SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Alumina Ltd v Alinta DQP Pty Ltd & Anor* [2006] QSC 391
PARTIES:	**QUEENSLAND ALUMINA LIMITED** ACN 077 102 526 (plaintiff) **v** **ALINTA DQP PTY LTD** ACN 083 050 284 (first defendant) **ALINTA DEQP PTY LTD** ACN 083 050 104 (second defendant)
FILE NO:	BS5274 of 2005
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	15 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	13-16 November 2006
JUDGE:	Muir J
ORDER:	**Judgment for the defendants with costs, including reserved costs, if any.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where agreement for provision of gas – where agreement expressed to be subject to statutory instrument – where parties agreed rate payable – where statutory instrument limited amount chargeable – where remittance exceeded limit – whether agreed terms and statutory instrument inconsistent – whether statutory instrument prevails ESTOPPEL – GENERAL PRINCIPLES – where moneys paid to defendants over lengthy period – where plaintiff seeks recovery of moneys – whether estoppel a bar to recovery RESTITUTION – MISTAKE: RESTITUTION ARISING FROM A PLAINTIFF'S MISTAKEN ACTIONS – RECOVERY OF MONEY PAID UNDER MISTAKE – RELEVANT PRINCIPLES – where plaintiff claims moneys paid over specified limit – where plaintiff alleges moneys paid under mistake – whether plaintiff mistaken – whether

moneys recoverable

Acts Interpretation Act 1954 (Qld), s 14B, s 23(1), s24AA
Gas Pipelines Access (Queensland) Act 1998, s 8, s 58(1), s 58(2), s 58(3), s 60, s 60(c)
Petroleum Act 1923, s 2, s 109, s 109(3), s 112, s 114
Statutory Instruments Act 1992 (Qld), s 7, s 14

Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd [1982] QB 84, considered
Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99, applied
Blue Moon Grill Pty Ltd v Yorkey's Knob Boating Club Inc [2005] QSC 251, cited
Bremer Handelsgesellchaft mbH v J H Rayner & Co Ltd [1979] 2 Lloyd's Rep 216, applied
Con-Stan Industries v Norwich Union Winterthur Insurance (Aust) Ltd (1986) 160 CLR 226, applied
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353, applied
Forbes v Git [1922] 1 AC 256, applied
Gesellschaft Burgerlichen Rechts v Stockholms Rederiaktiebolag Svea (The Robert Bravant) [1967] 1 QB 588, applied
Global Network Services Pty Ltd v Legion Telecall Pty Ltd [2001] NSWCA 279, applied
Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59 CLR 641, applied
J & S Holdings Pty Ltd v NRMA Insurance Ltd (1982) 61 FLR 108, applied
Legione v Hateley (1983) 152 CLR 406, applied
McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579, applied
Pagnan SpA v Tradax Ocean Transportation SA [1987] 3 All ER 565, applied
Reardon Smith Line Ltd v Hansen-Tangen [1976] 1 WLR 989, applied
Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] AC 80, considered

COUNSEL: G A Thompson SC, with him D Kelly, for the plaintiff
P O'Shea SC, with him A Pomerenke, for the defendants

SOLICITORS: Corrs Chambers Westgarth for the plaintiffs
Freehills for the defendants

Introduction

[1] The plaintiff, Queensland Alumina Limited, operates the world's largest aluminium refinery in Gladstone. The refinery is fuelled by natural gas conveyed by a pipeline from Wallumbilla to Gladstone operated by the defendants, Alinta DQP Pty Ltd and

Alinta DEQP Pty Ltd. The gas is provided by the defendants to the plaintiff pursuant to a Gas Transportation Service Agreement ("the Agreement"), entered into on 27 June 1996 between the plaintiff and PGT Queensland Pty Ltd ("PGTQ") as agent for PGT Australia Pty Ltd ("PGTA"). PGTQ assigned its rights under the Agreement to the defendants and the defendants agreed to assume the assignor's obligations under the agreement by deed of assignment dated 14 July 1998.

[2] The Agreement is contained in or evidenced by:

- a document entitled "Form of Service Agreement Applicable to Firm Transportation Service under Rate Schedule FT-1" ("**Transportation Service Agreement"**);
- the access principles for the Pipeline approved under the *Petroleum Act* 1923 (Qld) ("**Pipeline Access Principles**" or "**Access Principles"**);
- a document entitled "Rate Schedule FT-1" under the Indicative Tariff developed for the Pipeline by PGTQ ("**Rate Schedule FT-1**");
- a document entitled "Transportation General Terms and Conditions" under the Indicative Tariff developed for the Pipeline by PGTQ ("**Transportation General Terms and Conditions**" or "**General Terms and Conditions**").

[3] The Minister for Mines and Energy approved the Access Principles pursuant to s112 of the *Petroleum Act* 1923 ("the Act") on 27 June 1996.

[4] Between 1 July 1998 and 30 June 2004 the plaintiff made payments in US dollars to the defendants under the Agreement calculated pursuant to the provisions of clause 1 of Part VI of the Transportation Service Agreement.

[5] The plaintiff claims that the payments so made were higher than the payments required by the Agreement properly construed. The alleged overpayments are said to have arisen because clause 1 of Part VI of the Transportation Service Agreement is inconsistent with clause 4 of the Access Principles which prevail over the terms of the Transportation Service Agreement in the event of any inconsistency. The alleged inconsistencies are:

- the rates in clause 1 of Part VI are expressed in US dollars while the rates in clause 4 of the Pipeline Access Principles are expressed in Australian dollars;
- the US dollar rates in clause 1 of Part VI can differ from the Australian dollar rates in clause 4 of the Pipeline Access Principles as a result of exchange rate fluctuations; and, alternatively,
- in as much as the Australian dollar value of the rates contained in clause 1 of Part VI exceeds the maximum rates provided for in clause 4 of the Access Principles.

[6] By clause 27 of the General Terms and Conditions, in the event of an inconsistency between the Transportation Service Agreement and the Access Principles, the Access Principles prevail and the Transportation Service Agreement is deemed to be amended to the extent of the inconsistency.

A change in the regulatory regime

[7] The *Gas Pipelines Access (Queensland) Act* 1998 ("the *GPA Act*") came into effect on 18 May 2000. The *GPA Act*, by section 8, adopted as law in Queensland schedules 1 and 2 to the *Gas Pipelines Access (South Australia) Act* 1977 (SA) ("the gas pipelines access law"). It is common ground that the gas pipelines access law applies to the Pipeline.

[8] Section 2 of the *National Third Party Access Code for Natural Gas Pipeline Systems* (Schedule 2 of the South Australian Act) ("the *Code*") required the owner or operator of a Covered Pipeline to establish an Access Arrangement to the satisfaction of the relevant regulator for that Covered Pipeline.

[9] Under the *GPA Act*, the Australian Competition and Consumer Commission ("the ACCC") assumed the role of regulator. On 1 November 2001 it approved new Access Arrangements for the Pipeline which commenced operation on 19 November 2001 ("the 2001 Access Arrangements"). Section 60(c) of the *GPA Act* provided that, from the date of the approval of the 2001 Arrangements, Part 8 of the Act ceased to apply to the Pipeline.

[10] Schedule 4 of the 2001 Access Arrangements set out standard terms and conditions applicable to third party access to pipelines. Clause 22.7 of Schedule 4 provides:

> "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."

Relevant contractual provisions

[11] It is convenient to now set out the relevant provisions of the instruments comprising the Gas Transportation Agreement.

> "**Pipeline Access Principles**
> **1.2 COMPOSITION OF ACCESS PRINCIPLES**
> These access principles (the '**Access Principles**') consist of this Part 1 and the following Parts:
> (a) Part 2 – Indicative Access Conditions;
> (b) Part 3 – Tariff Setting Principles;
> (c) Part 4 – Indicative Tariff Schedule.
> …
> **'Capacity Reservation Rate'** means, subject to Clause 4.10(1) – Part 4 Indicative Tariff Schedule, the amount of $0.50 per GJ.
> …

'Distance Reservation Rate' means, subject to Clause 4.4(2) - Part 4 Indicative Tariff Schedule, the amount of $0.000943 per GJ per kilometre.

...

'**Indicative Tariff Schedule**' means the indicative tariff schedule for the Pipeline referred to in Part 4 – Indicative Tariff Schedule.

…

'**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.

…

'Rate Cap' means:

(a) prior to the Expansion Date, $0.795 per GJ of MDQ; and

(b) on and from the Expansion Date, $0.71 per GJ of MDQ.

…

'**Tariff Setting Principles**' means the tariff setting principles referred to in Part 3 – Tariff Setting Principles.

…

3.2 SCHEDULE TO INDICATE MAXIMUM TARIFF

The Indicative Tariff Schedule for the Pipeline shall:

(a) set out the Maximum Tariff or a methodology for determining the Maximum Tariff for access to the Pipeline;

(b) subject to the requirements of the Indicative Tariff Schedule and the Maximum Tariff, provide that tariffs and charges under access agreements will be a matter for negotiation between the relevant parties to each access agreement.

…

4.2 MAXIMUM TARIFFS AND CHARGES

(1) The Maximum Tariff provided for in this Indicative Tariff Schedule encompasses all the tariffs and charges which may be levied by an access provider on a facility user for access to the Pipeline.

(2) The Maximum Tariff provided for in this Indicative Tariff Schedule is for and extends to all types of access to the Pipeline including, without limitation, for the following services:

  (a) receipt of gas at the Receipt Points;

  (b) transportation of gas to the Delivery Points, including use of compression facilities installed on the Pipeline,

  (c) delivery of gas at the Delivery Points,

  (d) measurement of gas quantity and quality for the purposes of metering, billing and the operational and safety requirements of the Pipeline;

  (e) measurement and control of gas pressures for the purposes of metering, billing and the operational and safety requirements of the Pipeline;

  (f) establishment and management of transportation accounts, preparation of invoices and collection of revenue for tariff purposes;

  (g) operation and maintenance of the Pipeline;

(h) provision of all business and customer support services required for the provision of the services listed above or required by this Indicative Tariff Schedule.

(3) Subject to 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.

(4) Subject to sub-clause (5) an access provider is not obliged to enter into any access agreement with provision for tariffs and charges that are less than the Maximum Tariff.

(5) If an access provider agrees to charge a facility user less than the Maximum Tariff for access under an access agreement then that access provider must, on and from the effective date of such reduced tariffs and charges, charge such reduced tariffs and charges under all other access agreements which provide for similar access and must post a notice on the Electronic Bulletin Board of the facility owner (or provide notice in such other manner as reasonably determined by the facility owner) describing the similar access including the reduced tariffs and charges. For purposes of this sub-clause (5), "similar access" means that, in all material respects, the terms and conditions for access under the relevant access agreements (including, without limitation, term (if a new agreement) termination date, (if an amended agreement), payment provisions, and currency risk allocation) are equivalent, provided that material differences in quantity or distance of haul are not to be taken into account.

…

4.4 TARIFFS AND CHARGES

(1) Subject to adjustment in accordance with the following clauses of this Part, the Maximum Tariff for each access agreement for the Pipeline consists of:

(a) where the access agreement relates to Firm Forward Haul Service, for each Day:

(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;

(b) where the access agreement relates to Backhaul Service, for each Day, a back haul reservation charge equal to the Backhaul Rate multiplied by the relevant facility user's MDQ;

(c) where the access agreement relates to the As Available Service, for each Day, a charge equal to the As Available Rate multiplied by the quantity of

gas (in GJ) delivered at a Delivery Point for the account of the facility user on the relevant day;

(d) overrun charges and Imbalance charges in accordance with Clauses 4.8 and 4.9;

(e) a charge for new taxes, duties or charges imposed by any government or other regulatory authority in accordance with Clause 4.12;

(f) costs of construction, operation and maintenance of capital improvements in accordance with Clause 4.14(6).

(2) On and from the Expansion Date, the Reservation Rate shall be $0.000660 per GJ per kilometre.

(3) If the average capacity reservation charge and distance reservation charge as determined under Clause 4.4(1)(a) actually charged to a facility 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. At the option of the access provider, the rebate will be provided to the facility user either through a cash refund within 30 days after the end of that year or through a credit of $1/12^{th}$ of that excess each month for the monthly invoices issued under the access agreement for the 12 months after the end of that year.

…

4.10 TARIFF ESCALATION

(1) The Capacity Reservation Rate, as increased by the earlier application of this clause, may be increased by the facility owner by no more than $0.04 on the first day of July in the years 2001, 2006, 2011, 2016, 2021, 2026, and 2031.

(2) The Backhaul Rate, as increased by the earlier application of this clause, may be increased by the facility owner by no more than $0.03 on the first day of July in the years 2001, 2006, 2011, 2016, 2021, 2026, and 2031."

"**Transportation Service Agreement**

I Governmental Authority

1. This Firm Transportation Service Agreement ("Agreement") is made pursuant to the Access Principles for the PGT Queensland Gas Pipeline approved under the Petroleum Act 1923.

2. This Agreement is subject to all valid legislation with respect to the subject matters of this Agreement, either state of federal, and to all valid present and future decisions, orders, rules, regulations and ordinances of all duly constituted governmental authorities having jurisdiction.

…

VI Rate(s), Rate Schedules, and General Terms and Conditions of Service

1. Shipper shall pay PGTQ each month for services rendered pursuant to this Agreement in accordance with PGTQ's Rate Schedule FT-1, or superseding rate schedule(s) provided that:
   (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 and the escalation in the Capacity Reservation Rate being no more than US$0.03 per GJ in five year increments.

…

3. This Agreement in all respects shall be and remains subject to the applicable provisions of the Pipeline Access Principles, Rate Schedule FT-1, or superseding rate schedule(s), and of the applicable Transport General Terms and Conditions of PGTQ's Indicative Tariff, all of which are by this reference made a part of this Agreement.
4. PGTQ shall have the right from time to time to propose and file with the State of Queensland an amendment to the Pipeline Access Principles containing changes in the rates and charges applicable to transportation services pursuant to this Agreement, the rate schedule(s) under which this service is to be provided, or any provisions of PGTQ's Transportation General Terms and Conditions applicable to such services. Shipper shall have the right to comment on the proposed amendment to the Pipeline Access Principles consistent with the provisions of the Petroleum Act 1923. PGTQ will provide prior notice to Shipper of any proposed amendments.

VII Miscellaneous

…

5. A waiver by either party of any one or more defaults by the other under this Agreement shall not operate as a waiver of any future default or defaults, whether of a like or of a different character.
6. This Agreement may only be amended by an instrument in writing executed by both parties.

…

Note: Rates for transportation service under this Agreement and gas to be supplied by Shipper at Shipper's point(s) of receipt for system use gas are listed in the Statement of Maximum rates and Charges for Transportation of Natural Gas in PGTQ's Indicative tariff."

"Rate Schedule FT-1

1. AVAILABILITY

This rate schedule is available to any party qualifying for Service that has executed a Firm Transportation Service Agreement (also known as "Access Agreement" in the Pipeline Access Principles) with PGTQ in the form contained in this Indicative Tariff ("Shipper," also known as "facility user" in the Pipeline Access Principles).

…

2. APPLICABILITY AND CHARACTER OF SERVICE

Firm Transportation Service shall be subject to all provisions of the Pipeline Access Principles, the executed Firm Transportation Service Agreement between PGTQ and Shipper, and the applicable Transportation General Terms and Conditions in this Indicative Tariff.

…

3. RATES

Shipper shall pay PGTQ each month the maximum tariffs set forth in PGTQ's current Statement of Maximum Rates and Charges for Transportation of Natural Gas in this Indicative Tariff for the applicable Maximum Daily Quantity, except as provided for in Section 3.2. Such maximum tariffs are applied to transportation service rendered under this rate schedule.

3.1 Reservation Rate

The Reservation Rate for this service shall be the sum of:

(a) the currently effective Capacity Reservation Rate times the Shipper's Maximum Daily Quantity; and

(b) the currently effective Distance Reservation Rate multiplied by the distance, in pipeline kilometres, from the point(s) of receipt to the point(s) of delivery multiplied by the Shipper's Maximum Daily Quantity.

…

3.2 Shipper shall pay the maximum tariff for service under this rate schedule unless PGTQ offers to discount the Capacity Reservation Rate or the Distance Reservation Rate to Shipper under this Rate Schedule. If PGTQ elects to discount the Reservation Rate, PGTQ shall by written notice, advise Shipper of the effective date of such charges and the quantity of gas so affected; provided, however, such discount shall be offered to all shippers receiving the same service for a period of 1 year from that effective date or such longer period determined by PGTQ. Same service for this purpose means that, in all material respects, the terms and conditions for the service under the relevant Transportation Service Agreement (including, without limitation, term, payment provision and currency risk allocation) are equivalent provided that

material differences in quantity or distance of haul are not to be taken into account.

…

6. TRANSPORTATION GENERAL TERMS AND CONDITIONS

All of the Transportation General Terms and Conditions of this Indicative Tariff are applicable to this rate schedule, unless otherwise stated in the executed Firm Transportation Service Agreement between PGTQ and Shipper …"

"Statement of Maximum Rates and Charges for Transportation of Natural Gas

Rate Schedule and *Type of Rate*	*Maximum Tariff Rate*

FT-1 (Firm Transportation Service)

(a) Reservation Rate (Before Expansion Date)

Capacity Reservation Rate	$0.50 per GJ of MDQ/day
Distance Reservation Rate	$0.000943 per GJ of MDQ/day/km
Rate Cap	79.5 cents per GJ

…

The Capacity Reservation Rate for FT-1 service and the Backhaul Rate for BH-1 service are applied to the Shipper's Maximum Daily Quantity as shown on Exhibit A to the appropriate Transportation Service Agreement. The Distance Reservation Rate for FT-1 Service is applied to the pipeline kilometre distance measured between the point of receipt by PGTQ to the Shipper-designated point of delivery. The As Available Rate for AT-1 service is applied to the daily quantity of gas delivered to the Shipper.

Escalation

The Maximum Capacity Reservation Rate for Firm Transportation Service and Maximum Backhaul Rate and the As Available Rate shall be escalated as follows:

Years 1-5 No escalation

Year 6 and following Escalation in the Capacity Reservation Rate by no more than $0.04 per GJ in 5-year increments.

Escalation in the Backhaul Rate by no more than $0.03 per GJ in 5-year increments.

Escalation in the As Available Rate occurs when escalation occurs in the Capacity Reservation Rate.

Notes

A. The Initial Tariff Schedule will be effective until the earlier of 5 years from July 1 1996 or the Expansion Date (defined below).
B. The Expansion Tariff Schedule will be effective on the date the system commences providing transportation services for firm contracted capacity for firm transportation service of 25 PJ or more, on an

annualized basis, regardless of the combination of customer contracts that contribute to the increase (the "Expansion Date").

C. If the average combined Capacity Reservation Rate and Distance Reservation Rate for firm transportation service charged to a Shipper per GJ of MDQ per day in any year commencing 1 July exceeds the applicable Rate Cap, then PGTQ will rebate such excess to that Shipper. At the option of PGTQ, the rebate will be provided to the Shipper as a cash refund within 30 days after the end of that year or through a credit of $1/12^{th}$ of that excess each month for the monthly invoices issued under the Transportation Service Agreement for the 12 months after the end of that year.

…

10. BILLING

10.1 Billing under all rate Schedules: On or before the 20^{th} day of each month, PGTQ shall render a bill to each Shipper under all applicable rate schedules for the service(s) rendered during that month.

11. PAYMENT

11.1 Payment under all Rate Schedules: Each Shipper under all applicable rate schedules shall ensure that PGTQ receives, on or before the last working day of each month, payment in lawful money of Australia at PGTQ's office in Brisbane, Queensland, the amount of the bill rendered by PGTQ during the month in accordance with Paragraph 10.1 of these Transportation General Terms and Conditions. Any Shipper may, with the consent of PGT, pay to or upon the order of PGTQ an equivalent amount in lawful money of the United States of America at PGTQ's officer 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.

…

19. MISCELLANEOUS PROVISIONS

19.1 Waiver of Default: No waiver by either PGTQ or Shipper of any default by the other in the performance of any provisions of an executed Transportation Service Agreement shall operate as a waiver of any continuing or future default, whether of a like or different character.

…

27. PIPELINE ACCESS PRINCIPLES

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."

Negotiation of the Agreement

[12] There was a considerable body of evidence concerning the course of the negotiations leading up to the entering into of the Agreement. In particular, there was an issue as to the length of time prior to the entering into of the Agreement during which the parties had contemplated that payment under the Agreement be in US dollars and concerning the circumstances in which agreement was finally reached. It seems to me that these are false issues. It is apparent that for some weeks prior to the entering into of the Agreement, PGTQ considered that payment in US dollars may be attractive to the plaintiff and the plaintiff was of the view that payment in US dollars would suit PGTQ. It is obvious also that clause 1(a) of Part VI of the Transportation Service Agreement was carefully thought out and that it converted the Capacity Reservation Rate, Distance Reservation Rate and Rate Cap prescribed in the Access Principles from Australian dollars to US dollars at a conversion rate of US$0.77 to A$1. The open market exchange rate at the time of the Agreement was approximately US$0.79 to A$1.

[13] During the term of the Agreement the US$/A$ exchange rate fluctuated. Initially the exchange rate changes favoured the plaintiff but, since 2003, the exchange rate movement has generally favoured the defendants.

[14] The reason for the parties' interest in contracting in US dollars was that both sides had available to them a "natural hedge" against the adverse effects of foreign exchange fluctuations. PGTA was borrowing in US dollars for the purposes of acquiring the Queensland Government's interest in the pipeline and interest and principal were payable and repayable in that currency. The plaintiff operated on a non-profit basis. Its role was to process bauxite, the property of its shareholders, for the shareholders for fees which covered its operating costs. Its shareholders' borrowings for the purposes of constructing and maintaining the Gladstone plant were effected in US dollars and major decisions involving currency risks were taken by the shareholders and not by the plaintiff's management. The plaintiff charged its shareholders for whom it processed the bauxite at its Gladstone plant in US dollars. The plaintiff also had an obligation to pay in US dollars some recurring operating expenses such as the cost of caustic soda purchased by it and the costs of chartering the vessels which transported alumina and aluminium from Gladstone.

The role and status of the Pipeline Access Principles

[15] Section 109 of the Act commenced operation on 11 April 1995. The subject pipeline was in existence before the commencement of the section and, consequently, the owner of the pipeline was obliged to give the Minister proposed Access Principles for the pipeline within three months of the date in which the section first applied to the pipeline.[1] The proposed Access Principles were not approved by the Minister within six months of 11 April 1995 and the principles thus fell for determination by the Minister.[2] The Pipeline Access Principles, which were the same as those provided to the Minister by PGTA, were decided by the Minister on 27 June 1996.

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1 *Petroleum Act* 1923 s 109(3).

2 *Petroleum Act* 1923 s 109(4).

[16] In approving Access Principles for a pipeline the Minister was required to consider, amongst other matters:

(i) contractual obligations of the facility owner and facility users;
(ii) efficiency and economy in the facility's construction, operation and use;
(iii) fair and efficient market conduct with respect to tariff arrangements and access conditions for the facility.[3]

[17] The Minister was also required under s 112 to consider the objects of Part 8 of the Act. Those objects were:

"(a) to facilitate competitive markets in the petroleum industry for the benefit of the public and industry; and
(b) to promote efficiency in the petroleum industry; and
(c) to provide for access to facilities on fair commercial terms."

[18] The Access Principles were decided after taking into account the views of the plaintiff, PGTQ and other (prospective) users.

[19] Section 114 of the Act provides:

> "Within 6 months after notice of the access principles for a facility is gazetted, the parties to an access agreement that is inconsistent with the access principles must amend the agreement to remove the inconsistency, unless the Minister otherwise approves."

[20] The Rate Cap was introduced as a result of concerns expressed by the Director of the Office of the Energy Regulator that producers furtherest from Gladstone would suffer as a result of the distance component of the proposed tariff. That component is a function of the distance over which the gas is transported and would result in customers of producers at the furtherest end of the pipeline paying more for gas transportation than customers of producers closer to the other end of the pipeline. To address this concern a Rate Cap was introduced which had a fixed capacity charge component and a variable distance charge based on transportation over about half the length of the pipeline. The effect of this was to allow a Shipper to claim a rebate in respect of any charges attributable to transportation over a greater distance.

The defendants' arguments on the construction of the Agreement

[21] It is accepted that by virtue of clause 3 of Part VI of the Transportation Service Agreement and clause 27 of the Transportation General Terms and Conditions that, in the event of inconsistency, the Terms and Conditions of the Access Principles prevail over the terms of the Transportation Service Agreement. But there is no inconsistency.

[22] Clause 1 of Part VI of the Transportation Service Agreement provides for payment to be made at rates expressed in US dollars and that such rates not be adjusted by reason of exchange rate fluctuations. The expression of rates in US dollars rather than Australian dollars cannot be characterised as a qualification or modification of the Australian dollar rates, "rather it is merely a re-expression of them."

[23] In the course of submissions Mr O'Shea SC, who, with Mr Pomerenke, appeared for the defendants, accepted that the defendants' central argument was that if one looked at the full contractual documents together no inconsistency emerges "because although you have got the Rate Cap in the Access Principles, the [Transportation] Service

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[3] *Petroleum Act* 1923 s 112(2).

Agreement is not inconsistent; it accepts the Rate Cap but simply sets an exchange rate."

[24] Clause 1 of Part VI provides that "the particular exchange rate will be used and expresses then that same number in a different currency."

[25] No inconsistency arises from the possibility that "the AUD equivalent of the USD rates expressed in cl 1 of Part VI of the Service Agreement might differ from, and in particular might exceed, the AUD rates set out in the 1996 Access Principles." Nothing in the Agreement suggests that it is permissible to have regard to exchange rates prevailing at the time tariffs are to be paid. Under normal principles of contractual interpretation, to the extent that enquiry is to be made into the possible effects of exchange rate fluctuations, the relevant enquiry is to the rates prevailing at the date of the enquiry. A sentence of clause 1 of Part VI stipulates, "The above rates are not subject to future adjustment because of changes in exchange rates."

[26] The plaintiff's interpretation would render clause 4.2(5) of the Access Principles, which recognise that Access Agreements may contain provisions concerning "currency risk allocation", a dead letter.

[27] No inconsistency arises from the fact that during the term of the Agreement the exchange rate has been more favourable to the defendants than the plaintiff. This is because the only relevant exchange rate, for the purposes of assessing consistency with the Access Principles, is that prevailing at the date of the Agreement. The plaintiff's construction would have the effect of insuring the plaintiff against much of the ill effects of adverse currency fluctuations whilst fully exposing the defendants to that risk. That construction infringes the requirement that commercial documents be interpreted so as to make commercial sense. Such a construction does not serve the object or purpose of the Rate Cap, which is designed to limit the amount of the Distance Reservation charge to be borne by shippers.

[28] Clause 1 of Part VI "re-affirms the obligation to pay in accordance with Rate Schedule FT-1, or any superseding rate schedule … "[it] deals with the mechanics of payment. It provides that payment is to be made on rates that are equivalent of the AUD rates set out in Rate Schedule FT-1 and the 1996 Access Principles, being rates which are expressed in USD having regard to an agreed exchange rate."

The plaintiff's arguments on the construction of the Agreement

[29] The Access Principles are properly construed as a statutory instrument. They provide a public benchmark, as all Access Agreements must be consistent with the content of the Access Principles and the Act imposes a penalty for making an Access Agreement providing for access in a way inconsistent with the Access Principles.[4] Section 7 of the *Statutory Instruments Act* 1992 defines a statutory instrument as including an instrument made under a "power conferred by an Act" which is "a notification of a public nature" or "a guideline of a public nature" or "another instrument of a public nature by which the entity making the instrument unilaterally affects a right or liability of another entity." Section 14 of the *Statutory Instruments Act* makes applicable to the interpretation of statutory instruments section 14B of the *Acts Interpretation Act.* That section "circumscribes the extrinsic material to which consideration may be given in interpreting the Pipeline Access Principles."

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[4] *Petroleum Act* s 123(2).

[30] The Access Principles must be interpreted by all shippers existing and future. Consequently, even apart from the requirements of s 14B, it is "contrary to logic and principle" that the Access Principles be construed by reference to matters raised in the course of negotiations between representatives of the energy regulator and representatives of the pipeline owner.

[31] There is a plain inconsistency between the Rate Cap as defined by the Pipeline Access Principles and the Rate Cap nominated by clause 1 of Part VI. The latter purports to be "instead of, and indeed a discount of, the Rate Cap defined by the" Access Principles. The Rate Cap defined by the Access Principles can have meaningful operation only by reference to the A$ value of the payments actually made by the plaintiff.

[32] The Access Principles contemplated that the only charges which could be levied were charges calculated in Australian dollars. The payment of the levied Australian dollar charges in an equivalent amount of a foreign currency was unobjectionable and expressly contemplated by clauses 10 and 11 of the Transportation General Terms and Conditions. However, the levying of charges in a foreign currency was not within the purview of, and inconsistent with, the Access Principles. In these circumstances, the effect of clause 27 of the Transportation General Terms and Conditions was to render nugatory the charges contained in clause 1 of Part VI and the operative rates became those contained in Rate Schedule FT-1 and the Access Principles.

(a) The language of clause 4.2(1) of the Pipeline Access Principles spoke in terms of the Maximum Tariff provided for in the Indicative Tariff Schedule "*encompasses all the tariffs and charges which may be levied by an access provider on a facility user for access to the Pipeline"*;

(b) Clause 4.2(5) of the Access Principles enshrined the so-called non-discriminatory tariff, a feature of which was to provide the opportunity to any existing facility user, for a period of one year, to take advantage of reduced tariffs and charges agreed with another user. That opportunity is undermined in a context where fixed US dollar rates are being offered as what might represent a reduced tariff or charge in comparison to the Maximum Tariff when that tariff or charge is initially agreed, one year later (by reason of currency fluctuations) may well constitute an excessive, rather than reduced, tariff or charge in comparison to the Maximum Tariff. The one year opportunity only works if charges are being levied consistently in Australian dollars.

(c) The reference to "currency risk allocation" contained in clause 4.2(5) should properly be construed as concerning the type of arrangement expressly contemplated by clause 11 of the Transportation General Terms and Conditions. That is, an arrangement whereby charges are still levied in Australian dollars (see clause 10) and the currency risk allocation involves the user agreeing to pay an equivalent amount to the levied charges in US dollars by reference to a foreign exchange rate determined by the parties.

[33] Alternatively, the notion that fixed, non-adjustable US dollar rates could be used without limitation instead of the Australian dollar rates identified in the Access Principles is inconsistent with the Access Principles because it renders meaningless the concepts of the Maximum Tariffs and the Rate Cap (each of which are defined by and integral to the Access Principles). The way to avoid such an obtuse result is to give proper effect to clause 27 of the Transportation General Terms and Conditions and recognise that the Form of Service Agreement is deemed to be amended to the extent that it is inconsistent with the Access Principles. The deemed amendments would be to

the effect that the US dollar rates could only be utilised insofar as they remained subject to the overriding requirement to rebate any amount paid in excess of the Rate Cap and did not exceed the Maximum Tariffs, as each term was defined by the Access Principles.

[34] These arguments are to be preferred because they:

(a) observe the primary rule of construction and give effect to the unambiguous meaning of the language actually used by the parties as contained in the documents comprising the Agreement;

(b) give due primacy and effect to the Access Principles in a way which is mandated by the contractual language which is wholly consistent with the extrinsic circumstances outlined above;

(c) give effective operation to clause 27 of the Transportation General Terms and Conditions.

[35] Further, the defendants' construction suffers from the difficulties that it makes clause 27 of the Transportation General Terms and Conditions otiose and renders meaningless the Maximum Tariffs and Tariff Escalation enshrined in clauses 4.2, 4.4 and 4.10 of the Access Principles.

[36] Whatever right of negotiation existed in relation to the tariffs and charges identified in the Access Principles, it was not a right which was at large, and was expressly made subject to "the other provisions of the Access Principles and to the limits of the Maximum Tariff": clauses 3.2 and 4.2 (3) of the Access Principles. Hence clause 4.2(5) of the Access Principles expressly recognised that an access provider could agree to charge a facility user "less than the Maximum Tariff" so long as the reduced tariffs were published and made available to other users. What was not sanctioned was the notion that the Maximum Tariff could be exceeded. The defendants' construction is pregnant with the contention that the Maximum Tariff could be exceeded. That notion is fundamental to the defendants' contention that you could amend the tariffs and charges by nominating *instead of* the Australian dollar rates contained in the Access Principles, fixed amounts in a foreign currency which were expressed to be "not subject to future adjustment because of changes in exchange rates". That arrangement always carried with it the prospect of the Maximum Tariff as defined by the Access Principles being exceeded.

[37] The ACCC did not ultimately approve the Access Arrangement submitted by Alinta and, pursuant to a power conferred upon it under section 2.20 of the *Code*, the ACCC drafted and approved its own Access Arrangement for the Pipeline, being the 2001 Arrangements.[5]

[38] The 2001 Arrangements were approved by the ACCC on 1 November 2001 and became effective on 19 November 2001.[6] These arrangements were approved without the plaintiff being consulted by either the ACCC or the defendants about their content.[7]

The plaintiff's submissions concerning the applicability of the 2001 Access Arrangement

[39] The 2001 Arrangements consist of a document headed "Access Arrangement for the Queensland Gas Pipeline" which includes schedules 1 to 8.

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5 ACCC Final Approval, Ex 1, tab 49 at page 3, section 3.

6 2001 Arrangements, Ex 1, tab 50 at clauses 1.5 and 1.VI.

7 Ex 2, Affidavit of Mouna, at para 12.

[40] Clause 1.2 provides that the 2001 Arrangements set out "the policies and basic terms and conditions applying to third party access to Services provided by the Service Provider in relation to the Pipeline".

[41] Clause 1.4 provides:

> "For the purpose of this Access Arrangement, the Gas Pipelines Access Legislation and **any Access Agreements entered into pursuant to this Access Arrangement**, Alinta DEQP Pty Ltd and Alinta DQP Pty Ltd are the Service Providers and have the rights and obligations of the Service Provider as set out under those documents." (emphasis added)

[42] Clause 7.3 provides that Alinta is not obliged to enter into any Access Agreement for a Reference Service with provision for a Service Charge that is less than the Reference Tariff for the relevant Reference Service.

[43] The relevant Terms Sheet for the subject agreement is contained in Schedule 1.

[44] Schedule 1, which was the relevant Terms Sheet for Firm Forward Haul Service, provides in clause 1:

> "***What does this agreement consist of?***
> *This Terms Sheet*
> ***and***
> *Exhibit A*
> ***and***
> *The terms and conditions of the Access Arrangement*
> ***By signing this agreement, you acknowledge that you have received, read, are aware of and agree to all of the above terms and conditions***." (emphasis added)

[45] It is uncontroversial that the plaintiff and the defendants never signed a Terms Sheet in the form of Schedule 1 and there has never been any agreement between the plaintiff and the defendants pursuant to which the plaintiff and the defendants agreed to adopt the 2001 Arrangements as part of the Agreement.

[46] Schedule 4 to the 2001 Arrangements contains the terms and conditions for an Access Agreement. The schedule comprises some 27 pages. These terms and conditions relevantly include an entire agreement clause (clause 40), an execution clause (clause 41) and a clause which provided that the agreement could not be amended except by writing signed by both partes (clause 29).

[47] Clause 22.7 of Schedule 4 contemplated a payment option involving US currency rates. It enshrines a classic agreement to agree. Clause 22.7 provides:

> "[Alinta] may agree to accept payment under this agreement in US$.
> You must agree to a conversion rate with [Alinta] if you want to make payments in US$.
> If [Alinta] agrees to accept payment of a charge in US$, all components of the Service Charge, including the Reference Tariff, the Service Charge, the Distance Fee, the escalation amounts and the Rate Cap, will be converted to US$ 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."

[48] Schedule 5 to the 2001 Arrangements contains the Reference Tariffs which were approved by the Minister. Relevantly they are identical to those in Rate Schedule FT-1.

[49] The following provisions of Schedule 5 to the 2001 Arrangements are noteworthy:

(a) clause 2.1(4) preserved the Rate Cap as defined by the Access Principles and provided for the same rebate mechanism;

(b) clause 2.1(6) provided that the Reference Tariffs encompassed all the tariffs and charges which might be levied for the provision of specified services through the Pipeline; and

(c) clause 2.1(8) recognised that tariffs and charges under Access Agreements were a matter for negotiation between the parties but subject to clause 2.1(VI) and the limits of the Reference Tariffs.

[50] The 2001 Arrangements cannot be characterised as "a variant or variation" of the Access Principles. The Access Principles were a decision of the State Minister. The 2001 Arrangements were drafted and approved by the ACCC. In drafting and approving the 2001 Arrangements, the regulator was not purporting to vary a decision of a State Minister but rather to act under s 2.20 of the *Code* in approving a wholly new arrangement by reference to the requirements of a completely different statutory scheme.

[51] Access Principles, when decided and operational, could be varied in accordance with the terms of the Act. This was the statute which defined and recognised the Access Principles and which dealt with the limited occasions on which the Minister's decision could be varied or amended. Any varied or amended version of the Access Principles had to be notified in the Government Gazette: s 113 and s 114A.

[52] Section 2 of the *Code* however ushered in a new statutory regime with different arrangements, procedures, requirements and approving bodies. Under section 2.20(a) of the *Code*, the ACCC was required to decide something which did not previously exist, namely an Access Arrangement under the *Code* for the Pipeline. This decision of the ACCC was "subject to review by the Relevant Appeals Body under the Gas Pipelines Access Law", being in this case the Australian Competition Tribunal: see s 2.26 of the *Code*.[8]

[53] Hence, it is quite inapt to speak in terms of the Access Principles "being varied" by the 2001 Arrangements. Indeed, once the 2001 Arrangements were approved the Access Principles ceased to have any statutory recognition or operation: s 60 of the *GPA* Act. In this context, one cannot meaningfully speak of something which no longer exists or operates as being "varied". The Access Principles became defunct, rather than being varied. Because the Access Principles had ceased to have operation and were defunct, it became necessary for the Minister, acting under s 58(2) of the *GPA Act*, to notify in the gazette his approval of a Reference Tariff and a Reference Tariff Policy for the Pipeline.[9] This notification would not have been necessary had the Access Principles continued to exist and been amenable to variation.

[54] For these reasons, the defendants' attempt to bring the 2001 Arrangements within the definition of Access Principles contained in clause 1.22 of the Transportation General Terms and Conditions fails. This definition defined the term "Pipeline Access

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8 See also Ex 1, tab 49, p 3.

9 Ex 1, tab 48.

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

[55] As to the operation of the *Code*, there is no provision suggestive of an intention that an Access Arrangement established under the *Code* should be automatically incorporated into an existing gas transportation agreement. The defendants contend for not just an automatic incorporation but for an automatic incorporation in substitution for or in replacement of existing terms.

[56] Clause 22.7 is itself merely an agreement to agree. As is made clear from clause 22.3, what is contemplated by clause 22.7 is a separate agreement made under clause 22.7. Any earlier agreement as to currency exchange rate cannot constitute an agreement made "under clause 22.7". This result is consistent also with clause 40.2, which provides that any such earlier agreement is to be regarded as superseded.

[57] The language of clause 22.7 of Schedule 4 is to the same effect as the language of clause 11.1 of the Transportation General Terms and Conditions, but the two clauses are quite different. The attempt to assimilate their operation emphasises the weakness in the defendants' contention that the fixing of US dollar amounts, without adjustment for currency fluctuations, was countenanced by the proper construction of the Agreement.

The claim for restitution based on mistake – the plaintiff's contentions

[58] The mistake consisted of the plaintiff making payments in accordance with clause 1 of Part VI whilst "ignorant of, or failing to appreciate, the true legal position." The fact that a payment has been caused by mistake gives rise to a prima facie obligation on the part of the recipient to make restitution, whether the mistake is one of fact or law.[10] Mistake not only signifies a positive belief in the existence of something which does not exist but also includes ignorance or inadvertence.[11]

[59] That the plaintiff may have believed there was doubt as to the proper construction of the Agreement does not mean that it was not relevantly mistaken.

[60] In *David Securities*[12] the joint judgment said:

> "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."

The claim for restitution based on mistake – the defendants' contentions

[61] In order to found its mistaken payments claim, the plaintiff must show, amongst other things, a mistake in the form of either a positive but incorrect belief that it was legally

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10 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 376 and 379.

11 *J & S Holdings Pty Ltd v NRMA Insurance Ltd* (1982) 61 FLR 108 at 118 and *David Securities* at 369.

12 At 373.

bound to make the payments it seeks to recover, or that it made those payments in sheer ignorance of the circumstance that it was not so bound.[13]

[62] From some time prior to November 2001 (when the 2001 Access Arrangements were approved), the plaintiff through Mr Mouna was alive to the argument that the plaintiff is presently litigating: sufficiently alive to in fact raise it with the defendants (then Duke). From this point in time, it is impossible to say that the plaintiff either had the requisite positive belief, or was otherwise proceeding in sheer ignorance.

The estoppel defence – the defendants' submissions

[63] In the event that it is held that there is an inconsistency which deprives clause 1 of Part VI of the Transportation Service Agreement of effect, this case falls precisely within the dictum in the next paragraph.

- The representation relied upon is to the effect that clause 1 of Part VI of the Service Agreement was valid and binding and that the plaintiff would continue to make payments in accordance with its terms.
- In reliance on that representation, PGTQ and the defendants refrained from seeking to have the 1996 Access Principles amended so as to remove any doubt about the ability of parties to contract for payment to be made at rates, including a Rate Cap, expressed in USD.
- In consequence, PGTQ and the defendants were deprived of the opportunity of re-negotiating the transaction to render it legally enforceable in terms of the representation.

[64] In *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd*,[14] Robert Goff J recognised that an estoppel may arise where:

> "… one party has represented to the other that a transaction between them has an effect which in law it does not have. In such a case, it may, in the circumstances, be unconscionable for the representor to go back on his representation, despite the fact that the effect is to reduce his rights or enlarge his obligations and so give effect to what is in fact a gratuitous promise; for the effect of the representation may be to cause or contribute to the representee's error or continued error as to its true legal rights, or to deprive him of an opportunity to re-negotiate the transaction to render it legally enforceable in terms of the representation."

[65] The conduct upon which the defendants rely as amounting to the representation may be summarised as follows:

- In the context of a long negotiation, involving both the Transportation Service Agreement and the 1996 Access Principles, and with full knowledge of the terms of each, the plaintiff expressly promised in clause 1 of Part VI to make payment at rates expressed in USD, at a fixed exchange rate for a period of 10 years.

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13 *David Securities* at 369, 374, 376, 378.

14 [1982] QB 84 at 106-107.

- As the currency risk started, and then continued, to work against the plaintiff, the plaintiff nevertheless continued to make payments in accordance with clause 1 of Part VI of the Service Agreement.
- Over almost 5 years, the plaintiff engaged in this conduct with full knowledge of each and every fact which it now relies upon to assert an inconsistency.
- At no point prior to late 2001, did the plaintiff suggest that there existed an inconsistency.

[66] During the period from 27 June 1996 (when the 1996 Access Principles were approved by the Minister) to 1 November 2001 (when the 2001 Access Arrangements were approved by the ACCC), by operation of s 23(1) and s 24AA of the *Acts Interpretation Act* 1954 (Qld) (the "AIA"), the Minister was able to:

- amend or repeal the 1996 Access Principles, or his decision in respect thereof; and
- exercise his function or power under s 112 of the Act afresh as occasion required.

[67] Finally, to the extent that the estoppel is one that arose in favour of the defendants' predecessor, that is no impediment to the defendants taking advantage of it.

The estoppel defence – the plaintiff's submissions

[68] No representation was made by the plaintiff. Alternatively, if there was a representation, it was not "clear and unequivocal" as it must be in order to ground an estoppel.[15] Further, unless the conduct amounts to an implied representation it cannot constitute an estoppel.[16]

[69] The immediately striking aspect of the estoppel defence is that the alleged representations are contrived and depend in part on a litany of pre-contractual discussions and events. They were not mentioned in the defendants' correspondence responding to the issue when it was first raised, in circumstances where legal advice had been sought and obtained, at least by the time of the defendants' second letter dated 26 February 2004.[17] There is always a need for caution when an estoppel is alleged to be based upon a representation which is not express, clear or precise and said to be based upon oral discussions preceding the execution of a written contract: see the powerful cautions of Kirby P in *SRA NSW v Heath Outdoor Pty Ltd.*[18] This is such a case. The representations said to found this estoppel are not written or oral and nor are they attributed to a particular moment in time. Rather, they are alleged to be discernable from a variety of facts and some conduct occurring over a lengthy period of time. The facts themselves (which are contained in sections 16 to 18 of the Amended Defence) are either contentious or not established by the evidence. Moreover there is no evidence that some of the facts alleged were known to the defendants.

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15 *Legione v Hateley* (1983) 152 CLR 406 at 435; *George Whitechurch Ltd v Cavanagh* [1902] AC 117 at 145; *Canadian & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46 at 53, 54; *Discount & Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR (NSW) 598 at 603*; Queensland Independent Wholesalers Ltd v Coutts Townsville Pty Ltd* [1989] 2 Qd R 40; *Wright v Hamilton Island Enterprises Ltd* [2003] QCA 36 at [9] per McMurdo P, [56] per Jerrard JA and [84] per Mackenzie J.

16 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 110.

17 Ex 1, tabs 64 and 68

18 (1986) 7 NSWLR 170 at 177.

[70] As to the alleged facts, the key allegations are that there was a duty upon the plaintiff to amend the Agreement to remove any inconsistency with the Access Principles and that the plaintiff failed to discharge that duty.[19] This duty is said to have arisen either because of s 114 of the *Petroleum Act* or because of a term implied into the Agreement as a matter of law. There was, however, no occasion for the duty to arise in this case because the Agreement expressly recognised that the Access Principles prevailed. In particular, clause 27 of the Transportation General Terms and Conditions gave precedence to the Access Principles and deemed the Agreement to be amended to the extent of any such inconsistency. The parties' agreement was not an agreement which required amendment because the parties had agreed terms which ensured consistency with the Access Principles.

[71] There was further no evidence that the plaintiff made any such representations knowing or intending that Alinta would act upon them.

[72] Whilst there may not yet be a unified doctrine of estoppel, the High Court has accepted that there is a common principle which underlies all forms of estoppel.[20] That principle is perhaps best expressed by Dixon J in *Thompson v Palmer*[21] in the following terms:

> "The object of estoppel *in pais* is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. 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."

[73] The defendants did not adduce any evidence from any person to the effect that the alleged facts (even if proved) were relevantly understood by the defendants as founding the alleged representations. The only person from the defendants who was called was Mr Indermaur, the defendants' General Manager, and he gave no evidence about the defendants' relevant knowledge or understanding. Further, there was no evidence from any witness that the alleged facts were understood by anyone as giving rise to the alleged representations. The evidence of Mr Cavell (and in particular his evidence at paragraphs 68 and 69 of his affidavit) did not get anywhere near proving the representations.

[74] The defendants also failed to establish that they acted to their detriment in reliance upon any relevant assumptions. There was no evidence that the representations induced the defendants to make any assumptions or to act to its detriment upon those assumptions. Again, the evidence of Mr Cavell (and in particular his evidence at paragraphs 68 and 69 of his affidavit) did not get anywhere near proving the requisite inducement as it was unrelated to the alleged representations.

[75] The defence of change of position has been recognised as a possible defence to a claim in restitution based upon mistake and the central element of the defence is that the

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19 Further Amended Defence, paras 16(b) to (d)

20 *Legione v Hateley* (1983) 152 CLR 406 at 430; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 404, 448, 458; *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 409; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 506 and *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [39].

21 (1933) 49 CLR 507 at 547.

defendant has acted to its detriment **on the faith of the receipt.**[22] The phrase "*on the faith of the receipt*" is critical.[23] In *David Securities*, the joint judgment said:[24]

> "… the defence of change of position is relevant to the enrichment of the defendant precisely because its central element is that the defendant has acted to his or her detriment **on the faith of the receipt** (Birks, op. cit., at 410). In the jurisdictions in which it has been accepted … the defence operates in different ways but the common element in all cases is the requirement that the defendant point to expenditure or financial commitment which can be ascribed to the mistaken payment (*Rural Municipality of Stortoaks v Mobil Oil Canada Ltd* (1975), 55 DLR (3d) at 13; *Grand Lodge, AOUW of Minnesota v Towne* (1917), 161 NW 403 at 417."

[76] The defendants once again failed to adduce any evidence to prove that on the faith of the receipt of the mistaken payments, they incurred expenditure or financial commitment which can be ascribed to the mistaken payment. They called no witness who gave evidence touching upon this issue.

Principles applicable to the construction of the Agreement

[77] The object of contractual construction is to "ascertain and give effect to the intentions of the contracting parties".[25] Those intentions, to be determined objectively, are "what a reasonable person would have understood [the words of the contract] to mean."[26] And to ascertain that "normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction."[27] Such a reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation which they were in at the time of the contract [28] and a commercial contract, like the Agreement, "should be given a businesslike interpretation". Its interpretation requires "attention to … the commercial circumstances which the document addresses, and the objects which it is intended to secure".[29]

[78] Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tangen*[30] identified the information and materials to which recourse may be had in the following passage, which was referred to with approval by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*[31] and by the Court in *Pacific Carriers Ltd v BNP Paribas*:[32]

> "In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the

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22 *David Securities* at 385.
23 *Port of Brisbane Corp v ANZ Securities Ltd (No 2)* [2003] 2 Qd R 661 at 672.
24 At 385.
25 *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 at 737.
26 *Toll (FBCT) Pty Limited v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179.
27 *Toll (FBCT) Pty Limited v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179.
28 Per Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912, cited with approval by Gleeson CJ, Gummow and Hayne JJ in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2002) 210 CLR 181 at 188.
29 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589.
30 [1976] 1 WLR 989 at 995-996.
31 (1982) 149 CLR 337 at 350.
32 [2004] 78 ALJR 1045 at 1050, 1051.

> background, the context, the market in which the parties are operating."

[79] The contract must, insofar as is possible, be regarded as a harmonious whole. The reason for this is stated in the following passage from the reasons of Gibbs J in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*:[33]

> "It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention to the parties from the words of the instrument in which the contract is embodied. **Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render then all harmonious one with another**. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend the contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate', to use the words from earlier authority cited in *Locke v Dunlop* (1888) 39 Ch. D. 387 at 393 which, although spoken in relation to a will, are applicable to the construction of written instruments generally; see also *Bottomley's case* ((1880) 16 Ch. D. 681, at 686). Further, **it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument**. Finally, the statement of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* ((1932) 147 L.T. 503, at 514) that **the court should construe commercial contracts 'fairly and broadly, without being too astute or subtle in finding defects'**, should not, in my opinion, be understood as limited to documents drawn by businessmen for themselves and without legal assistance (cf. *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429, at p 437). (emphasis added)

Construction of the Agreement

[80] The plaintiff's arguments describe the Access Principles as the "critical document to be construed" and place considerable emphasis on the Access Principles being a statutory instrument within the meaning of the *Statutory Instruments Act* 1992. The latter contention was not disputed by the defendants. I accept its accuracy for present purposes.

[81] The Access Principles are thus to be construed as a statutory instrument in accordance with the requirements of the *Statutory Instruments Act* which makes applicable certain provisions of the *Acts Interpretation Act* 1954 including s 14B (with a stated variation).

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[33] (1973) 129 CLR 99 at 109-110.

[82] But it is the Agreement which has to be construed and the primary task is to ascertain the intention of parties as embodied in the Agreement. As the Access Principles form but a part of the Agreement it is inappropriate to focus on the Access Principles to the exclusion of the Transportation Service Agreement or, indeed, the other two instruments forming part of the Agreement.

[83] The Transportation Service Agreement is the only one of the four instruments comprising the Agreement which contains terms expressly negotiated and agreed between the original parties to the Agreement. The Transportation Service Agreement specifically provides in Part VI clause 3 that it is "subject to the applicable provisions of … Rate Schedule FT-1 … and of the applicable Transportation General Terms and Conditions …". But it is impossible to conclude that the contractual intention was that the Rate Schedule and the General Terms and Conditions were to apply so that the express provisions of clause 1(a) of Part VI would be ignored. Clause 1(a) plainly purports to qualify the manner in which the provisions as to payment of the other, and earlier, contractual instruments are to operate. If the plaintiff's construction is correct, this important provision will be deprived of effect. But if the defendants' construction is correct, a purpose is still served by the provisions which the plaintiff contends are inconsistent with clause 1(a).

[84] It is unnecessary to delve far or at all into the course of dealings between the plaintiff and PGTQ in order to discover "… the commercial circumstances which the document addresses and the objects which it is intended to secure".[34] The explanatory comments of the Minister for Mines and Energy accompanying or forming part of his determination of the Access Principles narrates that the Access Principles are the same as those proposed by PGTA in connection with its acquisition of the Pipeline.

[85] The explanatory comments to the Access Principles note an acceptable balance between "sale price and tariffs included in the Sale Agreement" and the Minister's conclusion that "the overall tariffs … are satisfactory and accord with the requirements of the Act". The Access Principles contemplate that the Pipeline owner will enter into separate agreements with users of gas supplied through the Pipeline. And it prescribes some of the terms and conditions which must be contained in any such access agreement.

[86] A "preliminary statement" in the General Terms and Conditions includes:

> "PGTQ offers open access transportation service under the general guidelines of the *Petroleum Act* 1923.
> The transportation of natural gas is undertaken by PGTQ only under written service agreements acceptable to PGTQ after consideration of its commitments, delivery capacity, and other pertinent factors."

[87] If it is thought necessary to have recourse to extrinsic evidence in order to give due "attention to ... the commercial circumstances which the [Agreement] addresses, and the objects which it is intended to secure",[35] the following matters are relevant. The original parties to the Agreement discussed the possibility that payment under the Agreement be in US dollars. The plaintiff was aware that the PGT intended or was likely to finance the acquisition of the Pipeline by borrowing in US dollars. There was discussion between representatives of the plaintiff and PGTQ in early June 1996 in

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34 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589.

35 Ibid.

which PGTQ offered to fix the exchange rate at US$0.77 to AUD$1. The market exchange rate was then approximately US$0.75 to AUD$1.

[88] On 20 June 1996 Mr Holloman and Mr Cavill of PGTQ met with Mr Booth, an officer of the plaintiff. Mr Booth confirmed that fixing the exchange rate at US$0.77 to A$1 was acceptable to the plaintiff. The plaintiff's agreement to pay in US dollars was referred to in a facsimile from the plaintiff to PGTQ on 26 June 2006. The Agreement then was intended by the parties to make provision for the terms and conditions, including as to price, on which PGTQ would transport natural gas for the plaintiff. Reference to extrinsic material confirms what is plain from the language of clause 1(a) of Part VI, namely that by the Transportation Service Agreement the parties were concerned to establish that payment should be made in US dollars and that the exchange rate be fixed.

[89] Nevertheless, if clause 1(a) is found to be inconsistent with any of the Rate Schedule, the General Terms and Conditions or the Access Principles, the latter must prevail. The critical enquiry then is as to whether an inconsistency exists. In deciding that question, regard must be paid to the need to consider the whole of the instruments, to construe all provisions "harmonious one with another" and, where possible, to "read them so that they are not internally contradictory".[36]

[90] In *Pagnan SpA v Tradax Ocean Transportation SA*,[37] Bingham LJ, with whose reasons Woolf LJ agreed, after reviewing authorities on the question of inconsistency, concluded:

> "These cases are only of significance as helping to define inconsistency and illustrating how courts have approached that question in the past. It is not enough if one term qualifies or modifies the effect of another; to be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses."

[91] The authorities reviewed by his Lordship prior to his reaching that conclusion regarded the relevant enquiry as whether the subject clauses were "in direct conflict"[38] or "in contradiction".[39]

[92] The other member of the Court, Dillon LJ, also concluded that inconsistency did not arise merely because a provision creating an apparently absolute obligation was qualified by another provision in the contract. Consistently with the approach to construction described by Gibbs J in *Australian Broadcasting Commission*,[40] Dillon LJ was of the view that the first task in construing a contract is "to see if the clauses can sensibly be read together". His Lordship said:[41]

> "What is meant by inconsistency? Obviously there is inconsistency where two clauses cannot sensibly be read together, but can it really be said that there is inconsistency wherever one clause in a document qualifies another clause? A force majeure clause, or a strike and lock

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36 *Blue Moon Grill Pty Ltd v Yorkey's Knob Boating Club Inc* [2006] QCA 253 at [28].

37 [1987] 3 All ER 565 at 575.

38 *Gesellschaft Burgerlichen Rechts v Stockholms Rederiaktiebolag Svea (The Robert Bravant)* [1967] 1 QB 588 at 602.

39 *Bremer Handelsgesellchaft mbH v J H Rayner & Co Ltd* [1979] 2 Lloyd's Rep 216 and *Scrutton on Charterparties*, 19th ed, 1984 p 20.

40 (1973) 129 CLR 99.

41 At 578.

> out clause, almost invariably does qualify the apparently absolute obligations undertaken by the parties under other clauses in the contract; so equally with an extension of time clause, for instance in a building agreement. So equally, with a lease, the re-entry clause qualifies the apparently unconditional demise for a term of years absolute, but no one would say they were inconsistent.
>
> In my judgment the first task is to see if the clauses can sensibly be read together. If they cannot, there is inconsistency and the special condition is to prevail over the other clause in the printed form. But, if they can be read together, they should be and there is no inconsistency."

[93] Another useful illustration of the manner in which seemingly discordant contractual provisions are to be reconciled is provided by the decision of the Privy Council in *Forbes v Git.*[42] In that case the appellant contracted with the respondents to carry out certain works for a consideration, stated in the first clause of the agreement, of $3,000 payable by three instalments. The appellant agreed to furnish the materials and perform the services stated in the contract and a final clause provided to the effect that the respondents were to pay the appellant the value of the materials provided and labour done at a certain rate, irrespective of whether the value of what was done or provided was greater or less than $3,000. It was held on appeal, by the Supreme Court of Ontario, that the first condition prevailed by application of the principle that if in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant.

[94] The Judicial Committee reversed the judgment on appeal. The advice of their Lordships, delivered by Lord Wrenbury, contains the following discussion[43] which is pertinent to the point of construction now under consideration.

> "Thus if A covenants to pay 100*l*. and the deed subsequently provides that he shall not be liable under his covenant, that later provision is to be rejected as repugnant and void, for it altogether destroys the covenant. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole. Thus if A covenants to pay 100*l*. and the deed subsequently provides that he shall be liable to pay only at a future named date or in a future defined event or if at the due date of payment he holds a defined office, then the absolute covenant to pay is controlled by the words qualifying the obligation in manner described.
>
> *Furnivall v Coombes* ((1843) 5 Man & G 736) is an illustration of the former case: *Williams v Hathaway* ((1877) 6 Ch D 544) is an illustration of the latter.
>
> In the latter case there could be no question if the later provision of the deed were introduced by the word 'but' or the words 'provided always nevertheless,' or the like. But there is no necessity to find any such words. **If a later clause says in so many words or as matter of construction that an earlier clause is to be qualified in a certain way, effect can be given and must be given to both clauses.**" (emphasis added)

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42 [1922] 1 AC 256.

43 At 259.

[95] Clause 1(a) of Part VI is plainly intended to affect the operation of those parts of the Access Principles, Rate Schedule and General Terms and Conditions which provide for the Capacity Reservation Rate, Distance Reservation Rate and Rate Cap. But, putting aside for the moment the special status of the Access Principles, it does not appear to me that clause 1(a) is in conflict with the subject provisions or that it contradicts them to the extent that effect cannot be given both to clause 1(a) and such provisions. Clause 1(a), in substance, allocates the risk attaching to exchange rate fluctuations by fixing the rate of exchange between the US dollar and the Australian dollar. In other words, it accepts the Maximum Rate, Rate Cap, Capacity Reservation Rate and Distance Reservation Rate in the Access Principles and the Rate Schedule but provides for their determination or calculation in accordance with an agreed exchange rate.

[96] The plaintiff's argument sets considerable store by the use of the words "instead of" in clause 1(a). It was submitted that this pointed to an attempted, and impermissible, variation of the provisions of the Access Principles. I do not accept that. It is necessary to look at the substance of the provision. It is concerned with payment and expresses agreement between the parties that, as at the date of the Agreement and during its term, when applying the figures for the Capacity Reservation Rate, Distance Reservation Rate and Rate Cap, they be in US dollars rather than Australian dollars and at an agreed rate of exchange. Another way of expressing the parties' bargain would be to state that for the purpose of calculating the various rates the prescribed figures be converted to Australian dollar at a fixed exchange rate of A$1 equals US$0.77 cents. If clause 1(a) had been worded along these lines the plaintiff could not have argued that the Access Principles had been varied. I am unable to discern any difference in substance between the clause as worded and the alternative provision. The Transportation Service Agreement contains no provision which purports to vary any of the other components of the Agreement. To the contrary, clause 3 states that it is subject to the applicable provisions of those instruments.

[97] Should a different conclusion be reached because of the status of the Access Principles? In my view, the question should be answered in the negative. The nature of the Access Principles does not affect the principles of contractual construction discussed above, except that it is necessary to apply the principle that where the words of a contract are capable of two meanings, one lawful and the other unlawful, the former construction should be preferred.[44]

[98] Clause 27 of the General Terms and Conditions does not provide that the Access Principles override all other provisions of the Agreement which may impinge on or qualify in any way any term of the Access Principles. The Access Principles are expressed to prevail in the event of "any inconsistency". There is no reason why "inconsistency" in clause 27 should be given a meaning different from that expounded in the authorities considered above. "Inconsistent" is not synonymous with "identical". The *Shorter Oxford English Dictionary*, for example, defines "consistent" as "[a]greeing or according in substance or form; congruous, compatible".

[99] There is no reason to suppose that it was any purpose of the Access Principles to preclude parties to an Access Agreement from making bona fide agreements in relation to foreign exchange fluctuations. Clause 4.2(5) of the Access Principles, by its reference to "currency risk allocation", implicitly acknowledges that such agreements may be made. And some support for this conclusion may be derived from clause 22.7

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[44] Lewison, *The Interpretation of Contracts*, 2nd ed, 6.09 and *Global Network Services Pty Ltd v Legion Telecall Pty Ltd* [2001] NSWCA 279.

of Schedule 4 of the 2001 Access Arrangements which makes it clear that provision may be made for rates expressed in US dollars and that exchange rates may be fixed. The plaintiff does not suggest the existence of any circumstances which would have made such risk allocation provisions unacceptable to the legislature in enacting the relevant provisions of the Act, or to the Minister in deciding the Access Principles.

[100] For the above reasons I conclude that there is no inconsistency between Part VI, clause 1 of the Transportation Service Agreement and any of the other parts of the Agreement.

The claim for restitution based on a mistake – findings of fact

[101] From the date the Agreement was entered into, the plaintiff, pursuant to clause 1(a) of Part VI of the Transportation Service Agreement, paid accounts rendered to it by PGTQ in US dollars adjusted in accordance with clause 1(a) of Part VI of the Transportation Service Agreement and accepted rebates calculated on the basis of the application of clause 1(a). On 14 July 1998 the plaintiff and the defendants entered into a deed under which the defendants undertook to be bound by the provisions of the Agreement and the plaintiff accepted the defendants as parties to the Agreement in substitution for PGTQ as agent for PGTA. It was expressly provided that the Agreement "take effect in all respects if [the defendants] were a party to the Agreement in place of PGTQ".

[102] After the assignment the defendants rendered accounts under the Agreement as before and the plaintiff continued to pay such accounts and to receive rebates on the same basis.

[103] Mr Peter Mouna commenced employment with the plaintiff in about June 2001. As part of his duties he reviewed all of the plaintiffs' contracts in relation to raw materials and energy including the Agreement. During that process he discovered that due to fluctuations in the US dollar/Australian dollar exchange rate, the Australian dollar amounts the plaintiff had been paying under the Agreement from time to time exceeded the Australian dollar rate cap stated in the Access Principles. He concluded from his perusal of the documents comprising the Agreement that there was an inconsistency between the Transportation Service Agreement and the Access Principles and that the Access Principles took precedence. Mr Mouna, however, was not a lawyer and sought advice from Ms Elizabeth Baker, the plaintiff's in-house legal counsel. On 22 July 2002 Ms Baker advised:

> "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."

[104] She qualified her advice "in that the documentation [provided to her] is a loose leaf photocopy only and accordingly it is not clear whether it is an accurate reflection of what was agreed". Mr Mouna, on or about 22 July 2002, informed another officer of the plaintiff with whom he had discussed the matter:

> "I have had Liz review the contract and the Access Principles and her preliminary advice indicates Duke[45] should not have charged QAL any more than the allowable price cap per GJ for transportation."

[105] He advised that Ms Baker had been requested to obtain advice on the point from the plaintiff's solicitors, Corrs Chambers Westgarth. In that regard, he said:

> "I am concerned that we may have either made an error, an out of date 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."

[106] After sending the email on 22 July, Ms Baker made plain in a discussion or discussions with Mr Mouna that she was not an expert in construing contracts of the nature of the Agreement and that advice should be taken from an external lawyer with appropriate expertise. Written advice was obtained from Mr John Kelly of the plaintiff's solicitors on 15 August 2002. Mr Kelly advised that:

> "A case by QAL that at the rate cap mechanism should be based on the A$ amount and not the US$ amount is not without merit but should be approached with caution."

[107] Mr Kelly's advice was relayed by Ms Baker to Mr Mouna on 16 August 2002.

[108] Mr Kelly advised in an email on 23 September 2003, after further consideration of the matter, that "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".

[109] Notwithstanding Mr Kelly's advice the plaintiff resolved to raise the issue with the defendants.

[110] In a letter dated 26 November 2003 to the defendants the plaintiff expressed the view that the Rate Cap stated in the Access Principles prevailed over that stated in the Transportation Service Agreement and requested, in effect, that the defendants recalculate the rebate accordingly and pay the plaintiff the moneys allegedly overpaid.

[111] The defendants, in a letter of 23 December 2003, maintained that the charges under the Agreement had been properly levied and that no refund was due to the plaintiff. Some further correspondence then took place between the parties which did not result in either party changing its position. On 16 March 2004 Mr Kimmins, a partner in the plaintiff's solicitors, advised that, in his opinion, clause 1 of Part VI of the Transportation Service Agreement was inconsistent with the Access Principles and therefore unlawful and unenforceable. On 24 June 2005 an opinion was obtained by the plaintiff from senior and junior counsel to the effect that the plaintiff had "reasonably good prospects of making a claim for damages for breach of contract in respect of a breach of [the defendants] contractual obligation to rebate amounts charged over and above the Rate Cap contained in the Pipeline Access Principles". They further advised that a claim for restitution of the amount of the overpayments

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[45] Alinta DQP Pty Ltd was formerly named Duke Queensland Pipeline Pty Ltd.

"enjoys like prospects of success". These proceedings were commenced on 29 June 2005.

[112] Mr Mouna swears that at no stage has he considered "that there was any certainty about [the plaintiff's] position under the" Agreement, despite the advice from Mr Kimmins and the plaintiff's counsel. He further swore that there could be no certainty about the matter until the matter had been determined by the court. Ms Baker reached a like conclusion after considering all the legal advice. I accept the evidence of these witnesses as to their respective states of mind and concerning the factual matters which bear on their respective understandings.

The claim for restitution based on a mistake – conclusions

[113] The mistake alleged by the plaintiff is making payments in accordance with clause 1 of Part VI "whilst ignorant of, or failing to appreciate, the true legal position which was that such payments did not have to be made insofar as they were inconsistent with the application of the Pipeline Access Principles". It is submitted that prior to the receipt of Mr Kimmins' advice:

> "… there was no appreciation on the part of [the plaintiff] that it had respectable grounds for not making the payments. From the date of receiving Mr Kimmins' advice, [the plaintiff] knew that it had respectable arguments, but there was still significant uncertainty in its thinking. Some further certainty was provided by the receipt of counsels' joint opinion, at which point [the plaintiff] immediately commenced proceedings."

[114] It is submitted that such facts support a conclusion that the subject payments were made under a mistake "which was driven from a position of ignorance of the true legal position".

[115] In support of its argument, the plaintiff cites the following passage from the joint judgment in *David Securities Pty Ltd v Commonwealth Bank of Australia*:[46]

> "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."

[116] *David Securities* establishes that a payment caused by a mistake is sufficient to give rise to a *prima facie* obligation on the part of the payee to make restitution.[47] It thus becomes necessary to determine what is meant by the word "mistake" in this context.

[117] After referring to a number of authorities dealing with the recovery of moneys paid under a mistake, it was observed in the joint judgment:[48]

> "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

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46 (1992) 175 CLR 353 at 373.

47 The joint judgment at 379.

48 At 374.

> the supposition that a specific fact is true, as Parke B. did in *Kelly v. Solari* ((1841) 9 M. & W., at p. 58 (152 ER, at p 26)), 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."

[118] The "narrower principle" is one narrower than the principle that moneys paid under a mistake of law are irrecoverable or one "to the effect that mistake of law does not on its own found an action for the recovery of money".[49]

[119] The last quoted passage does not venture a comprehensive definition of mistake. The reference in it to "the authorities cited earlier" include reference to *J & S Holdings Pty Ltd v NRMA Insurance Ltd*[50] and to the following passage:[51]

> "As Winfield makes clear, mistake 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' ("Mistake of Law", (1943) 59 *Law Quarterly Review* 327, at 327)."

[120] In *J & Holdings Pty Ltd v NRMA Insurance Ltd*, the Full Court of the Federal Court concluded that the borrower's mistake consisted of its "ignorance of or inadvertence to the existence or operation of the general statutory provisions contained in s 12 of the Ordinance". The joint judgment also analyses a number of cases, including *Cartwright v Rowley*[52] and *Brisbane v Dacres,*[53] in which it was held that a payment is irrecoverable by a payer who pays money in response to a claim when fully aware of all relevant facts or circumstances. These cases appear to have been treated as cases of "voluntary" submission to a claim.[54]

[121] I do not regard the passage from the joint judgment at page 373 quoted above, and relied on by both parties, as containing an explanation of the meaning of "mistake". It is part of a passage which concludes a discussion of the basis on which recovery of overpaid moneys was denied in *J & S Holdings*, *South Australia Cold Stores Ltd v Electricity Trust of South Australia*[55] and *Werrin v The Commonwealth.*[56] The quoted passage commences with the sentence:

> "An important feature of the relevant judgments in these three cases is the emphasis placed on voluntariness or election by the plaintiff."

[122] After that discussion, their Honours moved to an identification of the "narrower principle" that moneys paid under a mistake, whether of fact or of law, were *prima facie* recoverable where the mistake was causative of the payment.

[123] The concept of voluntariness, with which the passage quoted in paragraph [115] is concerned, is relevant for present purposes. The joint judgment does not appear to question the principle that payments voluntarily made in the sense described in the

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49 The joint judgment at 374.
50 (1982) 61 FLR 108.
51 *David Securities* at 369.
52 (1799) 2 Esp 723.
53 (1813) 5 Taunt 143.
54 See the references at 371.5 and 372.4.
55 (1957) 98 CLR 65.
56 (1938) 59 CLR 150.

passage are not recoverable and the plaintiff did not argue to the contrary. That is perhaps because the paragraph on pages 373 and 374, which commences with the words "An important feature", suggests agreement with the approach in the authorities discussed to the concept of voluntariness, at least to the extent that a "payment is voluntary … 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".

[124] The payments made by the plaintiff in response to accounts rendered by the defendants cannot, consistently with the principles expressed in paragraph [122], be regarded as voluntary after Mr Mouna's opinion as to the construction of the Agreement had been confirmed by Ms Baker. The understanding of both of these officers of the plaintiff was that the Australian dollar Rate Cap figure stated in the Access Principles and the Rate Schedule prevailed and that the plaintiff was entitled to rebates calculated in accordance with such figures. Mr Kelly's advice did not cause them to conclude that their initial conclusions were not reasonably arguable. They persisted with the matter and obtained a degree of vindication when their views were concurred in by Mr Kimmins and then by senior and junior counsel.

[125] At all times after Ms Baker's initial advice, the plaintiff was "prepared to make … payment [under the Agreement] irrespective of the validity or invalidity of the obligation rather than contest the claim for payment". The plaintiff believed that contractual provisions requiring payment may be inoperative or invalid. Additionally, after Ms Baker's initial advice the plaintiff cannot be said to have made payments under a mistake. The payments were not made by the plaintiff in a state of "sheer ignorance" as to its obligations under the Agreement and it did not have a positive belief that clause 1(a) of Part VI prevailed. Payments made by the plaintiff whilst in doubt about the true construction of the Agreement were not caused by a mistake. They were made through a reluctance to interfere with the established regime relating to billing and payments before the plaintiff's legal rights had been investigated more fully. Conduct of that nature does not appear to me to fall within the kind of conduct identified as constituting mistake in the joint judgment in *David Securities*.

[126] There is no suggestion by counsel for the plaintiff that the states of mind of either Ms Baker or Mr Mouna should not be regarded as that of the plaintiff for present purposes. I conclude that the plaintiff's claim for restitution based on a mistake would not have been meritorious had moneys been overpaid as it alleges.

The effect of the Gas Pipeline Access Law and the approval of access arrangements for the Pipeline by the ACCC

[127] Having regard to the above findings, this issue may be disposed of with relative brevity.

[128] The 2001 Access Arrangements were approved by the ACCC on 1 November 2001 and became effective on 19 November 2001. By operation of s 60(c) of the *GPA Act*, Part 8 of the Act then ceased to apply to the Pipeline. Part 8 contained those provisions of the Act which required Access Principles for any pipeline, as defined by the Act, to be approved or decided by the Minister.

[129] Under Part 8, Access Agreements could not provide for pipeline access inconsistently with the Access Principles for the pipeline.[57]

[130] An Access Arrangement is defined in clause 2 of the *Code*:

> "An Access Arrangement is a statement of the policies and basic terms and conditions which apply to third party access to a Covered Pipeline."

[131] Clause 3 of the *Code* provides:

> **"Terms and Conditions** – An Access Arrangement must include the terms and conditions on which the Service Provider will supply each Reference Service."

[132] Those terms and conditions are specified in Schedule 4 of the 2001 Access Arrangements.[58]

[133] The provisions of the Access Principles are reproduced, with immaterial wording changes, in Schedule 5 of the 2001 Access Arrangements.

[134] The plaintiff makes the point that there was no express legislative statement in the *GPA Act* concerning the enforceability of existing access agreements. But the *GPA Act* is intended to apply to and regulate the operation of the Pipeline and it is clear that it does so.

[135] In terms of the transition from Part 8 of the Act to the Gas Pipelines Access Law, s 58 of the *GPA Act* relevantly provided:

> "**58.(1)** This section applies to the following pipelines –
> (a) …
> (b) …
> (c) the pipeline mentioned in pipeline licence no. 30 (Wallumbilla to Rockhampton System); …"[59]

[136] Subsections (2) and (3) of s 58 permit the "local minister" to approve a tariff arrangement for a pipeline. Once approval is given, the approved arrangement is taken to be "the reference tariff and reference tariff policy" for the access arrangement which is to be approved.[60]

[137] Subsections (2) and (3) provide:

> **"(2)** The local Minister may once only, by gazette notice made within 30 days after this section commences, approve a tariff arrangement for each pipeline.
> **(3)** The approved tariff arrangement is taken to be approved under the Gas Pipelines Access Law as the reference tariff and reference tariff policy for the access arrangement to be submitted under the law for the pipeline until the revisions commencement date for the access arrangement."

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57 s 123(2)(a).

58 See the definition of "Service Providers' Standard Terms and Conditions of Service" on p 10.

59 It is common ground that this refers to the Pipeline.

60 An access arrangement for a pipeline is required to include a reference tariff and a reference tariff policy: section 3 of the *Code*.

[138] The Minister did approve a tariff arrangement for the Pipeline which became effective upon its publication in the Queensland Government Gazette on 16 June 2000. The tariff arrangement as approved is contained in the Reference Tariffs Schedule, which is Schedule 5 to the 2001 Arrangements. By reason of s 58(3) of the *GPA Act*, the approved tariff arrangement is taken to be approved under the Gas Pipeline Access Law as the reference tariff and reference tariff policy for the 2001 Arrangements until such time as the revisions commencement date for that arrangement. The revisions commencement date for the 2001 Arrangements is not until 2016.

[139] The arguments advanced by the plaintiff, and set out in some detail above, concentrate on matters external to the wording of the Agreement to support the conclusion that, contrary to the defendants' assertions, the Access Principles were not "varied as a result of the approval of the ACCC" of the 2001 Arrangements. One aspect of the argument depends on the lack of provision in the 2001 Arrangements for new access arrangements to be substituted for existing ones without further agreement. It is not contended by the defendants that there was any such further agreement.

[140] The plaintiff's argument fails to focus sufficiently on the terms of the Agreement. Clause 3 of Part VI provides that the Transportation Service Agreement is subject to the provisions of the Access Principles General Terms and Conditions. Clause 27 of General Terms and Conditions provides:

> "The parties are bound by the Pipeline Access Principles and if at any time there is any inconsistency … the Pipeline Access Principles shall prevail …"

[141] "Pipeline Access Principles" is defined in 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". "Access Principles" is not a defined term but clause 1 provides that:

> "If the *Petroleum Act* 1923 or the Pipeline Access Principles give a meaning to a term, then the same term in this Indicative Tariff shall have the same meaning prescribed in the *Petroleum Act* 1923 for the Pipeline Access Principles".

[142] Section 2 of the Act defined "access principles" as meaning "tariff setting principles, indicative tariff schedule and indicative access conditions".

[143] Upon approval being given by the ACCC, the Access Principles approved under the *Petroleum Act* no longer met the description of "the Access Principles applicable to the pipeline". The "Access Principles", namely the "Tariff Setting Principles, Indicative Tariff Schedule and Indicative Access Conditions" prescribed under the new statutory regime did meet that description. It does not matter that the new regime was under different legislation or that there was a different regulatory body. The reference to "Pipeline Access Principles" in the General Terms and Conditions accommodates reference to such principles as apply from time to time. The definitions referred to above do not confine the term to "Access Principles" provided for under the Act. The Agreement, although made in contemplation of and in accordance with a regime established under the Act, is flexible enough to accommodate Pipeline Access Principles established under a statute which replaced the Act. There is no principle of law which militates against this conclusion and it produces a perfectly sensible result. It was scarcely inconceivable that the regulatory regime under the Act would be replaced by another regime under a different Act. And why the parties to the Agreement should be regarded as having the intention to confine reference to "Access

Principles" in the Agreement to "Access Principles" approved under the Act but not under its replacement is by no means clear.

[144] For the above reasons, I find that the 2001 Access Arrangements became the Access Principles referred to in the Agreement upon their coming into effect. The consequences of that for the composition and construction of the Agreement are far from clear and can be determined only by reference to the precise terms of the Access Arrangement. The construction of the Access Principles was not the subject of any detailed submissions or consideration during the hearing and it is unnecessary for me to address it at any length.

[145] The plaintiff placed much weight on the definitions in clause 2.1 of the 2001 Access Arrangements of:

> "Access Agreement",
> "Terms Sheet",
> "Service Providers' Standard Terms and Conditions of Service",
> "User",
> "Service",
> "Reference Tariffs Schedule", and
> "Prospective User".

Also central to its arguments were clauses 4.3 and 4.7.

[146] Clause 4.3 provided:

> "**Access Agreements**
> Before the Service Provider is obliged to provide a Service, a User or a Prospective User must enter into an Access Agreement that specifies a Service to be used and the quantity of the Service in accordance with this Access Arrangement."

[147] Clause 4.7 provided:

> "**Terms and conditions for Services**
> The Service Provider will provide the Reference Services [relevantly defined to include Firm Forward Haul Service] outlined in this Access Arrangement on the terms and conditions set out in the Access Agreement for the relevant Reference Service from time to time and in accordance with the Reference Tariffs Schedule."

[148] It was pointed out that no "terms sheet" in the form of that in Schedule 1 to the 2001 Access Arrangement was ever signed.

[149] Clause 40 of Schedule 4, which contains the Service Providers' Standard Terms and Conditions of Service, contains an entire agreement clause and provides, in clause 29, that it may only be amended in writing signed by both parties.

[150] Under clause 5.2 of the Access Arrangement, the Terms and Conditions in the "Access Agreement for the subject Firm Forward Haul Service are:

> "The terms and conditions in the Service Providers' Firm Forward Haul Service Access Agreement Terms Sheet (see Schedule 1);
> The Service Providers' Standard Terms and Conditions of Service (see Schedule 4) and the Provisions of this Access Arrangement."

As no Terms Sheet was prepared or signed, if there was an Access Agreement, it did not contain a terms sheet. But the Agreement continued to exist and was not nullified by the *GPA Act* or the *Code*. It incorporated, for the reasons given earlier, the Access Arrangement which, in turn, imported Schedule 4. As the *Code* makes plain, the defendants as the "Service Provider" and the plaintiff as "User" were free to agree on terms and conditions differing from the Access Arrangement.[61] Consequently, I am not persuaded that the plaintiff's case derives any assistance from the coming into force of the 2001 Access Arrangements. In particular, I conclude that the Access Principles ceased to be a part of the Agreement on 1 November 2001, when the 2001 Access Arrangements were approved.

The defendants' estoppel case

[151] The defendants rely on a statement of principle of Robert Goff J in *Amalgamated Investment & Property Co (in liq) v Texas Commerce International Bank Ltd.*[62]

[152] The plaintiff argues, with some force, that the defendants may have difficulty in establishing the "clear and unequivocal" representation necessary to establish a promissory estoppel.

[153] I consider it likely that the defendants would have a stronger case based on estoppel by convention. The essence of such an estoppel was explained as follows in the judgment of the Court in *Con-Stan Industries of Australia Pty Ltd v Norwich Union Winterthur Insurance (Australia) Ltd*:[63]

> "Estoppel by convention is a form of estoppel founded not on a representation of fact made by a representor and acted on by a representee to his detriment, but on the conduct of relations between the parties on the basis of an agreed or assumed state of facts, which both will be estopped from denying. The existence of an estoppel based on a convention between the parties has often been recognized: *Thompson v. Palmer* (1933) 49 CLR 507, at p 547; *Grundt v. Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, at pp 657, 675-677; *Legione v. Hateley* (1983) 152 CLR 406, at pp 430-431; *Amalgamated Investment & Property Co. Ltd (in liq.) v. Texas Commerce International Bank Ltd* (1982) QB 84, at pp 121, 126, 130-131; Spencer Bower and Turner, *Estoppel by Representation* (1977) 3rd ed., at pp.157-177."

[154] After the above passage, the court explained that:[64]

- "… there is no estoppel unless it can be shown that the alleged assumption has in fact been adopted by the parties as the conventional basis of their relationship: *Dabbs v. Seaman* (1925) 36 CLR 538, at p 549."
- "…just as estoppel by representation requires a representation of fact, so too estoppel by convention requires the assumed state of affairs to be an assumed state of fact: *Greer v. Kettle* (1938) AC 156, at p 170; Spencer Bower and Turner, *Estoppel by Representation* (1977) 3rd ed., at pp 167-168."

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61 The *Code*, s 2 and s 25.
62 [1982] QB 84 at 106-107.
63 (1986) 160 CLR 226 at 244.
64 At 244-245.

[155] It now seems to be established that the doctrine extends to assumptions of law as well as to assumptions of fact.[65]

[156] The doctrine of estoppel by convention was the subject of the following discussion by Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd*:[66]

> "But the estoppel set up by the tributers goes to the first step, the winning of the ore. The principle upon which estoppel *in pais* is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations. This is, of course, a very general statement. But it is the basis of the rules governing estoppel. Those rules work out the more precise grounds upon which the law holds a party disentitled to depart from an assumption in the assertion of rights against another. **One condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption.** In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act a source of prejudice."
>
> …
>
> Fulfilment of the condition which so far I have discussed is not enough to make it just to preclude a party from setting up a state of facts. **The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption**

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65 See the discussion and authorities referred to in Meagher, Gummow and Lehane's *Equity Doctrines and Remedies* 4th ed para [17-020].

66 (1937) 59 CLR 641 at 674, 675, 676.

> **has been occasioned or induced. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it.** But the law does not leave such a question of fairness or justice at large. It defines with more or less completeness the kinds of participation in the making or acceptance of the assumption that will suffice to preclude the party if the other requirements for an estoppel are satisfied. A brief statement of the recognized grounds of preclusion is contained in the reasons I gave in *Thompson v. Palmer* ((1933) 49 CLR at p 547), and it is convenient to repeat it:- **'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, as in *Yorkshire Insurance Co. v. Craine* ((1922) 2 A.C., at pp. 546, 547; 31 C.L.R. 27, at pp. 30, 31.); cp. *Cave v. Mills* ((1862) 7 H. & N. 913, at pp. 927, 928; 158 E.R. 740, at pp. 746, 747.); *Smith v. Baker* ((1873) L.R. 8 C.P., at p. 357.); *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co.*((1921) 2 K.B., at p. 612.); and *Ambu Nair v. Kelu Nair* ((1933) L.R. 60 Ind. App. 266, at p. 271.); 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.'
>
> **It is important to notice that belief in the correctness of the facts or state of affairs assumed is not always necessary. Parties may adopt as the conventional basis of a transaction between them an assumption which they know to be contrary to the actual state of affairs**." (emphasis added)

[157] In view of my conclusions on other aspects of the case, it is unnecessary for me to reach a concluded view on the estoppel question. In case they are needed I make the following findings of fact.

[158] Mr Cavell's evidence was in no way impugned by cross-examination. I consider him to be a reliable witness with a particularly good recollection of relevant events and grasp of detail. I found Messrs Indermaur and O'Hara to be credible and reliable witnesses also.

Conclusion

[159] The plaintiff's claims have been wholly unsuccessful. There will be judgment for the defendants with costs.