SUPREME COURT OF QUEENSLAND

CITATION:	*Supangat v Byrnes* [2009] QSC 394
PARTIES:	**NANANG SUPANGAT** (plaintiff) v **TENNYSON BYRNES** (defendant)
FILE NO/S:	8537/05
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	4 December 2009
DELIVERED AT:	Brisbane
HEARING DATES:	20 & 22 April 2009, 13 & 14 August 2009, 5 October 2009
JUDGE:	A Lyons J
ORDER:	
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTURAL PRINCIPLES – MATTERS NOT GIVING RISE TO BINDING CONTRACT – VAGUENESS AND UNCERTAINTY – UNCERTAIN PROMISES – whether there was an agreement for the plaintiff to be paid $450,000 – whether the defendant has breached agreement between parties CORPORATIONS – SHARE CAPITAL – SHARES – CLASSES OF SHARES AND SHAREHOLDERS – GENERALLY – TRANSFER – whether emails between parties constitutes a valid transfer agreement – whether valid share transfer agreement exists between the parties – whether defendant failed to pay the agreed price to the plaintiff – where transfer of shares failed to take place
COUNSEL:	N Thompson for the plaintiff JA Griffin QC with JP Trichardt for the defendant
SOLICITORS:	Woods Prince Lawyers for the plaintiff Blake Dawson Waldron for the defendant

A LYONS J

Background

[1] Dr Nanang Supangat is a civil engineer who has businesses and residences in both Australia and Indonesia. Tennyson Byrnes is the managing director of a chemical company which has offices in Melbourne, Brisbane and Singapore.

[2] A mining company called Eastern Stone and Minerals Pty Ltd (ESAM) owned rights to an extensive granite deposit near Mundubbera, Queensland. The shareholders in ESAM were Park Pacific Investments Pty Ltd (Park Pacific) and Malcolm Payne and Associates Pty Ltd (Malcolm Payne and Associates).

[3] In September 2003, Byrnes and Supangat were invited to a presentation of the mine's potential. At that presentation, a proposal was advanced whereby potential purchasers were given an option to purchase ESAM for $3.5 million and the opportunity to conduct mining activities for a nine month period for a payment to ESAM of $10,000 per month.

[4] Byrnes and Supangat discussed the prospect of a joint venture to develop the mine. They agreed in about October 2003 to operate the granite mine together and to obtain the agreement of Park Pacific and Malcolm Payne and Associates, to do so prior to the execution of a Share Sale Agreement. They essentially agreed to a joint venture agreement on a 50/50 basis, with all expenses and profits to be shared equally between them. Production was to commence as soon as possible.

[5] The understanding between ESAM on the one hand and Byrnes and Supangat on the other was reflected in a document titled "Heads of Agreement", which was prepared and circulated in early October 2003. This agreement with ESAM stated that the purpose of the document was "To agree that ESAM will guarantee to provide a purchase option to Byrnes and Supangat in respect of the Mine Lease". The agreement was in fairly general terms and permitted the operation of the mine by Byrnes and Supangat for a payment of $10,000 per month. It also set out the agreed terms of the purchase option, which specified a purchase price of $3 million with an annual payment in arrears of $100,000.

[6] Pursuant to the agreement with ESAM, Supangat and Byrnes commenced to mine the granite deposit around April 2004.

[7] A written Share Sale Agreement in relation to the purchase of the shares in ESAM was ultimately entered into on 15 September 2004.

September 2004 agreement

[8] Whilst there was, therefore, some general agreement in October 2003, the documentation, as between Supangat and Byrnes and ESAM, was not finalised until 12 months later in September 2004. The solicitor who prepared the documentation, Henry Enslin (Enslin), was recommended by Byrnes' accountant, Warwick Ryan. Enslin prepared the documentation in relation to the proposed acquisition, which involved a complicated corporate structure, as well as the execution of a Share Sale

Agreement. The parties have come to a set of agreed facts in relation to that documentation and the various entities involved as follows:

Agreed Facts

"1.1 Pacific Rim Management Ltd ('Pacific Rim') is a company at the centre of the dispute is Pacific Rim Management Ltd ('Pacific Rim'), a company (sic):

(a) incorporated in the British Virgin Islands;

(b) of which the plaintiff was a director during the period 7 September, 2004, to 30 May, 2005;

(c) which had agreed to purchase all the shares in Eastern Stone and Minerals Pty Ltd ('ESAM') pursuant to a Share Sale Agreement dated 15 September, 2004, entered into with Park Pacific Investments Pty Ltd ('Park Pacific') and Malcolm Payne and Associates Pty Ltd ('MPAPL') and which, during the period 15 September, 2004, to 25 May, 2005, was permitted, pursuant to the terms of that agreement, to operate ESAM's granite mine at Mundubbera on the basis of a payment to Pacific Rim of $10,000.00 per month;

(d) in which the one issued share, at all material times, was held by Felgate Holdings Ltd ('Felgate Holdings') as corporate trustee for the Felgate Investment Trust ('Trust') and in which neither the plaintiff nor the defendant held any share or shares;

(e) which has had no assets since it returned all the shares in ESAM to Park Pacific and MPAPL pursuant to Clause 2.2 (resolute condition clause) of the Share Sale Agreement.

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

(a) incorporated in New Zealand;

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

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

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

1.3 ESAM was a company:-

(a) incorporated in Queensland, Australia;

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

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

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

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

(b) there are two classes of beneficiaries being described as the Byrnes Family Beneficiaries and the Supangat Family Beneficiaries, each class having a 50% entitlement;
(c) apart from the initial sum settled of $10, the only asset of the trust was Pacific Rim's interest under its contract relating to ESAM.

1.5 In fact and in law, during the relevant period:-
(a) all the shares in Pacific Rim were held by Felgate Holdings Ltd as trustee for the Trust;
(b) the beneficiaries of the Trust included Dr Supangat and Mr Byrnes;
(c) neither the plaintiff nor the defendant owned any shares in Pacific Rim, Felgate Holdings, or Anchor;
(d) neither the plaintiff nor the defendant nor their respective nominees nor their respective representatives had an interest in or control over the shares in Pacific Rim, Felgate Holdings, or Anchor.

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

[9] Clause 4 of the Share Sale Agreement provided that the purchase price payable by Pacific Rim to Malcolm Payne and Associates and Park Pacific was as follows:

(a) $3,000,000 on 1 March 2005 (payment date);
(b) $100,000 on 1 March 2006;
(c) $100,000 on 1 March 2007;
(d) $100,000 on 1 March 2008;
(e) $100,000 on 1 March 2009; and
(f) $100,000 on 1 March 2010.

[10] Pursuant to clause 2.2 of the Share Sale Agreement, Pacific Rim could elect to terminate by 1 March 2005.

[11] Both Supangat and Byrnes jointly and severally guaranteed and bound themselves for the performance by Pacific Rim of its obligations under the agreement. The 1 March 2005 termination date referred to was subsequently extended to 1 June 2005.

The different views regarding the management of the mine

[12] In early December 2004, it became apparent that the plaintiff and the defendant held different views as to the way the joint venture should be managed. It would seem that by late November 2004, the new quarry master of the mine was indicating that it was a difficult mine and that little progress had been made to date. At around this

time Supangat wanted to suspend operations. Byrnes however, had expended some $380,000 on mining equipment without consultation with Supangat.

[13] The plaintiff states that they resolved their differences pursuant to an agreement (the Transfer Agreement) which he seeks to enforce.

The dealings between the parties from December 2004 to May 2005

[14] The plaintiff's further amended Statement of Claim pleads that the Transfer Agreement was recorded in emails exchanged between the parties dated 9, 15, 17, 30 December 2004, 7 January 2005 and 2 February 2005.

[15] There was clearly extensive email correspondence and indeed, other dealings between the parties between December 2004 and May 2005. The essential issue is whether the emails establish the Transfer Agreement, as claimed by the plaintiff.

[16] The content of those six emails therefore, needs to be considered. On 9 December 2004, Byrnes emailed Supangat and suggested that he would buy out Supangat's interest or alternatively, that Supangat could take over his interest. He stated:[1]

> "… I think it better we split. I will continue on my own or alternatively you might want to continue on your own. If you think your plan can succeed I am happy for you to take over my only concern is the machinery that my company has just purchased it would have to be transferred and paid for. Come back to me with what you would like to do and we can discuss it."

[17] On 15 December 2004, Supangat, by email to Byrnes stated:[2]

> "After a serious discussion with Pak Edi, we finally agreed that I and Edi could not continue the mine operation as it is and we also agree to give you the priority to continue the way it is by taking over our share, for AUD $450,000, which is the amount of money we sent to your account. However, if you decided to pull out for any reason we are ready to take over your share with the same arrangement."

[18] Byrnes' response was an email dated 17 December 2004 to Supangat. He stated:[3]

> "After much analysing of the quarry and its operations I have decided to continue on with the mine and the direction and path that I have set it on.
>
> With this as the case I will have to get you to resign as a director and a shareholder of the holding company that we established, which would then remove your obligations in regard to settlement with the previous owners."

[19] The plaintiff states that the Transfer Agreement is reflected in the emails and does not rely on any oral agreements. The defendant however, pleads that the emails do not establish an agreement, but that an oral agreement between the parties was entered into in Melbourne in December 2004. The defendant pleads that the Melbourne agreement was not in the terms alleged by the plaintiff and in any event, is void for uncertainty, mistake and/or failure of consideration.

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1 Exhibit 1 at p 84, email from Byrnes to Supangat dated 9 December 2004.

2 Exhibit 1 at p 88, email from Supangat to Byrnes dated 15 December 2004.

3 Exhibit 1 at p 89, email from Byrnes to Supangat dated 17 December 2004.

[20] The parties agree that there was a meeting between the parties in Melbourne after these emails but shortly before Christmas in December 2004, where three options were discussed in relation to the management of the mine. The first was that Byrnes would take it over and run it, the second was that Supangat would take it over and run it and the third was running it together. During his testimony, Byrnes said the following in relation to this Melbourne Airport meeting:[4]

> "Well, the understanding was that I would continue the mine running it my way.
> All right? --- and, you know, that was the first priority and then he had the option of running the mine his way.
>
> … that was the third option, both staying together
>
> All right. Well, did you agree as to what would happen in the immediate future; that is, the - from then on, from that point onwards?-- Yeah, it was - I would - I would fund the mine and run it.
>
> On what-----?-- In my direction, the direction I'd set it on.
>
> Yes. And then do you have any further agreement as to what could happen after that?-- Yeah, he could - he could take it over.
>
> In what circumstances?-- Well, if I decided - I couldn't achieve it, he could take it over and do it himself.
>
> And was that up to you to decide whether you - you gave it away or not?-- Yes, it was.
>
> All right. And then - so if you decided not to continue with it, he could do the same thing?-- Yes.
>
> All right. And then what if it happened that neither ended up achieving that?-- We'd have to hand back the mine to the owners or Pacific Rim.
>
> All right. Well, now, what about the operation of the mine from then on? I think you have said that it was agreed that you would – you would be the first person to operate it on your own; is that right?-- "

[21] Dr Supangat, in his evidence about the Melbourne meeting, agreed to the following scenario:[5]

> "I suggest to you that at the Melbourne Airport you agreed along these lines: first of all one of the two of you would take over. Do you agree with that?-- Yes. We - we - in Melbourne Airport we discuss three options.

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4 Transcript day 2 at p 80, ll 6-9 and p 81, ll 1-32.
5 Transcript day 2 at p 8, ll 27-60 and p 9, ll 1-10.

Yes. Let's take it bit by bit. Did you agree that one or the other would take over?-- Yes. You know, the three options it's been agreeable by both of us and-----

And did you agree that the person that would take over first would be Mr Byrnes?-- Yeah, he - he will make the choice. We give him the priority.

Yes. And do you agree that it was agreed that he would – that he did take over as at that time?-- And - and, you know, in the discussion I always put - whatever we discuss and agree, I put it in writing. That's why-----

Would you just pay attention to the questions that I'm putting to you?-- Yes.

Do you agree that it was agreed between you that he would take over as from that time?-- Yes.

Okay. And then it was also agreed that he would subsequently - he could subsequently buy you out?-- Yes.

Okay. And that the price for that would be $450,000?-- That's correct.

Okay. But he could resile from the agreement at any time?-- He can dissolve-----

He can resile. Do you know what the word 'resile' means? He could withdraw, he could pull out for any reason?-- No. I mean, the deal is fixed and the deadline for payment is fixed.
This is a business deal. We give him something, the opportunity, and he - he's taking the opportunity and he want to make an offer to me, that's fine.

All right?-- And see whether – the situation – the arrangement is the same or not."

[22] Supangat, by email dated 30 December 2004, stated:[6]

"My apology for not informing you earlier regarding ESAM partnership status due to the holiday season and discussion among the Indonesian Partners.
We finally made our decision to take the first option, which is to support you to take full control of ESAM. We believe this option is better and simpler for smooth operation of ESAM to achieve the objective. I am now ready to hand over the same and resign from the Director position of the company. We also agree with the instalments you have offered, those are $150,000 now plus $50,000 monthly instalments for 6 months with a total payment of $450,000. This figure is the same total amount transferred to your account.

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6 Exhibit 1 at p 92, email from Supangat to Byrnes dated 30 December 2004.

> ..I am flexible with the timetable to see you in Melbourne to transfer the ownership of ESAM to you officially."

[23] In an email of 7 January 2005, Byrnes stated:[7]

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

[24] Accordingly, Byrnes proposed that he would transfer the first instalment of $150,000 in the first week of February 2005 to Supangat's account. The balance was then to be transferred by monthly instalments of $50,000.

[25] On 2 February 2005, Supangat emailed Byrnes[8] and indicated he would be in Australia in the third week of February and that he hoped he could "finalize the legal paper works to transfer my share of ESAM to you by the end of February". He also emailed his bank account details to Byrnes.

[26] The plaintiff relies on the emails between the parties from 9 December 2004 until 2 February 2005, to establish a concluded Transfer Agreement.

[27] No funds were in fact paid by Byrnes to Supangat in the first week of February 2005. On 17 February 2005, Byrnes emailed Supangat stating:[9]

> "I am not in a position to start repaying the money to you. I do not think that I can start repayments until I have some sales of granite finalised. I hope to have some results by the end of March."

[28] No documentation was signed by Supangat to resign his interests in ESAM in the third week of February 2005 as previously indicated.

[29] On 18 March 2005, there was a further meeting at Melbourne Airport between Supangat and Byrnes. Byrnes told Supangat that he had put a further $450,000 into the mine and that Supangat could come back into the venture if he paid a further $450,000.

[30] On 22 March 2005, Supangat visits the mine. He considers there is no progress and states he cannot see where the additional $450,000 has been spent.

[31] On 6 April 2005, Supangat emailed Byrnes that he had visited the mine a few days after he had seen Byrnes in Melbourne and indicated he would be able to meet him at Melbourne Airport on Sunday 10 April 2005. He also indicated:[10]

> "We are afraid the more money you invest, the less attractive the Mundubbera granite business due to the more expensive for new investor to take over. This situation will not be good for us, if we want to invite other investor to come.
>
> We must think hand [sic] how we can secure our investment or at least take back money we have spent."

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7 Exhibit 1 at p 91, email from Byrnes to Supangat dated 7 January 2005.

8 Exhibit 1 at p 91, email from Supangat to Byrnes dated 2 February 2005.

9 Exhibit 1 at p 91, email from Byrnes to Supangat dated 17 February 2005.

10 Exhibit 1 at p 93, email from Supangat to Byrnes dated 6 April 2005.

[32] On 7 April 2005, Byrnes replied:[11]

> "As you know this was a risky project and other people have failed before us. I will now have to reassess my position in regard to this agreement with yourself and Edi. I think that the original direction that we went with Sergio was flawed and wasted a lot of money.
> You have to decide if you are in or out. If you are staying in you have to put $450K into the account to match the money I have put in or if you want out I will inform Malcom and I will go my own way. I know this seems harsh but Matt and I have done a lot of work and I am not prepared to continue implementing my plans and spending my money to benefit a non-contributing partner.
> I am sorry to do this but you need to make a decision within a week as I have to know what your position is. I do not think there is any point meeting to discuss this as these are the only 2 options."

[33] On 8 April 2005 Supangat emailed Byrnes:[12]

> "As we have discussed and agreed in last December that we let you take our share and you will pay us instalments [sic] with $150K in February followed by $50K each month for six months, which adds up to $450K. The amount that we have transferred to your account. This is still what we have agreed and confirmed through emails.
>
> …
>
> The problem comes when in February the payment has not come instead you sent an email saying that you are not in position to pay financially. This was the main reason for our meeting at the Melbourne Airport on 18 March 2005 to clarify this main during the meeting. I have impression that 1) you need a partner to operate mine, 2) you are thinking of slowing down the operation because of the financial situation and 3) you consider us still as one of the potential partners beside people from China, Spain or USA. I and Edi always keep to do business together with you need and we never take any benefit from our partner. Point 3) above makes me going for another visit to mine to maks a few pictures, so I can discuss the matter with edi. Our conclusion is what I have written in my last email.
>
> …
>
> It is clear source last December that we could not follow you plans and decision was you take over our share. After my visit to the mine, we could not see any possibility to come back, as we may argue on how the mine should be operated. We are now expect you instalment as you promised. Please let me know when the first instalment will be done." (errors as per original)

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11 Exhibit 1 at p 93, email from Byrnes to Supangat dated 7 April 2005.

12 Exhibit 1 at p 94, email from Supangat to Byrnes dated 8 April 2005.

[34] Mr Matt Heery, the mine manager, sent some information about the mine to Supangat at some time prior to 12 April 2005. Supangat replied by email on 12 April 2005.[13] The email referred to the fact that Byrnes "took over the business in December 2004", and referred to the "split" which occurred at that time. It also included the following:

> "Now, I only ask what Mr. Tennyson has promised us last December that he will pay us all of our investment of AU$450,000 in stages for taking over our share. The first payment should come in February 2005 for AU$150,000 followed by AU$50,000 for the following 6 months. However, the payment has never come up to now. In my opinion, if Mr Tennyson fails to transfer the payment, it means that I still hold the 50% share of ESAM. Please let me know if I'm wrong in this case.
>
> If Mr Tennyson has a financial difficulty to pay me, I'm willing to discuss the matter and solve the problem for the benefit of both partners. I personally will cooperate to keep the business alive."

[35] On 13 April 2005 however, Byrnes emailed Supangat and referred to the earlier offer set out in Supangat's email of 15 December 2004. He stated:[14]

> "As per your email of 15/12/04 re the granite quarry. I would like to take up the option you offered that for any reason I cannot continue with the operation of the mine that you and Edi are prepared to take over my share with the same arrangement that I offered to you.
> My share is currently about $950,000 and I will quantify that for you. If you do not want this I will then contact the vendors and inform them we will be handing the mine back as per the agreement."

[36] On 15 April 2005 Supangat replied:[15]

> "I thank you for your offer, however, I'm not in the position to make any offer to you at this time. It is now a different situation than it was on 15 December 2004. The work activities conducted before 15th December was monitored and supervised by both of us, whereas the activity after 15th December 2004 was only supervised by you.
> It is noted that your investment has gone up from AU$450,000 to AU$950,000 in four months.
> …
> It is unfair for us because I and Edi are expecting to get our investment back as you have promised which is not the case now. Instead you are going to hand over the mine to the owner. This means we will both lose our investment.
> If you really want to sacrifice your investment, why don't you give me and Edi a chance to deal directly with the owner and perhaps I can save our investment by inviting another investor. If I and Edi are still in business, we can promise you that we should pay your investment of AU$450,000 in instalment as our first priority, I and Edi will consider this chance as a compensation for the payment you have promised us."

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13 Exhibit 2 at p 14, email from Supangat to Heery dated 12 April 2005.

14 Exhibit 1 at p 94 & Exhibit 2 at p 15, email from Byrnes to Supangat dated 13 April 2005.

15 Exhibit 2 at p 16, email from Supangat to Byrnes dated 15 April 2005.

[37] Byrnes replied on 15 April:[16]

> "My position has not changed in regard to the quarry. If you change your mind about purchasing my share you have until Monday evening to inform me as per my email.
> We still have the issue of the personal guarantees that we signed which will be enforceable after we hand the mine back. The mine currently owes $125K.
> The actual money paid to the mine is 1.3 million. 450k is the money you have put in $850,000 is what I have put in as of today."

[38] On 18 April 2005 Supangat emailed:[17]

> "I really don't know what you are talking about. It looks that you deny all the facts that you have purchased my share and agreed to pay $150,000 in February 2005 and $50,000 in the following 6 months. I don't think this is the Australian way. Please confirm that you want to buy my share or not. If you make the payment then you can do what you want with the mine. But if I still hold 50% of the share you we should agree on how we should proceed not only the way you see fit. I think we should talk because you want to run away from the facts that you run the mine yourself."

[39] In his reply to Supangat dated 21 April 2005, Byrnes stated:[18]

> "After speaking to Matt and out of courtesy to you and your partner Edi I will again offer you the opportunity to rejoin the mine as an equal partner. You can do this by matching my contributions I have given to the mine. Once you have done that or alternatively bought my share as per your offer then you can have some input into the running of the mine...If you don't want to do either of these options. I will inform the vendor as per the agreement that the current arrangement no longer can proceed and we will hand the mind back."

[40] In the meantime, on 21 April 2005, Supangat wrote to Mr Malcolm Payne, who represented ESAM.[19] He stated that in December 2004, Byrnes had agreed to take over the mine alone and to pay back Supangat's investment; and that since December Byrnes had run the mine alone. He stated that Byrnes was having difficulty in performing his agreement, and that the parties were discussing how they should continue the business. He stated that this means, "I am still attached with the Agreement", and asked to be informed if there were any changes and developments in relation to it. He stated that the letter was intended to inform Payne that Supangat and his Indonesian partner were "still interested with the mine".

[41] By email dated 2 May 2005, Payne on behalf of ESAM, in response to Supangat's letter, agreed to extend the deadline in relation to the option agreement to 1 June

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16 Exhibit 2 at p 17, email from Byrnes to Supangat dated 15 April 2005.
17 Exhibit 3 at p 14, email from Supangat to Byrnes dated 18 April 2005.
18 Exhibit 2 at p 21, email from Byrnes to Supangat dated 21 April 2005.
19 Exhibit 2 at p 20, letter from Supangat to Payne dated 21 April 2005.

2005.[20] This prompted an email from Byrnes on 3 May 2005, asking Supangat about the content of his letter of 21 April 2005.[21] Supangat replied on 9 May 2005,[22] stating they had an agreement (plainly a reference to Byrnes buying out Supangat) and that Byrnes' failure to perform had become a problem for Supangat. He asked for a meeting. Byrnes replied the same day,[23] asserting that Supangat's conduct had caused ESAM to call for full payment by 1 June. After a telephone conversation between them, Byrnes sent another email in similar terms on 13 May 2005,[24] stating that he was preparing to hand the mine back to ESAM.

[42] On 24 May 2005, Supangat sent an email to Byrnes offering to take over the mine and to seek a further investment from his partner of between $400,000 and $500,000. He also offered to repay Byrnes his investment of $450,000 in stages, if the operation was successful.

[43] However, on the same day their solicitors spoke and apparently agreed that the mine should be handed back to ESAM. The next day, 25 May 2005, Enslin sent documents to Supangat for execution by him, including a resignation of directorship of Pacific Rim. On 25 May there was a formal advice that the purchaser "elects to exercise its right to terminate the Share Sale Agreement".[25]

[44] Supangat did not, in fact, resign his directorship of ESAM until 30 May 2005, the date on which Byrnes also resigned.

The plaintiff's claim

[45] Supangat instituted proceedings on 12 October 2005 and claims the sum of $450,000 due under the Transfer Agreement and further, or in the alternative, claims damages in the sum of $450,000 for breach of the Transfer Agreement, as the shares are now worthless. Supangat also claims interest, together with costs.

[46] The plaintiff relies on the six emails and written exchanges between the parties of 9 December 2004, 15 December 2004, 17 December 2004, 30 December 2004, 7 January 2005 and 2 February 2005 as set out above, to establish an agreement between the parties. The plaintiff submits that these emails show a fixed agreement regarding the dissolution of the relationship between the parties. The plaintiff states that Byrnes' emails show that he regarded the relationship between Supangat and himself at an end and that only legal formalities remained to be completed to give Byrnes full control of the granite mine at Mundubbera.

[47] Whilst Byrnes admits the emails, he denies that the emails evidence a concluded agreement. Byrnes states that there was an oral agreement made in Melbourne in December 2004, whereby either one of them could proceed with the mine, or the party who conducted the mine would pay the other party $450,000 in exchange for a release of the obligations under the guarantee. The defendant however, pleads that this agreement was void as the parties were mistaken about the subject matter of the contract and that the agreement was uncertain.

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20 Exhibit 1 at p 95 & Exhibit 2 at p 37, email from Payne to Supangat dated 2 may 2005.
21 Exhibit 1 at p 95 & Exhibit 2 at p 35, email from Byrnes to Supangat dated 3 May 2005.
22 Exhibit 1 at p 95, email from Supangat to Byrnes dated 9 May 2005.
23 Exhibit 1 at p 97 & Exhibit 2 at p 39, email from Byrnes to Supangat dated 9 May 2005.
24 Exhibit 1 at p 98, email from Byrnes to Supangat dated 13 May 2005.
25 Exhibit 1 at p 100, letter from Enslin & Associates dated 25 May 2005.

[48] The plaintiff argues that it is inherently improbable that there were two distinct agreements, one oral and one written, as alleged by the defendant. Whilst the plaintiff concedes that some of the emails followed a face-to-face meeting in Melbourne, he submits that there is no evidence that what was discussed provided further contractual obligations between the parties. The plaintiff submits therefore, that there was no evidence of any other term being agreed between the parties in Melbourne that is not to be found in the emails.

[49] The plaintiff argues that Byrnes' evidence[26] as to what was said at the Melbourne Airport meeting in December 2004 supports this view, but that the written record in the emails offers the most reliable evidence of what was agreed between the parties.

Was there a Transfer Agreement?

[50] The defendant submits that the plaintiff's claim is not maintainable on several grounds and argues that the essence of the agreement pleaded in the Statement of Claim is that there is a Transfer Agreement constituted by the emails. The Transfer Agreement pleaded in the Further Amended Statement of Claim at paragraph 8 is:

> "8. To resolve their differences about the way in which ESAM should be managed the parties agreed (the transfer agreement) that the plaintiff should transfer shares in Pacific Rim Management Ltd controlled by him or his representatives or nominees and the defendant should pay the plaintiff the sum of $450,000.00 payable by instalments by an initial payment of $150,00 (by transfer to the plaintiff's account in the first week of February 2005) with the balance to be transferred monthly thereafter in $50,000 instalments."

[51] In my view, the parties entered into a binding agreement, substantially as alleged in para 8 of the Further Amended Statement of Claim. I consider that to be the true effect of the emails on which the plaintiff relies. It is, however, necessary to refer to the submissions made on behalf of the defendant about this.

[52] The defendant refers to earlier versions of the Statement of Claim and to the replies. He also relies on the particulars provided by the plaintiff as a basis for submitting that the emails do not amount to the agreement now pleaded by the plaintiff. I do not consider that allegations in other pleadings assist on the question which is to be determined by reference to the emails, understood against the background known to both parties.

[53] It is said that the agreement is not sufficiently certain because it referred to Byrnes taking over "our share", when the relevant shareholding was a single share in Pacific Rim, owned by Felgate Holdings, as trustee. It is agreed that Supangat did not own a share in ESAM or Pacific Rim. Accordingly, counsel for Byrnes argues that:[27]

> "Without considerable further agreement, the statement in the emails that the $450,000 was to be paid to Supangat for Supangat's *'share'* cannot be reconciled with the fact that the shareholding was not owned by Supangat but by Felgate Holdings in its capacity as trustee of the Trust, a discretionary trust in which entities associated with

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[26] Transcript day 2 at p 80, ll 1-11 and transcript day 2 at p 81, ll 1-30.

[27] Defendant's submissions at [3.3].

> both the plaintiff and the defendant were beneficiaries. The Trust owned the one issued share in Pacific Rim. The fundamental obligation of Supangat as expressed in the Emails, namely the transfer of his share, cannot be reconciled with the fact that he neither held nor controlled any share. Nor can the agreement contained in the Emails for Byrnes to pay the consideration to Supangat be reconciled with the fact that any payment in respect of the sale of the share of Pacific Rim would necessarily have to be paid to Felgate Holdings in its capacity as trustee of the Trust, a course which the parties did not contemplate, much less deal with."

[54] That submission mistakes the effect of the emails. The clear effect of the emails was that Supangat's interest in the venture would be transferred to the Byrnes' interest. While the mechanics of this remained to be worked out, there is no suggestion that either party had any difficulty understanding the proposal. Neither Byrnes nor Supangat had a clear understanding of the structures which had been put in place by Enslin. It is clear that they were not lawyers or accountants. It would also seem that it took some 12 months for this structure to be put in place and that Supangat and Byrnes had, in fact, conducted the mine together for some months before the final legal documents were signed between them. However, I consider that the clear intention was to transfer Supangat's interest to the Byrnes interest. I agree with the submission by counsel for the plaintiff, that "Mr Byrnes' attitude to the word 'share' was the same as Dr Supangat's. Such usage of the word 'share' was a short but compendious expression to describe the interest held by Dr Supangat and his family."

[55] It may have been enough that the beneficiaries in the Trust, who were associated with Supangat, surrender their interests in order to give effect to it. I am satisfied that the evidence of Mr Reynolds, Mrs Kusmali (Supangat), Mr Kirshnabudi and Melissa Supangat, established that it was extremely unlikely that any potential beneficiary in Dr Supangat's family would have opposed any transfer to the Byrnes family interest. It is clear that there was no prospect of the existing arrangement succeeding, given the different views of Supangat and Byrnes. It was also clear that if the dissolution of the joint venture did not go ahead, there was a possible loss of $450,000 to the Supangat family. Accordingly, it was very unlikely that any of the Supangat beneficiaries would oppose the proposal. It seems likely that Supangat was the agent of those beneficiaries; in which case, they could be ordered to do what was necessary to surrender their interests in the Trust, or to give effect to the agreement. If Supangat was not their agent, that does not make the agreement uncertain. It should be noted that the same issues would have arisen if the parties had chosen the alternative.

[56] The defendant submits that the plaintiff has asserted an agreement to use his best endeavours to transfer the interest and that it is unlikely that Byrnes would have agreed to pay a large amount for such a vague promise. However, the agreement pleaded is not an agreement that Supangat would use his best endeavours to achieve the transfer of the shares; it was to do all that was necessary to procure the transfer.

[57] In a somewhat similar vein, it is submitted that it is unlikely that Byrnes would have bound himself to pay such a substantial sum of money, either without the consent of the beneficiaries, or except in exchange for documents necessary to transfer the Supangat interest. That does not reflect Byrnes' conduct, as evidenced in his email

of 7 January 2005. The likely explanation is that each of Byrnes and Supangat, based on the history of their dealings, believed that the other had the control of associated beneficiaries necessary to transfer the interest of that side of the venture.

[58] The defendant submits that the agreement of the parties is so infected by mistake, that it does not amount to a binding contract. The mistake is said to be as to the subject matter of the contract, namely, a holding in Pacific Rim; they proceeded on the basis that each owned a shareholding in Pacific Rim. In my view, that was not the subject matter of the contract. In my view, that was the interest in the venture held by those associated with Supangat. That was the "share" which was to be transferred.

[59] The defendant then submits that there was no binding obligation to make the payments on the dates stated in his email of 7 January 2005, that promise not being supported by consideration; and that any promise to pay $450,000 was not enforceable in the absence of a Notice to Complete. I consider that the contract was not formed prior to 7 January 2005 and that the promise to make the payments on the stated dates was supported by the consideration from Supangat, which is apparent in the agreement pleaded in para 8. It is not necessary to deal separately with the question whether time was of the essence, but I note that the parties have not, in their submissions, dealt with the question whether at common law, time stipulations for a promise of this kind are regarded as essential.

[60] The defendant submits that the plaintiff did not accept the payment schedule proposed in his email of 7 January 2005 and by his reply of 2 February 2005, proposed a further term that was not accepted by the defendant. It is difficult to see the provision of the plaintiff's bank details in his email of 2 February 2005 as anything other than acceptance of the payment schedule. The proposal by the plaintiff to sign documents shortly after was not an offer requiring acceptance by the defendant. It was simply an indication by the plaintiff that he would take a step as part of the performance of his obligations under the contract.

[61] There is then a submission that the circumstances demonstrate that the parties did not intend the emails to create binding legal relations. In particular, parts of the emails and other correspondence from the plaintiff from February 2005 onwards are relied upon. Much of that correspondence has been set out earlier. It is fair to say that there is some ambiguity about the plaintiff's position in this period.

[62] In my view, a particularly significant fact is that from about December 2004, the defendant took over sole control of the mine. He alone decided on the expenditure of money in relation to it. He was not prepared to let the plaintiff have any say about its operation, unless the plaintiff invested a further substantial sum of money. He took the position in his correspondence with the plaintiff, that he alone had the right to hand the mine back to ESAM.

[63] The ambiguity which the plaintiff expressed about his position in this period, seems to me, to be ambiguity about his legal rights in this period. He constantly maintained that the defendant had made a binding agreement which he had not performed. He also expressed some sympathy for the defendant's position and was prepared to grant him some indulgence, and to consider either rejoining the venture or taking over the mine. In my view, his conduct as a whole, does not amount to an acknowledgment that no binding agreement had been reached earlier in 2005.

[64] For similar reasons, I do not consider that these matters show that the contract was abandoned by the parties. The defendant points to the fact that the plaintiff participated in the process of withdrawing from the venture, as demonstrating abandonment of the contract. I have noted the position the defendant took about his right to make that decision. The plaintiff did not contest this right. While the contract remained unperformed, the plaintiff and the beneficiaries associated with him obviously retained an interest in the venture. While he remained a director of ESAM, his participation in the bringing of the venture to an end seems appropriate. In the circumstances, I do not think his conduct demonstrates that the contract was abandoned or that he was abandoning rights that had already accrued under it.

[65] There should be judgment for the plaintiff in the sum of $450,000.

Counterclaim

[66] The defendant submits that if the plaintiff's claim succeeds, he is entitled to be awarded damages for the plaintiff's failure to transfer the "share" promised and the agreement of the parties demonstrates that the value of this was $450,000. On the agreement, I have found the defendant was in breach from early February 2005 and has remained in breach thereafter. By then the plaintiff had, in part, performed the agreement by giving the defendant sole conduct of the mining operation. However, the balance of the obligations remains unperformed.

[67] It is not inevitable that the untransferred share had a value of $450,000 at any time relevant to the assessment of damages on the plaintiff's counterclaim. Neither party has attempted to make submissions about the time by which the plaintiff was required to perform his obligations. It is likely to have been some time subsequent to January 2005 and to have required either co-operation between the parties, or some direction from the defendant as to the manner in which the transfer of the "share" would be achieved. This did not happen. Indeed, the defendant's conduct in this period suggests that he was keeping his options open. He retained control of the mine and would not permit the plaintiff to be involved in its management unless the plaintiff paid more money, yet the defendant did not make the payments he had promised. It would seem that in the period between January 2005 and the end of May 2005, the venture was failing and its value was going down rapidly. The defendant has not established the value of his rights under the agreement at the time when they should have been transferred to it, and they may well have then been of no value.

[68] The defendant has therefore failed to establish an entitlement to substantial damages on his counterclaim.

[69] I will hear from counsel as to the form of the orders to be made including what orders should be made in relation to interest on the plaintiff's claim and as to costs.