

52/84

APPEAL No 39 of 1984

Griffin Coal Mining Company Limited (Appellant)

V

The State Energy Commission of Western Australia (Respondent)

Case for the Appellant - Corrigenda

- Page 6 line 7 - after the word "lesser" delete "a"
- Page 14 Line 24 - delete "Company" and substitute "Commission"
- Page 14 line 25 - delete "herein" and substitute "hereinafter"
- Page 18 line 50 - delete the words "demonstrate that the"
- Page 19 line 46 - delete "of" and substitute "a"
- Page 19 line 47 - delete "may" and substitute "many"
- Page 29 line 7 - delete "mitigate" and substitute "militate"
- Page 29 line 47 - delete "Company" and substitute "Commission"

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA

IN PROCEEDINGS NO. 2749 OF 1982

BETWEEN: GRIFFIN COAL MINING COMPANY LIMITED

Appellant
(Defendant)

AND: THE STATE ENERGY COMMISSION OF WESTERN AUSTRALIA

Respondent
(Plaintiff)

CASE FOR THE APPELLANT

10 1. This is an appeal as of right from a Judgment of the Honourable the Chief Justice of the Supreme Court of Western Australia (Sir Francis Burt) made on the 22nd April 1983 whereby His Honour made orders and declarations by way of answer to various questions contained in an Originating Summons dated 12th November 1982 which was issued pursuant to Order 58 Rule 10 of the Rules of the Supreme Court of Western Australia and concerned the construction of a contract in writing dated the 29th day of March 1979 (hereinafter called "the Contract") between the abovenamed parties providing for the long term supply of coal by the Appellant (Defendant) Griffin Coal Mining Company Limited (hereinafter called "the Company") to the Respondent (Plaintiff) the State Energy Commission of Western Australia (hereinafter called "the Commission").

Record
pp.193-198
pp.1-9
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PROCEDURAL MATTERS

20 2. On the 13th day of May 1983 the Company applied to the Honourable Mr Justice Rowland in the Supreme Court of Western Australia for conditional leave to appeal to Her Majesty in Council against the decision of the Honourable the Chief Justice. His Honour refused to grant leave on the basis that the dispute between the parties was not of the value of 500.00 Pounds Sterling or upwards as prescribed by Rule 2(a) of the Order in Council dated the 28th June 1909.

Documents not transmitted
pp199-206

3. On the 16th day of September 1983 the Company appealed to the Full Court of the Supreme Court of Western Australia against the decision of Mr Justice Rowland and on the 1st day of February 1984 the Full Court (the Honourable Mr Justice Brinsden, the Honourable Mr Justice Kennedy and the Honourable Mr Justice Olney) granted the Company conditional leave to appeal to Her Majesty in Council. The conditions of such leave having been complied with, the Full Court granted final leave to appeal to Her Majesty in Council on the 3rd day of May 1984.

Documents not transmitted
pp207-233
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ORIGINATING SUMMONS AND JUDGMENT

4. The Commission's Originating Summons dated the 12th November 1982 contained nine questions relating to the construction of the Contract. A further three questions were subsequently added by the Company and by consent a revised version of question 7 was substituted for the original version at the hearing of the Originating Summons.

pp1-9
pp167-169

5. There is broad agreement between the parties as to what the answers to questions 1(a), 1(b), 2, 3, 4, 8(1) and 12 posed in the Originating Summons should be. The Company accepts that the answers to those questions should be as formulated in the Order of the Honourable the Chief Justice provided that the answers given by Her Majesty in Council to the disputed questions mentioned below do not require the Company to review its position. The Company therefore does not propose to place submissions before Her Majesty in Council as to what answers should be given to the seven questions just mentioned but does seek liberty to apply to have the answers to such questions varied should the need arise.

pp193-198

6. The parties agree that questions 6(3), (4), (5), (6), 7, 8(2), (3) and 9 do not require answers and that question 5 is not an appropriate question to be answered by a court of construction.

7. There is a dispute between the parties as to what answer should be given to question 1(c). The Company accepts that the said question should and can only be answered in the manner indicated by the Chief Justice.

8. The remaining questions identify the main area of dispute between the parties and it is the answers given by the Honourable the Chief Justice to questions 6(1), (2), 10 and 11 which are

(principally) the subject of this appeal. These questions concern the manner in which "gross revenue" is to be calculated in order to determine what amount, if any, will be due to the Company by way of a Financial Deficiency payment at the end of each financial year pursuant to the provisions of clause 8(3)(c) and Schedule F of the Contract ("the Financial Deficiency payment issue").

pp50.23-51.18
pp81-83

10 9. The Company appeals against the answers given by the Honourable the Chief Justice to questions 6(1), (2), 10 and 11. The relevant questions and the declarations made in respect of each and the answer for which the Company contends are as set out below.

Question 6(1)

20 Upon a proper construction of the Contract where it is necessary to apply clause 8(3) and Schedule F to determine the "pre tax cash surplus" of the Company in a financial year when the Company does not deliver the annual base tonnage of coal required to be supplied is the "gross revenue" for the purposes of the calculation in Schedule F: p5.1-15

(a) The actual tonnage of coal delivered multiplied by the Base Price paid; or

30 (b) The tonnage specified in Schedule A regardless of how much has been actually delivered multiplied by the Base Price as adjusted or the average Base Price as adjusted; or

(c) Some other formula and if so what formula.

Answer by Burt C.J.:

40 Where it is necessary to apply clause 8(3) and Schedule F to determine the "pre-tax cash surplus" of the Company in a financial year when the Company does not deliver the annual base tonnage of coal required to be supplied in that year the "gross revenue" for the purpose of calculation in Schedule F is the tonnage specified in Schedule A for that year multiplied by the Base Price as adjusted ruling at the time of delivery as ordered. p195.23

Company's Answer:

6(1) (a) No.

6(1) (b) No.

10

6(1) (c) Gross revenue should be calculated by multiplying the base tonnage coal which the Commission was obliged to accept or pay for in the relevant year (whether delivered during the year or not provided that the Company was ready and willing to deliver) by the Base Price as adjusted.

Question 6(2):

Does the expression "any additional quantities of coal" in the definition "gross revenue" include all or any of: p5.16-25

(i) extra coal supplied under clause 3(2);

(ii) extra coal supplied under clause 3(3);

20

(iii) extra coal delivered to make good deliveries postponed pursuant to clause 10;

(iv) extra coal delivered to make up shortfalls in prior years to which clause 24 has applied;

(v) extra coal delivered to make up shortfalls in annual base tonnage not falling within clauses 10 and 24.

Answer by Burt C.J.:

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The expression "any additional quantities of coal" in the definition "gross revenue" includes - p196.3-196.15

(a) extra coal supplied under clause 3(2): and

(b) extra coal supplied under clause 3(3) but does not include -

(i) extra coal delivered to make good deliveries postponed pursuant to clause 10: or

(ii) extra coal delivered to make up shortfalls in previous years to which clause 24 has applied: or

(iii) extra coal delivered to make up shortfalls in annual base tonnage falling within clause 5(2)(b).

Company's Answer:

6(2) (i) Yes.

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6(2) (ii) The expression "any additional quantities of coal" in the definition "gross revenue" includes:

(a) extra coal supplied under clause 3(2); and

(b) extra coal supplied under clause 3(3):

but does not include-

(i) extra coal delivered to make good deliveries postponed pursuant to clause 10; or

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(ii) extra coal delivered to make up shortfalls in previous years to which clause 24 has applied; or

(iii) extra coal delivered to make up shortfalls in annual base tonnage falling within clause 5(2)(b).

Question 10

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If during a financial year the Commission is p167.17-167.24 under the terms of the Contract for any reason bound to accept or pay for a quantity of base tonnage coal being less than the quantity for such year specified in Schedule A of the Contract is the quantity of coal which constitutes base tonnage for such year to be brought to account in determining the gross revenue of the Company for the purposes of clause 8(3((c) of the Contract such lesser quantity.

Answer by Burt C.J.:

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If during a financial year the Commission is p197.3-197.10 under the terms of the Contract bound to

accept or pay for a quantity of base tonnage coal being less than the quantity specified in Schedule A the base tonnage for such year to be brought to account in determining the gross revenue of the Company for the purposes of clause 8(3)(c) of the Contract is not such lesser a quantity.

Company's Answer:

Yes.

10 Question 11

If the answer to question 10 is "No" might the answer be different depending upon the reason for the reduction in the quantity of coal which the Commission was required to accept or pay for and in particular would the answer be different if such reason was due to any one or more of the following reasons: p167.5-168.20

- (a) inefficiency of the Company carrying out its operations (clause 5(2)(b));
- 20 (b) improper management by the Company (clause 8(3)(d));
- (c) the effect of activities of the Company unrelated to the mining of coal for the purposes of the Contract (clause 8(3)(d));
- (d) departure by the Company from the Mining Plan (clause 8(3)(d));
- 30 (e) failure by the Company to observe the best modern practice in mining methods (clause 8(3)(d));
- (f) failure to amend the Mining Plan due to default by the Commission (clause 12);
- (g) force majeure affecting the Company and/or the Commission or both of them (clause 24);
- (h) a defined event within the meaning of clause 8(1) of the Contract;
- 40 (i) subterranean or other mining conditions not anticipated by the RTZ

Study but not coming within a defined event under clause 8(1) of the Contract.

Answer by Burt C.J.:

The answer to question 10 would not be different depending on the reasons for the reduction in quantity of coal which the Commission was required to accept and pay for and in particular the answer would not be different if such reason was due to any one or more of the following reasons -

10

(a) inefficiency of the Company carrying out its operations (clause 5(2)(b)):

(b) improper management by the Company (clause 8(3)(d)):

(c) the effect of activities of the Company unrelated to the mining of coal for the purposes of the Contract (clause 8(3)(d)):

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(d) departure by the Company from the Mining Plan (clause 8(3)(d)):

(e) failure by the Company to observe the best modern practice in mining methods (clause 8(3)(d)):

(f) failure to amend the Mining Plan due to default by the Commission:

(g) force majeure affecting the Company and/or the Commission or both of them (clause 24):

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(h) a defined event within the meaning of clause 1 of the Contract:

(i) subterranean or other mining conditions not anticipated by the RTZ Study but not coming within a defined event under clause 8(1) of the Contract.

Company's Answer:

If question 10 is answered in the affirmative it is not necessary to answer question 11.

FACTS

10. The Commission is a body corporate originally

constituted by the State Electricity Commission Act 1945 of Western Australia and now continuing pursuant to the State Energy Commission Act 1979 as amended.

10 11. Pursuant to its various statutory powers the Commission generates, distributes, supplies and sells electrical energy throughout Western Australia. For such purpose the Commission has established and operates an electricity generation station adjacent to the Muja Pit.

12. At all material times the boilers at Muja Station have been generally fired by coal supplied by the Company from the Muja Pit.

20 13. The Company has mined coal in the Collie p122 region for more than 50 years. An open cut mine was commenced at Muja in 1953 followed by a deep mine to exploit coal from what is known as the Hebe Seam in 1954. The deep mine ceased operating in 1965 after a drill hole from the surface had penetrated the workings and resulted in a large inflow of water which flooded the mine. Subsequently the open cut was expanded and the Company is now mining through the area formerly worked by deep mine methods with the result that extraneous materials such as steel roof bolts, old mine timbers, pieces of scrap metal and of cables are inevitably mixed in with the "run of mine" coal excavated from that portion of the open cut operation notwithstanding that the Company utilises good mining practices and takes all reasonable steps in the circumstances to keep the extraneous material to a minimum.

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40 14. During the course of the 1970's it became apparent that the volume of coal to be supplied to the power station would have to be increased and that the Company would require additional equipment in order to achieve the necessary results. It also became apparent that in order to obtain finance with which to acquire the equipment required to increase production from the mine it would be necessary to engage internationally respected consultants to prepare a thorough study of the project so that financiers would be prepared to make advances. p123

15. RTZ Consultants Limited were engaged to undertake the study and a draft copy of the RTZ Study was available by June 1978. p123

16. As at 1978, the Company was the registered p123
lessee of a block of 23 coal mining leases, known
as the Muja leases, which embraced the Muja Pit and
the surrounding area and amounted in total to an
area of approximately 2,685 hectares.

10 17. The RTZ study indicated that the total p123-4
estimated coal reserves comprising the Muja Pit as
at 1st January 1978 amounted to 67.91m tonnes. The
greater part of the coal reserves are located in
the Hebe seam and the Hebe split that is to say the
seams situated at the lowest level of the nine
seams comprising the Muja Pit.

20 18. The RTZ study noted (at page 6) that allowing p124
for a phased build up to an output of 2.1m tonnes
of coal per year and having regard to the
requirements of the Commission as a consequence of
increasing the capacity of the Muja Power Station,
the reserves would be adequate for approximately 30
years. The RTZ study noted (at page 6) that the
Company had additional reserves nearby at Chicken
Creek but such reserves were not then considered by
the RTZ study.

19. The RTZ study noted (at page 10) that the p124
expansion of production at Muja according to the
strategy proposed in the report was technically and
economically feasible subject to the negotiation of
an appropriate sales contract. That strategy
presumed expansion of the existing fleet of
equipment.

30 20. The RTZ study contained a "Mining Plan" which
prescribed the way in which the coal was to be
mined and it also set out in some detail the plant
and equipment which the Company would require so as
to achieve the stipulated production. The RTZ Study
indicated the manner in which the acquisition of
that plant and equipment by the Company could be
financed.

40 21. Negotiations were commenced between the p124-5
Company and the Commission with a view to bringing
about a new and more permanent contractual
relationship. Those negotiations proceeded upon
the basis that :

(a) the mining methods and financing of the
operation contemplated by the RTZ Study would
be carried into effect;

(b) there would therefore be a new and
extended fleet of equipment;

(c) there would be regular schedules of delivery and at a price sufficient to finance the operation and give the Company a reasonable return;

(d) overburden would be removed at a prescribed rate and that work, and working hours would be conducted in the manner contemplated by the RTZ Study.

10 22. The parties to the negotiations, being p125
conversant with the findings detailed in the RTZ
Study, recognised that the Commission was seeking
to obtain an assured supply of coal for a
guaranteed 25 year period at what was basically a
"cost plus" price (that is to say the price was not
to be necessarily related to the general economics
of the energy supply situation) and the Company was
seeking to obtain a permanent customer with special
provisions in the Contract ensuring the economic
viability of the project from the Company's point
20 of view during the life of the Contract.

23. Based upon the RTZ Study the parties entered
into the Contract that is to say the agreement
dated 29th March 1979. The Contract is expressed
to operate for a period of 25 years commencing the p34.9
1st July 1978 and provides that the Company will p34.10
supply the Commission with coal at the annual
tonnage rates as set out in Schedule A to the p67
Contract.

30 24. The Company has been supplying and is
continuing to supply the Commission with coal
pursuant to the provisions of the Contract.

25. In the second half of 1981 disputes arose p11.1
between the parties concerning, inter alia, alleged
shortfalls of coal deliveries, quality of coal,
adequacy of the Commission's receival facilities
and generally as to the state of account between
the parties. The Company contended that:-

40 (a) Many of the disputes arose from the need p128.10
for revisions to the Mining Plan and a need to
review the mining operation in the light of
events transpiring subsequent to the making of
the Contract.

(b) Although the presence of extraneous
materials in coal supplied to the Commission
was frequently a source of friction between
the parties, the Contract was essentially for

the supply of "run of mine coal" in respect of an open cut mining operation which from the outset was known would proceed through former deep mine workings. The Company was obliged to and in fact utilised good mining practice in the course of performing its obligations under the Contract and in coping with the extraneous materials.

10 26. In December 1981 the Commission issued a default notice under clause 23 of the Contract based upon alleged shortfalls in the delivery of tonneages of coal prescribed by the Contract. The Company contended that the shortfalls in delivery were due to the inadequacy of the Commission's receival facilities. The default notice was eventually withdrawn as a result of agreements reached on the 23rd August 1982.

20 27. The operation of the default notice was also affected by the fact that following unseasonal heavy rains over the Christmas-New Year period in 1981-82 (when the Company's main work staff were on leave) there was substantial flooding in the main pit at Muja. The Company claimed the occurrence of a force majeure situation under clause 24 of the Contract as a result of the flooding. The Commission accepted that this was a bona fide claim of force majeure.

30 28. As to the application of the contractual provisions and especially clause 24 which provides for suspension of obligations during the period of delay and requires the Commission to meet on behalf of the Company payments due to the Banks under the financial agreements:

(a) the impact of the force majeure situation had both an immediate and deferred impact on coal deliveries and overburden waste removal; and

40 (b) the effect of the force majeure situation to the 30th June 1982 resulted in a deficiency of coal deliveries of 104,000 tonnes a portion of which comprising one day's delivery (approximately 8,850 tonnes) could be attributed to an event of force majeure declared by the Commission in respect of strike action on the 3rd February 1982.

29. (a) For the financial year ended 30/6/1982 the Commission ordered 2.0 million tonnes of base tonnage coal in accordance with the Contract. The Company delivered 1,739,705.92

tonnes leaving only a shortfall for that year (for whatever reason including the force majeure claim hereinbefore referred to) of 260,294.07 tonnes.

10 (b) Pursuant to Clause 3(1) and Schedule A of the Contract, the Commission in the year ending 30.6.82 had prima facie to purchase 2.0 million tonnes of base tonnage coal. In the year ending 30.6.83. and thereafter the annual base tonnage prescribed by the Contract is 2.1 million tonnes. The price of coal in the 1981/1982 Financial Year was about \$27 per tonne.

p34.10
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p67
p16.25

20 (c) In 1982 there was a difference of opinion between the parties concerning the interpretation of clause 8(3)(c) and in particular the meaning of "gross revenue" and the calculation to be made for the purpose of Schedule F of the Contract. By a minute of agreement dated 23rd August 1982 the parties agreed on an interim measure pending a determination by an arbitrator or by the Supreme Court that for the purposes of Schedule F calculations for the 1981/1982 Financial Year "gross revenue" would be determined by multiplying the actual base tonnage delivered by the base price as adjusted.

pp50.24-51.4
pp117-118

30 (d) As at 4th November 1982, on the basis of the draft accounts for the 1981/1982 Financial Year the Commission estimated that, on a worst case result it would be required to pay the Company a total of \$6.9 million if the Company's contentions were correct as against a total of \$2.3 million if the Commission's contentions were correct. As at 15th December 1982 the Company calculated that the relevant figures were \$6,821,698 and \$3,421,332 respectively.

p19.13
p19.22
p141.8
p165.20
p166.24

40 (e) As a consequence of the decision of the Honourable the Chief Justice the Company was obliged to repay the Commission a sum in excess of \$3.4 million which had previously been paid to it on the 22nd December 1982 in accordance with the minute of agreement. The Company will be entitled to recover this amount if it succeeds in the appeal. The result of the appeal will also determine how relevant provisions of the Contract are to be

p225.20

interpreted and applied in the remaining 21 years of life of the Contract.

THE CONTRACT

30. The Contract provides that: pp26-96

(a) the Company will mine, sell and deliver to the Commission for use in the Commission's Muja Power Station over a period of 25 years from 1st July 1978" the aggregate of the base tonneages of coal to be supplied in each of the financial years as provided in Schedule A at the Base Price as adjusted" (clause 3(1)). p.34.10

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(b) the base price as adjusted is the Base Price per tonne of coal for the relevant financial year referred to in Schedule B to the contract but subject to: p.30.5

(i) adjustment pursuant to a formula prescribed by clause 7 which takes account of movements in the cost of labour, materials and payment due in respect of equipment ("the adjustment formula"); pp41.32-45.12

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(ii) variations to the Mining Plan effected pursuant to clauses 12 and 21 of the Contract. pp53.1-54.10 pp59.3-60.18

(c) if during any quarter the Company is ready and willing to deliver and the Commission should fail to accept delivery of the whole or any part of the base tonnage of coal to be delivered/sold in that financial year as provided in Schedule A in quantities ordered by the Commission up to but not in excess of the base tonneages prescribed then the Commission shall within 30 days of the expiry of such quarter pay the Company for the shortfall ("the clause 5(4) take or pay provision"). p38.14-38.23

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31. The Contract contains various provisions controlling the financial relationship of the parties. More particularly, the Contract allows for revenue derived by the Company from the sale of coal to the Commission to be adjusted from time to time by various means including the following:

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(a) by application of the Base Price adjustment formula pursuant to clause 7; pp41.32-45.12

(b) by compensation for the happening of pp45.13-48.30

Defined Events pursuant to clause 8(1);

(c) by Financial Deficiency payments pursuant to clause 8(3) whereby the Company is guaranteed a return which is not to fall below a specified minimum or to exceed a specified maximum percentage of its gross revenue in any financial year; pp50.1-51.18

10 (d) as a consequence of a review of the Mining Plan pursuant to clause 12 or a Five Year Engineering Review undertaken pursuant to clause 21 of the Contract. pp53.1-54.10 pp59.3-60.18

32(a) The Contract defines a number of expressions in clause 1(1) as follows:

"Base Price" means the base price per tonne of coal for the relevant financial year referred to in Schedule B; p30.2-3

"Base Price as adjusted" means the relevant base price as adjusted pursuant to clause 7; p30.4-5

20 "base tonnage" means the relevant base tonnage of coal to be supplied by the Company to the Commission in any financial year as provided in Schedule A and which the Company must accept or pay for as herein provided; p30.6-11

"base tonnage in any quarter" means the base tonnage for the relevant financial year divided by four;

30 "Defined Event" means any event beyond the control of the Company or the Commission described in clause 8(1); p31.3-4

"Financial Deficiency payment" means a payment by the Commission to the Company made pursuant to clause 8(3)(b); p31.20-22

"gross revenue" means the base tonnage as specified in Schedule A for the applicable year plus any additional quantities of coal delivered multiplied by the base price as adjusted; p32.1-4

40 "pre-tax cash surplus" means the pre-tax cash surplus which the Company derives from its operations under this Agreement determined on an annual basis at the end p32.22-25

of each financial year in accordance with Schedule F;

"RTZ Study" means the results of the studies carried out by RTZ Consultants Limited and supplemental consultant studies initialled by the parties hereto for the purposes of identification. pp32.29-33.2

(b) Clause 7(4) provides that:-

10 "The Base Price as adjusted when multiplied by the base tonnage plus any incremental tonnages equals the gross revenue." pp44.25-45.3

33. The issues principally arising on this Appeal concern the construction of clause 8(3)(c) of the Contract which provides that:

"If at any time after the expiration of financial year three - pp50.23-51.18

20 (i) notwithstanding good mining and management practices, in the immediately preceding financial year the pre-tax cash surplus of the Company expressed as a percentage of gross revenue falls below the pre tax cash surplus expressed as a percentage of gross revenue estimated pursuant to the RTZ Study computed for the financial year in Schedule F, by more than one percentum then the Company shall notify the Commission and the Commission within 30 days of receipt of such notice will pay to the Company such amount as is required to restore the pre-tax cash surplus to that estimated pursuant to the RTZ Study for such financial year;

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40 (ii) the pre tax cash surplus of the Company expressed as a percentage of gross revenue in the immediately preceding financial year exceeds the pre-tax cash surplus expressed as a percentage of gross revenue estimated pursuant to the RTZ Study computed for the relevant financial year in Schedule F, by more than 5 percentum, then the Company shall notify the Commission and the Company within 30 days of receipt of notice of demand from the Commission shall pay to the Commission such amount as is required to restore the pre-tax

cash surplus to that estimated pursuant to the RTZ Study for such financial year plus 2 percentum."

10 34. The Company submits that the contractual provisions referred to above must be considered in the context of the commercial relationship between the parties; a relationship which has evolved from a history of previous dealing between the parties and a conscious decision on the part of both parties to expand the mining operations at the Muja Pit in the manner proposed by the RTZ Study. The main features of the relationship between the parties may be summarised as follows.

20 35. The Contract has been drawn in such a way that it is what is known in the industry as a bankable document. It forms the primary security for the financing operations which are referred to in the recitals and which are given such primacy that, in the event of a force majeure situation under clause 24, the Commission is obliged to make the lease payments in respect of the financed equipment and the payments in respect of the company-funded equipment. Even in the event of default, the banks are given the opportunity to move in and perform the Contract in order to save themselves. Even in the event of the Company being wound up, the banks are given an opportunity under the default provisions to move in take over the performance of the Contract and save themselves, if they can. p29.4-12 pp62.12-63.14

30 36. The scheme of the Contract is one which might be described as a cost plus guaranteed return contract. The return is guaranteed by ensuring that at two levels there is a guaranteed cash flow, first in terms of the pre-tax cash surplus clause 8(3), and, secondly, in terms of the after tax cash surplus, clause 8(1). pp50.1-51.18 pp45.15-48.32

40 37. The purpose of clause 8(3) is to maintain a cash flow for the Company. That may be seen as a quid pro quo for the Company having agreed upon a base price, which is fixed throughout the term of the Contract, subject only to adjustments on account of increases in the cost of labour, materials and plant. That is the essence of the base price as adjusted. Hence there is no relationship between the base price as adjusted and competing sources of energy.

38. In return for reserving to the Commission the exclusive right to resort to 67m tonnes of coal and acknowledging that there would be substantial

expenditure involved in converting a deep mine to an open cut, clause 8(3) reflects an agreement that within an upper and lower set of parameters the Company is to get a guaranteed cash flow in terms of pre-tax cash surplus as expressed as a percentage of gross revenue.

10 39. The object of Schedule F is to set out those heads of expenditure which may be taken into account in computing the deductions to be made from gross revenue to arrive at the pre-tax cash surplus, they being the heads of deduction which were utilised by RTZ consultants in carrying out their feasibility study. For the purposes of the application of clause 8 to the contract, the only relevant figure in Schedule F is the percentage which the projected pre-tax cash surplus in Schedule F bears to the projected gross revenue. In particular, for financial year 4, 1981/82, the percentage is 33.09 per cent. pp81-83 p82

20 40. The Company submits that the object of the exercise contemplated by clause 8(3) is to compare the actual financial result of the mining operations of the Company in a given year with the projected result in terms of the percentage ratio between pre-tax cash surplus as indicated in Schedule F and gross revenue. The main point of difference between the parties is whether one applies for the purposes of the computation of gross revenue the figure specified in Schedule A as representing the quantity of coal to be supplied during the course of the year, or the figure which, looking back historically from the close of the financial year, represents the quantity of coal which the Commission was actually obliged to accept or pay for.

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40 41. In short, the object of clause 8(3) is to compare the pre-tax cash surplus in any given year in terms of the ratio of costs to gross revenue with the optimum specified for that financial year as laid down in Schedule F. If it is not achieved within the parameters which are set out in clause 8(3), then there is to be a payment made on one side or the other.

THE ISSUES

42. The issues raised by the questions set out in the Originating Summons (as amended) fall into two broad categories:-

p133.13

(a) Take or Pay issues - questions directed to ascertaining the circumstances in which the Commission is bound to pay on a quarterly basis for coal not delivered for some reason during the relevant quarter - such questions are concerned essentially with the interpretation of clause 5(4) of the Contract.

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(b) Financial Deficiency payment issues - questions directed to ascertaining the meaning of "gross revenue" and the basis upon which the annual Financial Deficiency payment contemplated by clause 8(3)(c) of the contract should properly be calculated particularly in circumstances where -

(i) the scheduled quantity of coal for the relevant year as set forth in Schedule A of the Contract is for some reason not delivered; and

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(ii) in the relevant year quantities of coal are delivered to make up shortfalls in deliveries from previous years.

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43. As appears from the summary contained in paragraphs 4 to 9 hereof, many of the questions raised by the Originating Summons and dealt with by the judgment of the Honourable the Chief Justice are not in contention. As to the Take or Pay issues, the parties accept that the Company is entitled to be paid at the end of each quarter for coal not delivered during that quarter if the Company was ready and willing to deliver but the Commission failed to accept delivery. If, however, for any reason whatsoever, the Company was not ready and willing to deliver then the Company would concede that it would not be entitled to claim payment under clause 5(4). There is still a dispute between the parties, however, as to the manner in which the Company should demonstrate that it is ready and willing to deliver upon the proper construction of the Contract. This issue is addressed by questions 1(c) and 12. The Company seeks to uphold the declarations previously made by the Honourable the Chief Justice in regard to both those questions.

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44. Questions 1(c) and 12 raise an issue whether the Commission is obliged to pay if the Company does not tender for acceptance for the Commission the whole of the tonnage ordered. The Company says that the Contract does not expressly require that coal be tendered in order to demonstrate that the demonstrate that the Company is ready and willing

p1.1-1.18
p168.20-30

to deliver. It says further, and in any event, that there are practical difficulties in giving effect to a concept of "tender" in the administration of the Contract. The RTZ study prescribes and the Contract has been administered on the basis that coal will be mined in shifts and that coal extracted from the work face of the open-cut mine will be transported to weighbridges and receiving hoppers manned by the Commission in massive dump trucks operated by the Company. If for any reason there is any delay at the weighbridge and receiving hoppers then a queue of trucks will inevitably form at the delivery point. It will merely create confusion and will be incompatible with good mining practice if, in order to effect a "tender", of delivery the Company is obliged to demonstrate its capability to deliver by some formal process on those occasions when delivery cannot be physically effected owing to the presence of a queue of trucks at the point of delivery. The only manner in which capacity to deliver could be convincingly demonstrated in such circumstances would be by immediate stockpiling at the delivery point or by trucks being immediately and formally "turned away" from the weighbridge. Such steps would be impractical and in any event, have not been proposed by the Commission.

p134.26

p134.28

p135.12

45. In the event of delay, the practice has been to re-schedule the trucking operation. The Company therefore submits that the proper test of its capacity to deliver is whether it is ready and willing as measured by an examination of its operations at the work face and of its trucking capacity and method of operation rather than by a process of formal tender which would be futile for the reasons set out above.

p135.19

46. The Honourable the Chief Justice considered that there was nothing in the Contract which would lead one to the conclusion that upon the proper construction of the Contract the Company can never be heard to say that the Commission has failed to accept delivery of coal unless the Company "physcally tenders" the coal at the Commission's power station. He held that "a failure to accept delivery as well as the ability of the Company to make delivery is each of question of fact and as to each it may be established in may ways, depending upon the circumstances. No further answer to question 1(c) is required." The Company says that view of the matter is correct.

p180.10-20

47. The main dispute between the parties concerns the Financial Deficiency payment issues and the meaning to be attributed to the term "gross revenue." In that regard, as also appears in the summary contained in paragraphs 4 to 9 inclusive hereof, the Company appeals against the orders and declarations made by the Honourable the Chief Justice in respect of questions 6(1), (2), 10 and 11.

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FINANCIAL DEFICIENCY PAYMENT ISSUES

48. The dispute concerning the basis upon which an end of year Financial Deficiency payment should be calculated focuses upon the interpretation and application of clause 8 and Schedule F of the Contract. The dispute arose as a result of a deficiency in deliveries in the latter part of 1981. The Company contends that the deficiency in deliveries arose from the Commission's inability to accept delivery owing to the inadequacy of its receival facilities. The position was further complicated by the unusually heavy rainstorm in January 1982 which substantially flooded the mine thereby giving rise to a force majeure situation under clause 24. p138.20

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49. The parties do not propose that the precise cause of the shortfall be determined in proceedings commenced by way of Originating Summons. They do, however, require a determination of the meaning of "gross revenue". Within the scheme of the Contract, which makes provision for a guaranteed cash flow to the Company, the definition of "gross revenue" is fundamental. Clause 8(3)(c)(i) entitles the Company to a Financial Deficiency payment at the end of each financial year if at any time after the expiration of the third financial year, notwithstanding good mining and management practices, "the pre-tax cash surplus of the company express as a percentage of gross revenue falls below the pre-tax cash surplus expressed as a percentage of gross revenue estimated pursuant to the RTZ study computed for that financial year in Schedule F." p136.27

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50. The Commission contends that the term "gross revenue" referred to in clause 8 is to be taken as the total base tonnage for the relevant year referred to in Schedule A of the contract rather than the lesser quantity of base tonnage actually delivered or in respect of which the Commission is obliged to pay for. The consequence of this assertion is that "gross revenue" would be a p18.22

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notional figure which does not reflect the moneys actually paid to the Company by the Commission in respect of coal delivered or which the Commission was in any event, obliged to pay for pursuant to the take or pay provisions (clause 5(4)) of the Contract. It would follow that the Financial Deficiency payment payable to the Company pursuant to the pre-tax cash surplus calculation contemplated by clause 8(3)(c) (sometimes referred to as "the top up" payment) would be substantially reduced in respect of a year, such as the financial year 30th June 1982, in which there were shortfalls of coal deliveries either because of a force majeure situation or because of extraneous circumstances such as (arguably) a deficiency in the coal receival facilities.

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51. The Company contends that the only sensible basis for the calculation to be made pursuant to clause 8(3)(c) and Schedule F is on the basis of actual revenue received by the Company. Otherwise, the protection afforded to the Company by clause 8 and Schedule F would be illusory. The Company says that the clear intention of clause 8(3)(c) is that the Company will obtain the minimum acceptable rate of return as agreed at the inception of the Contract, but will not be permitted to exceed the maximum acceptable return as also agreed. It therefore follows, in the Company's submission, that the calculation must basically be made having regard to actual rather than to notional revenue.

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52. The Company is obliged to maintain the infrastructure, equipment and manpower capable of producing the contracted quantities of coal from the Muja Open Cut Mine in any given contract year. The basic cost of maintaining that establishment does not vary significantly with the amount of coal actually produced. The Commission's interpretation of "gross revenue" for the purposes of the definition of pre-tax cash surplus in clause 8 and Schedule F would in the circumstances pertaining in the 1981/82 financial year, produce the result that the top up payment would be calculated on the basis of the Company having received a notional revenue which substantially exceeds the actual revenue which the Company in fact received. The Company's expenditure would nonetheless have been much the same as would have been required if total base tonnage had in fact been delivered. A consequence would be that the pre-tax cash surplus actually derived by the Company from its mining operations at the Muja Pit would be substantially below the

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minimum return agreed at the time of execution of the Contract.

53. In summary, the Company contends that:

(a) the relevant base tonnage figure for the purposes of calculating gross revenue is that quantity of coal the Commission was obliged to accept or pay for in the relevant financial year;

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(b) in the event that deliveries fall short of the quantities in Schedule A of the Contract the relevant quantity will be the quantity which the Commission was bound to take or pay for under the provisions of the Contract;

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(c) any part of the deficiency, being coal which the Company was ready and willing to deliver, but which the Commission failed to take (for any reason other than a properly declared event of force majeure) must be paid for by the Commission and will form part of the base tonnage figure for the purposes of the calculation of gross revenue;

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(d) any part of the deficiency, being coal which the Company was ready and willing to deliver, but which the Commission failed to accept by reason of a properly declared event of force majeure is not coal which the Commission must accept or pay for within the definition of base tonnage and accordingly will not form part of the base tonnage figure for the purposes of the calculation of gross revenue;

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(e) any part of the deficiency not properly described as coal which the Company was ready and willing to deliver and which the Commission failed to accept, is not coal which the Commission "must accept or pay for" within the definition of base tonnage, and accordingly will not form part of the base tonnage figure for the purposes of the calculation of gross revenue;

(f) where coal has been paid for by the Commission, but not delivered, and in a subsequent contract year such coal is delivered and, in accordance with the provisions of the Contract, an additional payment is made by the Commission in respect

thereof, only the amount of the additional payment is to be brought to account in such subsequent year for the purpose of the calculation of gross revenue in that year;

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(g) if by reason of a reduction in the quantity of coal which the Commission must take or pay for in any year the pre tax cash surplus percentage figure calculated pursuant to clause 8(3)(c) is lower than it would otherwise have been then the Commission, will be obliged to make a top up payment under such clause unless the reason for the reduction in the quantity of coal taken or paid for is due to any of the reasons specified in clause 8(3)(d), that is to say-

(i) the result of improper management by the Company; or

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(ii) the effect of activities of the Company unrelated to the mining of coal for the purposes of the Agreement; or

(iii) any departure by the Company from the Mining Plan as adjusted; or

(iv) the failure of the Company to observe the best modern practice in mining methods.

CONCLUSIONS OF THE HONOURABLE THE CHIEF
JUSTICE IN REGARD TO THE FINANCIAL
DEFICIENCY PAYMENT ISSUES

54. His Honour rightly considered that the real p182.20
dispute between the parties rested on the answer to
be given to question 6 in the Originating Summons.
Question 6(1) was:

10 "Upon a proper construction of the Contract
where it is necessary to apply clause 8(3) and
Schedule F to determine the "pre-tax cash
surplus" of Griffin in a financial year when
Griffin does not deliver the annual base
tonnage of coal required to be supplied is
the "gross revenue" for the purpose of the
calculation in Schedule F:

a. the actual tonnage of coal
delivered multiplied by the Base Price
paid: or

20 b. the tonnage specified in Schedule A
regardless of how much has actually been
delivered multiplied by the Base Price as
adjusted or the average Base Price as
adjusted: or

c. some other formula and if so what
formula".

55. His Honour took account of the fact that both pp182.35-183.9
parties agreed that question (a) should be answered
"No". He went on to say that there was a real
difference between the parties as to what answers
should be given to questions (b) and (c). He
recognised that the Commission would answer
question (b) in the affirmative. The Company, on
30 the other hand, would say that at the end of each
financial year one must look back on the events as
they have happened and ascertain the tonnage of
coal which the Commission was obliged to accept and
pay for during that year. The tonnage so
ascertained, multiplied by the Base Price as
adjusted, applicable at various times within the
year and applied to the tonnages delivered at
those times, would establish the gross revenue
which is then used so as to calculate the "top up"
40 payments (if any) calculated in accordance with
Schedule F.

56. His Honour summarised the Company's argument p183.10-30
as follows:

10 "The Company's argument starts with the definition of base tonnage (to be found within clause 1(1) of the Agreement). (His Honour goes on to repeat that definition.) The Company would construe that definition, in effect, as being so much of the base tonnage for the relevant year as it appears in Appendix A as the Commission must accept and pay for. Hence if within the year, for one reason or another, the Company is unable to supply ordered coal up to the then Appendix A tonnage the Commission is not obliged to pay for the shortfall and the "base tonnage" in the sense of the definition is to that extent reduced below the Appendix A figure. Having taken that step, then the definition of "base tonnage" so understood is imported into the expression of "gross revenue" so that the definition reads, in effect, "so much of the base tonnage specified in Schedule A for the applicable year as the Commission must accept and pay for plus any additional quantities of coal delivered multiplied by the Base Price as adjusted"."

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57. His Honour rejected this argument as advanced by the Company and stated:-

30 "The definition of "gross revenue" seems to me to be perfectly clear. The tonnage to be multiplied by the Base Price as adjusted to produce "gross revenue" is "the base tonnage as specified in Schedule A for the applicable year plus any additional - cl.3(2) or (3) - "quantities of coal delivered". Nor can I take the first step within the argument which is centred on the definition of "base tonnage". That is a tonnage to be supplied. It is, subject to any increase pursuant to clause 3(3) of the Agreement, a tonnage which is known at the beginning of the financial year and again subject to clause 3(3) it remains constant. As defined and when used within the definition of "gross revenue" it remains constant in the scheduled tonnage and one adds to that clause 3(2) or (3) coal, if any." p184.1-14

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50 58. His Honour concluded that he could not accept the Company's central submission without in effect rectifying the definition of "gross revenue". As a court of construction this is something which he was unable to do. For the purposes of that p186.19-25

definition the base tonnage cannot be less than the "base tonnage as specified in Schedule A".

59. For the reasons outlined above His Honour p186.26-31 answered questions 6(1)(a) and 6(1)(b) as formulated "No" and answered question 6(1)(c) as follows:

10 "The tonnage to be multiplied by the Base Price as adjusted to calculate "gross revenue" is the relevant tonnage as in Appendix A plus clause 3(2) of clause 3(3) coal, if any. That tonnage is multiplied by the Base Price as adjusted ruling at the time of delivery at ordered."

APPELLANT'S SUBMISSIONS IN REGARD TO
THE FINANCIAL DEFICIENCY PAYMENT ISSUES

20 60. (a) Having defined gross revenue in the manner specified in paragraph 9 herein, the Honourable the Chief Justice should have held that there was a repugnancy between the definition of gross revenue on the one hand and the definition of pre-tax cash surplus on the other hand because the expression "pre-tax cash surplus" is by definition a sum which the Company "derives" from its operations and must therefore be an actual figure which cannot be compared with a notional figure of the kind contemplated by the definition preferred by the Chief Justice in order to determine the amount of the Financial Deficiency payment. 30 The Supreme Court sitting in its capacity as a court of construction should therefore have proceeded to determine whether to give controlling effect to the definition of gross revenue or to the definition of pre-tax cash surplus.

40 (b) In resolving the repugnancy, the definition of "pre-tax cash surplus" should have an overriding effect because such a ruling would be consistent with the overall philosophy of the Contract entered into between the Company and the Commission.

(c) Further, and in any event, the Chief Justice was wrong in law in defining gross revenue in the manner specified in paragraph 9 hereof because the definition of gross revenue and the manner in which that term is employed in clauses 7(4) and 8(3)(c) indicate that the base tonnage nominated in Schedule A in

respect of each year are of prima facie significance only and that, having regard to the scheme of the contract including especially the take or pay and force majeure provisions, base tonnage comprises the quantity of coal which the Commission was obliged to take or pay for in the relevant year.

10 (d) The Chief Justice should have held that gross revenue be calculated by multiplying the base tonnage which the Commission was obliged to accept or pay for in the relevant year, (whether delivered during that year or not provided the Company was ready and willing to deliver) by the Base Price as adjusted.

20 61. The basic proposition advanced on behalf of the Company is that, for the purposes of clause 8, the object is to get as near as may be to comparing the actual performance of the company financially with the projected performance, utilising the same heads of revenue and expenditure as had been utilised in the RTZ study. The Company submits that the intention of the Contract was to make a comparison between actual financial performance and a projected or theoretical financial performance. The intention was not to compare a notional theoretical financial performance with another.

30 62. The Company supports its basic proposition by two main submissions. The first submission focuses upon the meaning of the term "pre-tax cash surplus" as defined in clause 1(1) of the Contract. The second submission concentrates upon the definition of "gross revenue" and the meaning of the term "base tonnage" which appears within the definition of gross revenue.

63. As to the first submission, the Company says:

40 (a) The expression "pre-tax cash surplus" must be an actual, not a notional or hypothetical, figure because by definition it is a sum which the Company "derives from this agreement": see Clause 8(3)(a). The expression is not "would have derived". It is "derives" which must mean "actually receives or becomes entitled to receive": See Harding v The Federal Commissioner of Taxation (1917) 23 CLR 119 at 132-133 per Isaacs J.; Federal Commissioner of Taxation v Clarke (1927) 40 CLR 246 at 261 per Isaacs A.C.J.; Federal Commissioner of Taxation v Thorogood (1927) 40

CLR 454 at 458: Carden's Case (1938) 63 CLR 108 at 155 - 157 per Dixon J.: Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation (1965) 114 CLR 314 at 32L: J Rowe & Son Pty Ltd v The Federal Commissioner of Taxation 124 CLR 421 per Gibbs J.: Brent v Federal Commissioner of Taxation 125 CLR 418 at 427: Mildura and District Dried Fruit Growers' Hail Storm Damage Compensation Scheme v Federal Commissioner of Taxation (1968) 118 CLR 342: Henderson v Federal Commissioner of Taxation (1968-70) 119 CLR 612. (A discussion of these authorities is contained in the Appendix to this Case).

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(b) The actual revenue of the Company is the fundamental element in the calculation of the surplus. Indeed, the surplus is that part of the actual revenue that remains after deducting costs and expenses.

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(c) The question whether the pre-tax cash surplus "falls below" a certain figure requires a comparison between actual revenue derived and actual costs and expenses incurred.

(d) The calculation of the "amount required to restore the pre-tax cash surplus" to a certain sum requires the working out of a sum to be added to the amount which the Company derives.

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(e) This indicates that the comparison which clause 8(3)(c)(i) requires is between actual operating results (i.e. actual pre-tax cash surplus calculated by deducting actual costs and expenses from actual receipts) and estimated or projected pre-tax cash surplus based on estimated or projected figures.

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(f) The definition of "gross revenue" works easily and naturally to enable the above comparison where there is a shortfall. Then, assuming the Honourable the Chief Justice to be correct as to the definition of gross revenue, there is a repugnancy between the definition of "gross revenue" on the one hand and the definition of "pre-tax cash surplus" on the other hand. The Company submits that the task confronting a court of construction is to determine whether to give controlling effect to the definition of "gross revenue" or to the definition of "pre-tax cash surplus".

The Chief Justice did not deal with this problem.

(g) The Company says that the repugnancy referred to above must be resolved in a way which is consistent with and gives effect to the overall scheme of the Contract. Such an approach must mitigate against gross revenue being represented by a notional or hypothetical figure otherwise the guaranteed income or protection which was to have been afforded by clause 8 would be illusory. This leads to a consideration of the meaning to be attributed to "gross revenue" and "base tonnage", and to a consideration of the Company's second main submission.

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64. As to its second submission, the Company is concerned to discover the meaning which should properly be attributed to the term "gross revenue". The Company does not accept that the term "gross revenue" should be interpreted in the manner adopted by the Chief Justice. The Company refers to the definition of "gross revenue" in clause 1(1) of the Contract. "Gross revenue means the base tonnage as specified in Schedule A for the applicable year plus any additional quantities of coal delivered multiplied by the Base Price as adjusted."

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65. The definition of "gross revenue" throws up the crucial question as to the extent to which, if at all, reference should be made to the definition of base tonnage when computing gross revenue for the purpose of clause 8(3)(c) of the Contract. It is important to notice that, although the definition of base tonnage and the substantive provisions of the Contract presume that base tonnage is, prima facie, linked to figures nominated in Schedule A in respect of each year, the substantive provisions indicate that base tonnage will vary according to the circumstances.

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66. Thus, clause 3(2) permits the Commission to increase the tonnage to be supplied by any percentage not exceeding 5 per cent. The take or pay provisions in clauses 5(4) and (5) presume that supervening circumstances may require that coal which would have been delivered as base tonnage be reserved for future use. Clause 10 permits the Company to suspend deliveries or in any financial year to order less than the base tonnage (subject to certain rights and duties concerning deliveries of the quantities deferred in the future and price adjustments). Clause 7(4) specifically provides

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that "The Base Price as adjusted when multiplied by the base tonnage plus any incremental tonnages equals the gross revenue". In considering clause 7(4) it is important to notice, first, that as compared with the definition of "gross revenue" the words "as specified in Schedule A for the applicable year" are omitted and, second, the expression "plus any incremental tonnages" is used as distinct from the expression "plus any additional quantities of coal delivered."

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67. The provisions just mentioned all suggest that gross revenue will be calculated not merely by reference to a presumed quantity of coal deliveries but by reference to the quantity of coal actually taken (or in respect of which there is an obligation to take) during the course of the financial year.

68. If one looks at base tonnage as defined (subject to the context) base tonnage means "the relevant base tonnage of coal to be supplied by the Company to the Commission in any financial year as provided in Schedule A and which the Commission must accept or pay for as hereinafter provided." There are two elements in the definition. The first part is limited to a reference to Schedule A. It does not, therefore, include any increase not exceeding 5 per cent required by the Commission in sub-clauses (2) or (3) of clause 3, which may properly be referred to as any incremental tonnages. In the Company's submission, if one is looking at the definition of gross revenue, it does not include any additional quantities of coal which are referred to there. The second part of the definition of base tonnage incorporates the fundamental notion of the contract as a take or pay contract. i.e. that base tonnage embraces the quantity of coal which "the Commission must accept or pay for as hereinafter provided". This is a reference to clause 5(4) which provides that "if during any quarter in any financial year the Company is ready and willing to deliver and the Commission shall fail to accept delivery of the whole or any part of the base tonnage of coal to be delivered, the Commission shall, within 30 days of the expiry of such quarter, pay the Company for the shortfall."

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69. The method of calculating gross revenue prescribed by the substantive provision in clause 7(4) refers to "base tonnage plus any incremental tonnages". This seems to take account of the take or pay concept. Clause 7(4) recognises that

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10 although, prima facie, base tonnage will be the figure specified in Schedule A, the answer is subject to variation. It may be increased because the Commission exercises its 5 per cent right under clauses 3(2) and 3(3). It may be reduced if, by reason of force majeure, the Commission is excused from taking or paying for the coal. In either case, the adjusted base tonnage figure to be used as a multiplier in calculating gross revenue will reflect the actuality and will not be merely the prima facie or notional figure. If there is an inconsistency between clause 7(4) and the relevant definitions in that respect then the substantive provision should prevail.

20 70. Clause 7(4) means that the base price as adjusted, when multiplied by the relevant base tonnage of coal to be supplied by the Company to the Commission in any financial year as provided in Schedule A and which the Commission must accept or pay for, plus any incremental tonneages under sub-clauses (2) and (3) of clause 3, equals the gross revenue. Such an interpretation of clause 7(4) requires no adjustment to the language of the clause. It simply reads the clause as if the relevant portion of the definition of "base tonnage" were inserted in lieu of those words viz: "The Base Price as adjusted when multiplied by the relevant base tonnage of coal to be supplied by the Company to the Commission in any financial year (as provided in Schedule A) and which the Commission must accept or pay for as hereinafter provided plus any incremental tonneages equals the gross revenue".

40 71. When one takes into account that the object of clause 8(3) is to compare pre-tax cash surplus on the basis of gross revenue derived from base tonnage less the cost to produce it, the calculation would be distorted and not be comparing like with like if such things as clause 10 coal, which had been paid for as part of the base tonnage in a previous year but delivered in a subsequent year were introduced into the calculation. If one limits the notion of base tonnage to the quantity of coal which is that which the Commission must accept or pay for in that year, then the only event which would reduce the base tonnage in those terms would be a force majeure event.

50 72. The company's submission in regard to the meaning to be attributed to gross revenue can now be applied to the force majeure situation.

73. The Company's primary contention is that if, during the course of the year, a force majeure event took place which relieved the Commission of the obligation to accept or pay for coal, the result is a reduction of the base tonnage for that year, for the purposes of the computation of gross revenue. The pre-tax cash surplus which the Company actually derives from its mining operations will be correspondingly reduced. Consequently, the top up payment claimed by the Company will be larger than an amount calculated by reference to an assumed or notional base tonnage. It would follow, then, that the Commission, on this construction of the Contract, is the party which, in return for the commitment of this source of supply of energy has accepted the force majeure risk. It has accepted the risk in at least two ways:

(a) First, notwithstanding that the force majeure relieved it from its obligations to accept coal, the Commission expressly covenanted in clause 24 to pay the amounts required in respect of instalments under the financial agreements including the lease payments for the equipment and the payments for the company-funded equipment.

(b) Second, the Commission would be in the position that, if as a result of a force majeure situation, the gross revenue which would otherwise have been obtained was reduced, then it would make a top up payment under clause 8(3)(c) to put the Company in the position of receiving that cash flow so that it would be able to pay the workforce and pay costs of maintaining the establishment throughout the force majeure period and overall, during the lifetime of the contract, to sustain its cash flow.

74. In other words, if during the course of the year a force majeure event occurs which causes coal deliveries to fall (such event not being attributable to default by the Company) then the quantity of coal which the Commission must accept or pay for in the financial year will be reduced because of the provisions of clause 24 which makes the whole agreement subject to delay in the performance and provides for a temporary suspension of continuing obligations.

75. If, during the course of a year, the Commission is relieved of the obligation to accept or pay for a quantity of coal, the Company's

submission is that, consistent with the definition in clause 1 of the Contract at p.3, the relevant base tonnage figure is reduced by the amount of coal in respect of which the Commission ceased to be obliged to accept or pay for.

10 76. If then the gross revenue is reduced below what would otherwise have been or the costs are increased above what they would otherwise have been, the pre-tax cash surplus top up provisions represent the mechanism to compensate the Company for that occurrence.

20 77. The forward price of coal is calculated upon the assumption that the base tonnage, which is in fact provided in Schedule A, will be delivered. If that assumption is affected by a force majeure event, then the base tonnage which is required to be delivered under the contract will be reduced; and if the Commission is relieved of the obligation to pay for it, the gross revenue would be reduced. In the contemplation of the parties, that is the kind of event which was sought to be dealt with by the pre-tax cash surplus make up mechanism.

78. The submission in the case of force majeure is that its impact is to reduce the amount of base tonnage which the Commission would otherwise be bound to accept and pay for. If one applies the definition of base tonnage, that would result in a reduction of the Schedule A figure for the purposes of the computation of gross revenue.

30 SUMMARY

40 79. It is respectfully submitted that the Honourable the Chief Justice erred in holding that where it is necessary to apply clause 8(3) and Schedule F to determine "pre-tax cash surplus" of the Company in a financial year when the Company does not deliver the annual base tonnage of coal required to be supplied in that year the "gross revenue" for the purpose of calculations in Schedule F is to be determined according to the following formula: the tonnage to be multiplied by the Base Price as adjusted to calculate "gross revenue" is the relevant tonnage as in Appendix A plus clause 3(2) or clause 3(3) coal, if any. That tonnage is multiplied by the Base Price as adjusted ruling at the time of delivery as ordered.

80. The Company submits that the "base tonnage" to be used when calculating the pre tax-cash surplus is only so much of the base tonnage as,

looking back from the end of the financial year, the Commission was in fact obliged to accept and pay for during that year, multiplied by the Base Price as adjusted applicable at the various times during the year to the relevant quantities of coal to be taken into account.

81. The Company's position with respect to the questions raised in the Originating Summons as dealt with by the Honourable the Chief Justice is as follows:-

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(a) The Company accepts the answers given by the Chief Justice in respect of questions 1(a) and 1(b), 2, 3, 4, 8(1), and 12.

(b) The Company agrees that it is not necessary for questions 5, 6 (3), (4), (5) and (6), 7, 8(2), 8(3) and 9 to be answered.

(c) The Company seeks to uphold the declaration made by the Chief Justice in respect of question 1(c).

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(d) As to questions 6(1) and (2), 10 and 11, it is respectfully submitted that the order of the Honourable the Chief Justice be varied and that in lieu thereof the questions be answered as follows:

Question 6

6(1)(a) No

6(1)(b) No

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6(1)(c) Gross revenue should be calculated by multiplying the base tonnage coal which the Commission was obliged to accept or pay for in the relevant year (whether delivered during that year or not provided that the Company was ready and willing to deliver) by the base price as adjusted.

6(2)(i) Yes

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6(2)(ii) The expression "any additional quantities of coal" in the definition of "gross revenue" includes -

(a) extra coal supplied under clause 3(2):

(b) extra coal supplied under clause 3(3) but does not include -

(i) extra coal to make deliveries postponed pursuant to clause 10: or

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(ii) extra coal delivered to make up shortfalls in previous years to which clause 24 has applied: or

(iii) extra coal delivered to make up shortfalls in annual base tonnage falling within clause 5(2)(b).

Question 10

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Yes

Question 11

If question 10 is answered in the affirmative it is not necessary to answer question 11.

D. K. Malcolm

.....
COUNSEL - D. K. MALCOLM

..... *N. P. Hasluck*

COUNSEL - N.P. HASLUCK

APPENDIX

REVENUE AUTHORITIES DEALING WITH THE CONCEPT OF "DERIVED"

1. Section 17 of the Income Tax Assessment Act 1936 as amended provides, inter alia, that income tax shall be paid "upon the taxable income derived... by any person".
2. In Harding -v- the Federal Commissioner of Taxation (1917) 23CLR 119 at pages 132-3 Isaacs J discussed the concept of "income derived from property" which was contained in the predecessor to section 17 above. His Honour stated at page 133:

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"The word "derived" was considered by the Privy Council in Kirk's case [(1900) AC at page 592], an income tax case, and their Lordships attached no technical meaning to the word, but considered it in such a connection as equivalent to "arising or accruing"... If support were needed for such high authority, it can be found in the use of the word "derived" as recognized by lexicographers. In the Oxford Dictionary, under the word "derive"... the definition includes "to... get, gain, obtain (a thing from a source)". This exactly touches the present contention. The examples there given show how broadly the word may be used."

Harding's case concerned the question of whether income was derived from land. Isaacs J stated, also at page 133:

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"Consequently, once concede (sic) that the use of the land is "income" within the Statute - that is, something which "comes in" - then, as it must come in from some source in Australia, the word "derived" is apt to express the idea."

3. In Federal Commissioner of Taxation -v- Clarke (1927) 40 CLR 246 Isaacs ACJ stated at page 261 that "'derived' only means 'obtained' or 'got' or 'acquired'. All income is derived from something and by someone." This definition was applied in the Mildura and Carden cases referred to below.
4. In Federal Commissioner of Taxation -v- Thorogood (1927) 40 CLR 454 Isaacs ACJ stated at page 458 that "'derived' is not necessarily actually received, but ordinarily that is the mode of derivation". In Thorogood's case the High Court held that in a business of buying and selling land on instalment contracts, the present value of future instalments of purchase moneys should not be included in the taxable income derived during an accounting period.

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5. In The Commissioner of Taxes (South Australia) v The Executor Trustee and Agency Company of South Australia Limited (Carden's case) (1938) 63 CLR 108 the High Court considered the South Australian Taxation Act which imposed tax on all incomes arising or accruing in or derived from South Australia. Dixon J, at page 155, referred to Thorogood's case and cited the statement of Isaacs ACJ referred to above at paragraph 4. At page 157 Dixon J cited with apparent approval the statement of Isaacs J in Harding's case to the effect that "derived" was the equivalent of "arising" or "accruing".

6. In Arthur Murray (NSW) Pty Ltd -v- Federal Commissioner of Taxation (1965), 114 CLR 314, the facts were that the taxpayer received in advance tuition fees for courses of dancing lessons, payment being either in lump sums or by instalments. Often advance payments were in respect of lessons intended to be taken in a financial year or years subsequent to the payment. The High Court held that fees in respect of lessons in subsequent financial years should not be included in the taxpayer's taxable income. At page 321 the High Court per Barwick C.J., Kitto and Taylor J.J. stated -

"In our opinion, on the facts appearing on the case stated the conclusion is not open that a receipt of fees for a specified number of dancing lessons to be given over a future period is a derivation of assessable income."

Earlier at page 319, the Court stated that -

"It would be out of accord with the realities of the situation to hold, while the possibility remains [of the taxpayer providing a refund], that the amount received has the quality of income derived by the company."

Semble, therefore, unearned receipts were held not to be derived income.

7. In J. Rowe & Son Pty Ltd -v- the Federal Commissioner of Taxation, 124 CLR 421 Gibbs J stated at page 452 that -

"Income of a trading business is derived when it is earned and the receipt of what is earned is not necessary to bring the proceeds of sales into account."

8. In Brent -v- Federal Commissioner of Taxation, 125 CLR 418 Gibbs J stated at page 427-

"The Act does not define the word "derived" and does not establish a method to be adopted as a general rule to determine the amount of income derived by a taxpayer... The word "derived" is not necessarily equivalent in meaning to "earned". "Derive" in its ordinary sense according to the Oxford English Dictionary means "to draw, fetch, get, gain, obtain (a thing from a source)"".

10 9. In Mildura and District Dried Fruit Growers' Hail Storm
Damage Compensation Scheme -v- Federal Commissioner of
Taxation, (1968) 118 CLR 342 the taxpayer was an
unincorporated association of fruit growers formed with
the purpose of insuring members against damage to fruit
caused by hail storms. At page 345 Owen J approved the
definition of "derive" provided by Isaacs J in Clarke's
case and using phraseology modelled on that definition
stated that the contributions made by members of the
association were "obtained" or "got" by the association
from its members and therefore were assessable income, a
fortiori, were income derived by it.

20 10. In Henderson -v- Federal Commissioner of Taxation
(1968-70) 119 CLR 612 the High Court distinguished the
concepts of "accounts rendered" and "work in progress",
holding that the value of the latter did not comprise
derived income. Barwick C.J. stated at page 650-
"When the service is so far performed that
according to the agreement of the parties or in
default thereof, according to the general law, a
fee or fees have been earned, then it or they will
30 be income derived in a period of time in which it
or they have become recoverable. But until that
time has arrived, there is, in my opinion, no
basis, when determining the income derived in a
period for estimating the value of the services so
far performed but for which payment cannot properly
be demanded and treating that value as part of the
earnings of the professional practice up to that
time and as part of the income derived in that
period."

40 11. Summary

(a) The contract between the Commission and the Company
contains no definition of "derived". The same
situation exists in the revenue legislation
referred to in the cases cited above. In those
cases the Courts have given the word its ordinary
dictionary meaning.

(b) The ordinary dictionary meaning connotes the
concept of something obtained, got or acquired from
something else. The word is used by the Courts in
50 the revenue cases as connoting a choate benefit

rather than an inchoate benefit. That is, something has come to be or has matured. Arthur Murray's case and Henderson's case, amongst others, illustrate this point. That is, in order for income to be derived, the facts and circumstances giving rise to that income must have come to pass. Income cannot be derived if it is merely anticipated or for some other reason is in an inchoate form.

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(c) Because the revenue cases were seeking to identify the tax payers' profit on income calculated on the basis of sound commercial practices, the Courts were in certain circumstances obliged to hold that "income derived" did not only include "costs received". Thus, book debts were included in the meaning of "income derived". Conversely, cash prepayments may not be income received. The principle common to all the cases was that the taxpayers' right to the income must have actually matured, ie. his taxable income must represent all actual entitlements and not prospective, or notional entitlements.

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