necessary implication to that effect.

[62] Under the Access Arrangement, a user or a prospective user had to enter an executed written Access Agreement, to include a Term Sheet. The parties had not entered such an agreement. The Access Arrangement should be understood as governing the position of new applicants for access to the pipeline, not users with existing contracts. Even if the Access Arrangement were to be regarded as incorporated into the contract, Schedule 5 contained provisions to similar effect to those in the Access Principles.

[63] The respondents adopted a different analysis from the learned trial Judge, and indeed from their own written submissions, arguing that the Access Principles now incorporated into the contract were not the Access Arrangement as a whole but only Schedule 5 (since it alone met the description "Tariff Setting Principles, Indicative Tariff Schedule and Indicative Access Conditions"). Of course, cl 22.7, on which they wanted to rely, was contained in Schedule 4; but the respondents contended that although that Schedule and the other parts of the Access Arrangement were not to be regarded as incorporated into the Act, Schedule 5 should nonetheless be construed consistently with them.

Conclusions - the 2001 Access Arrangement

[64] Clause 1.22 of the General Terms and Conditions, by defining "Pipeline Access Principles" as "the Access Principles applicable to the Pipeline … as varied from time to time" did, in my view, indicate the parties' intention that should a new set of "Tariff Setting Principles, Indicative Tariff Schedule and Indicative Access Conditions" for the pipeline come into being, it would become the relevant Access Principles under the contract. But the balance of the Access Arrangement was not incorporated into the contract; there was no agreement or statutory imperative that it should be. Consequently, Schedule 4 did not form part of the contract and there is no basis for having regard to it, or in particular to cl 22.7, in order to construe Schedule 5 as it forms part of the GTA. The practical result is that the incorporation of Schedule 5 in lieu of the Access Principles made under the *Petroleum Act* did not relevantly affect the terms of the agreement between the parties.

The argument at trial as to mistake of law

[65] In their defence to the claim for restitution, the respondents denied that the appellant's payments were made by mistake, at least from 22 July 2002. This was because in late 2001, a Mr Mouna, an employee of the appellant, began reviewing the documents which made up the GTA and noted that the amounts being paid under it exceeded the Maximum Tariff under the Access Principles. Mr Mouna was not a lawyer. He raised the matter with the appellant's in-house legal counsel, Ms Baker, who, on 22 July 2002, sent him an e-mail, the last paragraph of which was as follows:

> "Clearly, regardless of the provisions in the Agreement there appears to be no power to charge a rate higher than that contained in the Pipeline Access Principles. If the conversion of the $US rate exceeds the rate within the Pipeline Access Principles then PGTQ have breached the provisions of the Agreement and the loss suffered by QAL would be that amount payed [sic] over and above the maximum rate as outlined in the Pipeline Access Principles."

Ms Baker preceded that advice with a caveat to the effect that she had only seen a looseleaf photocopy of the relevant documents and it was not clear whether they accurately reflected the agreement. However, she went on to refer in the body of the e-mail to the Transportation Service Agreement, the Pipeline Access Principles, the Rates Schedule and the Transportation General Terms and Conditions, and it seems that any doubt as to their constituting the GTA was resolved by 25 July 2002 when she forwarded a copy of them, without any reservation as to their completeness or correctness, to the appellant's solicitors.

[66] In response, the appellant pointed out that the matter did not end there. Ms Baker in her evidence at trial described her view as "preliminary"; wanting to get specialist advice, she requested an opinion from the appellant's solicitors. They responded with a tentative advice to the effect that the appellant's case was "not without merit but should be approached with caution", and recommended a review of records and the interviewing of the appellant's representatives involved in the GTA's negotiation. In September 2003, however, those solicitors expressed a view that the "US$ rates and rate cap would prevail". Notwithstanding, the appellant sent a letter of demand to the respondents on 26 November 2003, asserting that the Access Principles rates prevailed and that it was entitled to be repaid monies overpaid by it and to have the rebate recalculated, a demand which was rejected. In March 2004, a senior member of the firm of solicitors engaged by the appellant gave his opinion

that the inconsistency existed. In June 2005, counsel's opinion to similar effect was received and these proceedings were launched.

[67] The learned trial judge accepted the appellant's evidence as to the sequence of events, but concluded that once Ms Baker's advice was given, the appellant was "prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment";[23] so that the payments were voluntary. The appellant was not in a state of "sheer ignorance" as to its obligations, nor did it have a "positive belief" as to the binding effect of cl 1(a). Its payments, while in that state of doubt, were not caused by a mistake but were made through a reluctance to interfere with the established state of affairs before investigating its rights more fully.

Submissions on mistake on appeal

[68] On appeal the appellant conceded that it could not rely on mistake after the letter of demand was sent on 26 November 2003, but argued that until that point, the payments were made in an ignorance of the true legal position. Its mistake of law gave rise to a *prima facie* obligation on the part of the respondents to make restitution unless they could point to circumstances making it unjust. The only circumstance identified was the contention that the appellant's payments, once it received the 22 July e-mail from Ms Baker, were made voluntarily. But Ms Baker's advice was expressly qualified, and other evidence confirmed that her advice was a preliminary view. The relevant test was that referred to by the trial judge from *David Securities Pty Ltd v Commonwealth Bank of Australia*,[24] which was, more fully set out, in these terms:

> "The payment is voluntary or there is an election if the plaintiff chooses to make the payment even though he or she believes a particular law or contractual provision requiring the payment is, or may be, invalid, or is not concerned to query whether payment is legally required; he or she is prepared to assume the validity of the obligation, or is prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment."

In this case, the appellant said, the evidence was that it was concerned to query whether the payment was legally required; hence Mr Mouna's request for advice. Ms Baker's views were tentative and the appellant was entitled to investigate the legal position more fully. It was not making the payments irrespective of the validity or invalidity of its obligation.

[69] The respondents relied on an earlier passage from *David Securities*, in terms of which his Honour framed his conclusion:

> "[M]istake not only signifies a positive belief in the existence of something which does not exist but also may include 'sheer ignorance of something relevant to the transaction in hand'."[25]

Here, from the date of Ms Baker's response, they contended, the appellant had no positive belief that cl 1(a) was valid, nor was it in a state of sheer ignorance. And if it were necessary to go to considerations of voluntariness, the appellant was

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23 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, at 373-74.

24 (1992) 175 CLR 353, at 373-74.

25 At 369.

"prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment".

Conclusions: Mistake of law

[70] It is not entirely clear whether voluntariness is a prerequisite to a claim for restitution of a payment made under a mistake of law or whether it provides a defence to such a claim.[26] The answer is probably both, depending on the sense in which the term is used. The passage cited by the appellant from *David Securities* occurs in the context of a discussion by the majority of voluntariness as the significant feature of a number of cases in which recovery of monies paid under mistake of law was rejected. It contemplates in its first example the position of the payer alive to the possibility that the obligation to pay does not exist, but prepared to make the payments notwithstanding; while what follows concerns the payer indifferent to whether any such question exists and prepared to make the payments regardless.

[71] Contrary to the appellant's submission, what is described does not constitute a cumulative set of conditions. The party who "chooses to make the payment even though he or she believes a particular law or contractual provision requiring the payment is, or may be, invalid …" is an example discrete from what immediately follows. It is not necessary that it also be demonstrated that he or she was "not concerned to query whether payment is legally required". Of the forms of voluntariness discussed in the *David Securities* passage, at least that involved in choosing to make the payment, despite a belief that the obligation may not be binding, must go to the question of whether mistake caused the payment; not simply, as the appellant contended, to whether injustice would arise if restitution were required.

[72] As the learned trial Judge found, once Ms Baker's advice was received, the appellant was not labouring under a positive belief as to the efficacy of cl 1(a), nor was it in a state of sheer ignorance. As to other possible states of mind, it is clear on the evidence that once Ms Baker's view was given, the appellant believed that the contractual provision might be invalid but chose to make the payments nonetheless. It follows that from that point the payments were voluntary and not caused by a mistaken belief as to the legal position.

The estoppel argument at trial

[73] The respondents pleaded in their defence that the appellant had represented to them that Part VI cl 1(a) was legal and binding and did not create any inconsistency, that it accepted the risk of currency exchange rate fluctuations and that it was bound to and would make payments at the rates agreed to in the clause. The representations were to be deduced from conduct, pleaded as the appellant's negotiation of and agreement to tariffs set in US dollars at a fixed rate as per cl 1(a); its failure to seek any amendment of the GTA to resolve any inconsistency; its payment of the charges levied by PGT and the respondents; and its failure to make any claim for adjustment to bills rendered within 12 months of their receipt, as required by cl 11.5 of the General Terms and Conditions. On the strength of those representations, the respondents alleged, PGT, and they in their turn, did not seek to amend the 1996 Access Principles to make it clear that such a clause was permissible.

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[26] See the discussion of that question, and other aspects of voluntariness, in the judgment of Ormiston JA in *Hookway v Racing Victoria Ltd* [2005] 13 VR 444.

[74] At trial the respondents relied on the evidence of Mr Cavell, the former managing director of PGT's Australian concern. He deposed to the negotiations between PGT and the appellant, and said that had the appellant raised the suggestion that the Rate Cap in the Access Principles could not be converted to US dollars at a fixed exchange rate or otherwise suggested that "the currency risk allocation was effectively only one-way", PGT would have sought legal advice on gaining the Minister's approval for amendment of the Access Principles to make it clear that conversion of the Rates and the Rate Cap was permissible and to overcome any suggested inconsistency.

[75] The respondents also called Mr O'Hara, who had been the director of the Office of the Energy Regulator and in that capacity made recommendations to the Minister for Mines and Energy about approval of access principles. He deposed that the Minister usually acted on his recommendations, and that he would have supported an amendment of the Access Principles to make it clear that a term for payment of charges in a foreign currency at a fixed exchange rate was permissible.

[76] Mr Cavell's cross-examination was limited to questions about the pre-contract negotiations; Mr O'Hara was asked only a couple of questions about his more recent contact with the Minister who had administered the *Petroleum Act* at the relevant time. The learned trial judge accepted both men as credible and reliable witnesses but found it unnecessary to decide the estoppel point. He observed, however, that there was "some force" to the plaintiff's argument that the defendants could not establish a clear and unequivocal representation; he thought the case for an estoppel by convention was stronger.

The estoppel case advanced on appeal

[77] The respondents maintained the claim of estoppel by representation, although on a more limited basis: the representation was that Part VI cl 1(a) was valid and binding and that the appellants would make payments in accordance with its terms, and the conduct which amounted to that representation was the appellant's agreement to the clause and its continued making of payments, notwithstanding currency movements to its disadvantage. The inference from Mr Cavell's evidence, the respondents argued, was that PGT relied on the appellant's representations and had consequently refrained from seeking to have the 1996 Access Principles amended to remove any doubt. PGT or the respondents could have sought such an amendment through Mr O'Hara, whose recommendation would have been accepted.

[78] Until the 2001 Access Arrangement was approved, the Minister could, by virtue of s 23[27] and 24AA[28] of the *Acts Interpretation Act 1954* (Qld), have amended or repealed the 1996 Access Principles and re-exercised his power of approval. Section 112(2) of the *Petroleum Act*[29] sets out the considerations for the Minister in approving Access Principles. They include among other things the "legitimate business interests" of the pipeline owners and its users. The respondents conceded that the Minister would have to take into account the appellant's commercial interest in having the existing Maximum Tariff and Rate Cap maintained. But Mr O'Hara had not been cross-examined on those considerations and the learned primary judge had accepted his evidence and that of Mr Cavell.

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27 Permitting the exercise of a statutory power "as occasion requires".

28 Conferring power to amend a statutory instrument, the making of which is required or authorised by statute, subject to the same considerations as applied on its making.

29 Section 61M(2) in the *Petroleum Amendment Act 1995* (Qld).

[79] The appellant ought accordingly to be prevented from departing from its represented state of affairs, as it had done by contending that cl 1(a) was not binding in its terms and thus that it was not obliged to pay at the rates set by the clause. If the estoppel were one that arose in favour of PGT, the respondents' predecessor in title, the respondents could nonetheless take advantage of it.

[80] The respondents sought in the alternative to rely on estoppel by convention. During the hearing of the appeal, they sought leave to amend in order to plead such an estoppel, consistently with their arguments. The proposed further amended defence (provided after the hearing) pleaded, as the relevant common assumptions, that cl 1(a) was valid and binding and not inconsistent, and that the appellant was bound to make payments in accordance with it and accepted the risk. The appellant's payment of the charges levied and failure to make any claim for adjustment were pleaded as demonstrating the adoption of those assumptions as the conventional basis of the parties' relationship. The loss of the opportunity to amend the Access Principles, caused by the reliance of PGT and the respondents on those assumptions, made it unjust or unconscionable for the appellant to deny its truth.

[81] The respondents argued that the necessary assumption, i.e that cl 1(a) was valid on its terms, was established for their part by Mr Cavell's evidence. So far as the appellant was concerned, the foundation of its mistake case was that it had assumed the contract was valid and binding. Although estoppel by convention had not been argued at first instance, all the necessary facts had been established and it was not a point which could have been met by the appellants calling further evidence at trial.

[82] If it were considered that cl 1(a) was inconsistent with the Access Principles as a statutory instrument, so as to raise a question of illegality but for the effect of cl 27 of the General Terms and Conditions, it was necessary to ask whether the proposed estoppel in truth entailed any conflict with the social policy underlying the *Petroleum Act*.[30] Currency risk allocation of the kind effected by cl 1(a) did not offend any of the public policy objectives of the statute. It was of note that while s 123 of the *Petroleum Act*[31] set restrictions on Access Agreements, it made some contraventions of those restrictions void but not others; and the making of an Access Agreement inconsistent with the Access Principles was not in the former category. It would not frustrate any statutory policy simply to dismiss the appellant's claim.

[83] The appellant argued that the representations said to found the estoppel relied on at trial were not clear and unambiguous: the respondents sought to infer them from facts and conduct occurring over a lengthy period of time. Mr Cavell's evidence simply indicated what PGT's conduct would have been had the appellant raised the argument as to inconsistency. He did not go so far as to say that the appellant had made the representations. Nor was there evidence that the respondents were induced to believe or assume anything or to act to their detriment on any such basis. If any representation were made, it was to PGT, not the respondents. There was no pleading or evidence that the respondents would not have taken the assignment of PGT's rights and obligations had the claimed representations or assumptions not been made.

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30 *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, at 1016.

31 Section 61X of the *Petroleum Amendment Act 1995* (Qld).

[84] Mr O'Hara had not explained how the considerations under s 112(2) of the *Petroleum Act* might have affected the Minister's consideration of whether to amend the Access Principles and there was no evidence as to the substance of those considerations. The Act had been further amended in 1997 by the insertion of s 114A:

> "**114A(1)** On the application of the owner of a facility, the Minister may approve a minor amendment of the access principles for the facility.
>
> **(2)** An amendment is minor only if the Minister considers it does not adversely affect in a material way the facility owner or any user or proposed user of the facility."

The material effects on the appellant of any change to the Access Principles had not been addressed, nor were they the subject of evidence.

[85] The appellant objected to the raising of the convention-based estoppel on appeal. The trial had been conducted by reference to the pleadings. Had the estoppel by convention case been made at first instance, more attention would have been paid to the pre-contractual negotiations. It was incumbent on the respondents to show that the appellant had led it to act on the conventional basis asserted by them. Evidence could have been led about that issue. Mr Cavell would have been cross-examined to establish that he did not hold the assumptions relied on and his credit would have been challenged. Further evidence would also have been adduced from officers of the appellant as to their understanding; in particular, Mr Mouna would have deposed as to his communication to the respondents' representatives, from the second half of 2001, of his concern that the Maximum Tariff could not be exceeded by agreement. Moreover, because of its view that the respondents had failed to prove facts giving rise to the representations or that they or PGT had relied on the representations, the appellant had not cross-examined Mr O'Hara about the reality of the detriment: the alleged lost opportunity to have the Access Principles amended. Rebutting evidence might have been called on that aspect.

[86] In any event, the claim for estoppel whether by representation or convention cut across the social policy enshrined by the *Petroleum Act*, which was meant to prevent the respondents from operating the pipeline without regard to the Access Principles.

Conclusions – Estoppel

[87] The formulation by Dixon J in *Thompson v Palmer* remains authoritative:

> "Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct…; or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the

> faith of the assumption; or because he directly made representations upon which the other party founded the assumption."[32]

[88] The first and last of those possibilities are relevant here. The problem for the respondents in arguing for an estoppel by representation is that identified by the learned trial Judge: the difficulty in establishing any clear and unambiguous representation.[33] The conduct relied on by the respondents as constituting the representation entails no positive assertion that cl 1(a) was valid and binding or that it would accept currency fluctuations and make payments regardless of the clause's efficacy. At best it is equivocal: it is consistent with a mere belief or opinion, like the respondents' own, that the clause was effective. The appellant was not in any special position of knowledge so as to confer any greater significance to its conduct which might have entitled the respondents to construe it in the manner pleaded.

[89] Nor, indeed, did the respondents' evidence go so far as to say it did construe it thus. The appellant says, correctly, that Mr Cavell's evidence was not that the appellant's conduct induced PGT to any particular course of action. Rather it was that if the appellant had expressed a different opinion, PGT would have acted differently. But the appellant held no different opinion. Nor does it seek to say otherwise now; its case is that its opinion, though held, was mistaken. By the time that opinion began to be questioned in late 2001, any opportunity of change the respondents might have had through the Minister's intervention was gone.

[90] These observations by Deane J in *Foran v Wight*[34] are apposite:

> "A representation can found an estoppel by conduct only to the extent that it is clear. It can, however, be reduced to what is clear by discarding so much of its content as is equivocal or ambiguous. That being so, a representation of future fact and a representation of law will often, upon analysis, involve no more, for the purposes of the doctrine of estoppel by conduct, than a representation of present opinion. In a case where that is so, any estoppel founded upon the representation will ordinarily be of no use to the representee since it will extend no further than precluding a denial that the represented opinion was truly held".[35]

[91] It is unnecessary to consider whether the respondents were entitled to rely on a representation made not to them, but to their predecessor in title. They cannot point to any clear and unambiguous representation by the appellant that the clause was binding or that it would regard it as so even if it were not. The respondents cannot succeed on estoppel by representation.

[92] Although the respondents cannot demonstrate an unequivocal representation, they are on stronger ground in establishing a common assumption by the parties, in accordance with which each conducted itself, that the clause was valid. The matters which must be proved to establish estoppel by representation are not identical to those requisite to estoppel by convention. A mutual mistake may found an estoppel by convention.[36] I doubt the correctness of the appellant's assertion that it was

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32 *Thompson v Palmer* (1933) 49 CLR 507, at 547.
33 *Legione v Hateley* (1983) 152 CLR 406, at 434-35.
34 (1989) 168 CLR 385.
35 At 435-36.
36 *Coghlan v SH Lock (Aust) Ltd* (1985) 4 NSWLR 158.

necessary to show that one party's adoption of the mistake was caused by the other, the party to be estopped. In that regard, I note this remark by Brereton J in *Moratic Pty Ltd v Gordon*[37] in the context of a summary of the principles of conventional estoppel (approved in a later case by the New South Wales Court of Appeal[38]):

> "Although I accept that detriment is an element of conventional estoppel … , and that each party must know or intend that the other act on the relevant assumption, there is no requirement that either have induced, or acquiesced in, the adoption of the assumption by the other, and in particular there is no requirement that either know that the other may occur detriment by reliance on the assumption."

It seems to me that it would suffice to show that each was aware that the other was acting on the basis that cl 1(a) was effective according to its terms; something which could be evinced by conduct. The question then becomes whether either party would suffer detriment if the common basis on which they have relied is abandoned, so as to make departure from it unjust.

[93] The question of when a party can successfully advance a new argument on appeal was addressed by the High Court in *Water Board v Moustakas*:[39]

> "More than once it has been held by this Court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. Where all the facts have been established beyond controversy or when the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point, but otherwise the rule is strictly applied".

The limits to appellate consideration of such an argument were emphasised in *Coulton v Holcombe*:[40]

> "The powers of an appellate court with respect to amendment are ordinarily to be exercised within the general framework of the issues so determined and not otherwise. In a case where, had the issue been raised in the court below, evidence could have been given which by any possibility could have prevented the point from succeeding, this Court has firmly maintained the principle that the point cannot be taken afterwards: see *Suttor v Gundowda Pty Ltd*; (1950) 81 CLR 418, at p 438; *Bloemen v The Commonwealth* (1975) 49 ALJR 219."

[94] The problem for the respondents is that because the underlying components of the two forms of estoppel are not identical, the case that the appellant had to meet at trial was not on all fours with estoppel by convention. I doubt that a challenge to Mr Cavell's evidence as to the assumptions relied on would have made much difference, and it is difficult to see how the appellant could, consistently with its reliance on mistake as to the clause's validity, argue that it did not share those assumptions. But there is force to the appellant's argument that it was entitled to focus its attention at trial on the weak aspect of the respondent's case on estoppel by representation: its difficulty in establishing the making of representations or reliance on them. Had estoppel by convention been raised, it seems probable that more

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37 [2007] NSWSC 5, at [37].

38 *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65, at [199-201].

39 (1988) 180 CLR 491, at 497.

40 (1986) 162 CLR 1, at 7-8.

attention would have been given to the question of whether the respondents could prove detriment, particularly with regard to the question of how the considerations in s 112(2) and the limitations in s 114A might have been addressed. It is not, in my view, in the interests of justice to allow reliance on such an estoppel now, and I would, accordingly, refuse the respondents leave to amend their defence for that purpose.

Orders

[95] I would allow the appeal, set aside the judgment given for the respondents and substitute judgment for the appellant in an amount to be determined, with costs of the trial and of the appeal. The parties indicated that they were able to agree as to the amount of any judgment; should consent orders not be filed within 21 days to reflect that agreement, the issue of quantum should be remitted to the Trial Division for determination in accordance with these reasons.

[96] **FRYBERG J**: I agree with the orders proposed by Holmes JA and with her Honour's reasons for those orders.

[97] The respondent submitted that it was entitled to take advantage of any estoppel by representation which arose in favour of PGT, on the basis that PGT was its predecessor in title. I am far from persuaded that the authorities cited in support of that submission[41] are sufficient to make it good. However as Holmes JA has observed, it is unnecessary to consider this point.

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[41] *Commonwealth of Australia v Verwayen* [1990] HCA 39; (1990) 170 CLR 394 at p 444 per Deane J; *Grace v Hamilton Island Enterprises Ltd*, unreported, Supreme Court of Queensland (Thomas J), 8976 of 1996, 17 March 1998, at pp 40-43.