

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA

IN PROCEEDINGS NO. 2749 OF 1982

BETWEEN:

THE GRIFFIN COAL MINING COMPANY LIMITED

Appellant
(Defendant)

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AND:

THE STATE ENERGY COMMISSION OF WESTERN
AUSTRALIA

Respondent
(Plaintiff)

CASE FOR THE RESPONDENT
ON SUBSTANTIVE APPEAL

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Record
(Page Nos)

PART 1 - Introductory Matters

1. The proceedings in this particular matter were instituted by the Respondent by way of Originating Summons under the Western Australian Rules of the Supreme Court Order 58 Rule 10 which reads:-

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"Any person claiming to be interested under a deed, will, or other written instrument, may apply by Originating Summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested."

This Rule was the equivalent of the English Order 54A Rule 1. procedure prior to the substantial amendments to the English Rules of the Supreme Court which occurred in 1962.

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2. The Originating Summons was issued as part of the working out of the Minute of various agreements reached on 22nd of August 1982 between the parties reproduced in the main Record at pp.116-118. The parties held sharply conflicting views as to how "gross revenue" (defined in Clauses 1(1) and 7(4)) under their contract was to be calculated in a year (as in 1981-82) where the contract tonnage of coal was not delivered.

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There were also a number of other points on which the parties differed as to the construction or operation of the Contract, and which also appeared to be convenient for determination.

10 3. The declarations or orders pursuant to Order 58
Rule 10 were expressly made without prejudice to the
rights of either party to apply for rectification of the
Contract if so advised: see the Reasons of Sir Francis
Burt C.J. now at page 186 of the Record. Their common
problem was that, particularly in respect of the
definition of "gross revenue", until there had been an
authoritative decision on the literal construction and
operation of the Contract neither party was in a position
to make a decision as to whether rectification should be
sought. [Since the hearing of the Originating Summons
much more fundamental and drastic disputes have arisen
between the parties the subject of actions Nos. 2336/1983,
20 in which the Respondent is plaintiff and Nos. 2712/1983
and 1763/1984 in which the Appellant is plaintiff].

30 4. By reason of the proceedings being essentially a
construction summons, the Respondent contends that prima
facie no extrinsic evidence should be received. Factual
background evidence or material should be limited to the
very minimum or wholly excluded. Essentially, if, on the
Appellant's arguments, factual or evidentiary material is
relied upon to give some colour or significance to words
or phrases then the matter is not one where their
Lordships can embark upon further examination. The
matter was dealt with by Burt C.J. as a construction
summons (vide Record at p.186 line 20) and he was not
obliged to and did not make findings of fact. In short,
the Respondent submits that unless their Lordships are
convinced that it is quite patent from a simple and
natural reading of the terms of the document itself, that
Burt C.J. has demonstrably erred in construing the
instrument, his conclusions and orders ought to be upheld
summarily.

40 PART II - Background Extrinsic Material: RTZ Study

5. Whilst not conceding that any extrinsic material
ought to be referred to, if their Lordships are of opinion
that, in order to deal effectively with the Contract and
the appeal it is necessary to have some idea of the
so-called genesis or factual matrix of the transaction,

the Respondent submits such materials, in principle, should not extend beyond that information which would be considered by a Supreme Court Judge in Western Australia as being notorious, or close to notorious, or clarifies the Recitals to the Contract or which was adopted as common ground by the parties. The Respondent contends that such materials would not extend beyond the following:-

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- (a) That the Respondent is a statutory corporation originally constituted by the State Electricity Commission Act, 1945 of the State of Western Australia and now continuing pursuant to the State Energy Commission Act, 1979. It, inter alia controls the generation and distribution of electricity throughout the State of Western Australia. Whilst it is a quasi governmental body, responsible to the Minister for Mines, Fuel and Energy Resources of the State of Western
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- of the State of Western Australia in the traditional or strict sense.
- (b) That in Western Australia there is no authority such as the British Coal Board which controls the mining and distribution of coal. The Appellant is the beneficial owner as lessee under the Mining Act, 1904 (superseded by the Mining Act, 1978) of the Coal Mining Leases or Mining Leases upon which the open cut (open cast) coal mine commonly called the Muja Pit is situated and that the Respondent has no statutory powers or controls over the manner in which the Appellant conducts its mining operations in the Muja Pit;
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- (c) That the arrangements under which the Appellant holds its coal mining leases at Muja and elsewhere in the Collie Basin are the subject of a formal agreement between the Appellant and the Government of Western Australia adopted and ratified by the Collie Coal (Griffin) Agreement Act, 1979;
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- (d) That the only deposits of coal being mined commercially in Western Australia are located in the Collie Basin, centred around a rural town called Collie with a district population of about 10,000 people located approximately 140 miles by road in a generally SSE direction from Perth;

- (e) That the Respondent does not conduct and has never conducted coal mining operations;
- (f) That at all material times there have been only two significant producers and suppliers of coal in Western Australia viz the Appellant and another mining company called Western Collieries Ltd. from which two companies for many years the Respondent has purchased its supplies of coal;
- 10 (g) That the Government of Western Australia or any Government instrumentality does not own or control (save generally pursuant to the statutes of Western Australia) the activities of either of those two coal mining companies which are both privately owned and not State owned;
- (h) That the Respondent purchases the bulk of all coal produced by all of the mines at Collie and for some years has been the predominant or the only significant purchaser of Collie coal in Western Australia; and that in general terms there is no market for coal in Western Australia nor is any supply of coal in Western Australia available in commercial quantities other than from the Collie Basin;
- 20 (i) That the Appellant's Muja Pit is located about 20 kilometres from the town of Collie and the Respondent's Muja power generating station is immediately adjacent to the Appellant's coal mining leases and is situated about 1 kilometre from the rim of the Muja Pit;
- 30 (j) That in 1978 the Respondent had been taking coal from the Muja Pit for the Muja station to the extent of about 1 million tonnes per annum but with increase in the generating capacity in the Respondent's Muja station it required coal at the rate of about 2 million tonnes per annum;
- 40 (k) Save when exceptional circumstances apply, the Appellant has been the sole supplier of coal to the Muja station since the parties entered into the Contract but the supply of coal to the Respondent is not the Appellant's only business activity;

- 10 (1) That in 1977 the Respondent agreed to pay one half of the cost of an investigation by mining consultants to investigate and report and advise inter alia on the matters set out in Recital B(1) of the Contract with a view to the parties entering into an agreement generally along the lines mentioned in Recital A to the Contract; and that the Appellant thereupon engaged a firm of British mining engineers called RTZ Consultants Limited of London, who in the second half of 1978 produced the report and recommendations called "the RTZ Study" referred to in the Contract; and that the "Mining Plan" referred to in the Contract was basically one of the alternatives (CASE E) referred to in the RTZ Study;
- 20 (m) That the parties entered into protracted negotiations in London and Perth from June 1978 to December 1978 and eventually shortly before Christmas 1978 reached agreement on all parts of the Contract as executed save for clause 19 which was not finally settled until March 1979, primarily due to certain matters being referred to the Trade Practices Commission of the Commonwealth of Australia;
- 30 (n) That the Appellant's annual operating and capital costs were to a substantial extent fixed, or of constant categories, which would not vary greatly in any one year whether the Appellant delivered the full contractual tonnage, or fell short to a tolerable extent (i.e. to an extent which would not be expected to cause the Respondent to seek to terminate the Contract for serious breach or inability of the Appellant to perform);
- 40 (o) That as from 1st July, 1983 the Appellant pursuant to Clause 10(1) of the instrument called by the parties "the Chicken Creek Variation Agreement" reproduced at pages 98 to 115 of the Record, the Appellant moved its private coal sales operations under Clause 19(2) of the Contract (Record - p.57) to other deposits not the subject of the Contract (Record pp.110-111).

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6. The RTZ Study was not referred to by Burt C.J. to construe the contract, although he referred to it as a source of background information - vide his Reasons at pp. 173-4 of the Record. The Respondent submits that, in the way the case was conducted before him, the Chief Justice correctly ignored the RTZ Study in determining what the terms of the Contract meant or how those terms operated. The Respondent submits that the RTZ Study ought not be referred to by their Lordships, or if referred to, this may only be done to clarify and explain the meaning of words in the Contract (in the limited or cautious way which has been the custom of Courts in the past); but it may not be referred to so as to alter or modify the natural or plain meaning in the express terms of the Contract. The Respondent will contend there are no issues before their Lordships which require an enquiry as to the meaning of words or phrases of technical or specialised connotation. If there is agreement substantially as to the factual background along the lines of the items in paragraph 5 of this Case, reference to the RTZ Study to construe the Contract seems neither proper nor necessary.

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7. The Respondent at hearing gave notice that it objected to certain parts of the affidavit of George Michael Strmotich (Record - ppl21-166) being received in evidence before Burt CJ. A copy of a notice to that effect handed up at trial appears in the Record at pp 170-171.

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PART III - Form of the Contract

8. The Respondent submits that the Contract is basically one for the sale of goods (coal) by instalments. To the extent appropriate, the Western Australian Sale of Goods Act, 1895 (59 Victoriae No. 41), adopting with few alterations to the U.K. Sale of Goods Act, 1893, would apply. The Respondent submits that save to the extent the Contract expressly provides to the contrary, it is one whereby it is the coal itself, and not the promise to deliver that is to be paid for: cf Automatic Firesprinklers Pty. Ltd. v Watson (1946) 72 C.L.R. 435 per Dixon J. at 464. Like most instalment contracts for supply of goods it operates at several levels i.e.:-

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- (a) It is a a global contract by clause 3(1) for sale and delivery of "the aggregate of the base tonneages of coal... in Schedule A..." viz 50,250,000 tonnes; 34
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- (b) It is also an annual contract for supply of the annual base tonnage in Schedule A each year; 67
- (c) It is also a quarterly contract (cf. cl. 5 and the definition of "base tonnage" where it defines base tonnage for a quarter as meaning the base tonnage for the relevant financial year divided by four); 36-38
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- (d) In certain contexts it may also be a fortnightly or other shorter term, or smaller quantity (instalments) contract.

9. If it is contended that the Contract should be categorised as a "cost plus" or "take-or-pay" contract, it is submitted that any such categorisation is not helpful and is likely to obscure a proper analysis of the true operation of a complex and unusual document.

"Cost Plus"

10. The expression "cost plus" contract in ordinary parlance refers to a contract whereby the price is fixed by reference to the actual cost of production or supply. To that cost (which ordinarily is not stipulated in the contract itself) is added a supplier's margin on the cost of production or supply. Here the price is stipulated from the outset in Schedule B. It is subject to adjustment, but the adjustments are not directly dependent on the cost of production per tonne of coal. Whilst there is an additional margin stipulated in Schedule F by way of annual percentage each year, that percentage is taken by calculation from revenue and not cost. Further, the annual percentage of guaranteed return (pre-tax cash surplus) differs each year.

11. On at least one significant area, total labour costs, in some instances increases are not worked directly into the coal price. For instance although the "Labour Related Cost Index" (Schedules G, H and I and clause 7 sub-clauses (1), (2), (3)(a), (4) and (5)) picks up increases in wage rates, it does not pick up increases in the wages bill due to increased numbers of personnel being

10 hired or changes in percentages of staff categories. If, say, pursuant to the Mines Regulation Act or an award of the Coal Industry Tribunal (an industrial tribunal dealing with conditions of employment) the Appellant was required to increase its labour force by 10-20% overall or in specific areas, the increase in the total wages bill would not reflect in the Base Price as adjusted. Prima facie the costs of a mandatory increase in workforce would only fall for consideration in the allowable deductions under Schedule F which determine the Appellant's - "pre-tax cash surplus" under clause 8(3). Even if the increases were the subject of an application to vary the Mining Plan under clause 12(1), unless (which seems most doubtful) such an application can procure a re-writing of the Indices in Schedules G, H and I, the Indices remain as they are until the next Five Year Engineering Review (clause 21(1)(d)).

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20 12. In short, the Respondent contends the escalation machinery in the Contract is basically designed to adjust the original negotiated base price and maintain the guaranteed rate of return for 25 years. That rate of return is calculated from the original base price (as adjusted), not from a simple aggregate of yearly costs. If the agreement of the parties was that the Appellant receive actual costs plus, say 33%, they could surely have expressed that intention in rather more direct language, (leaving excesses to be checked on the Five Year Engineering Review under Clause 21).

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"Take-or-Pay"

40 13. The expression "take-or-pay" contract is a vernacular expression popular in project financing and mining circles. It does nothing to clarify what construction or interpretation should be put on any particular contract. In so far as this broad expression has any meaning it simply indicates that the contract is one whereby, in some cases where the stipulated quantities are not delivered or accepted, in lieu of having to sue for unliquidated damages for non-acceptance, the vendor can sue for the price or for an agreed sum: cf Dixon J. in the Automatic Fire Sprinklers case (ibid) referred to in paragraph 7 above; Treitel: The Law of Contract (6 Ed. - 1983) p. 758 et seq.

14. The two provisions which may be referred to in the Contract as giving it the flavour of a take-or-pay contract are clauses 10 and 5. Clause 10(1) gives the Respondent the options of having the Appellant suspend deliveries of coal, or order less coal than the Base Tonnage for that year, provided that the Respondent pays the Appellant such amount as would have been payable had the Respondent ordered and taken delivery of the coal in accordance with the scheme of ordering set out in clause 4. The Appellant is then required to reserve an equivalent quantity of coal for delivery at a future date. When this coal is eventually delivered the Respondent is obliged to pay to the Appellant such additional amount [per tonne] as will equal the prevailing Base Price as adjusted at the time of delivery. Any additional costs over and above this are recoverable by way of adjustment to the Appellant's after-tax cash surplus pursuant to clause 8(1)(f) of the Contract.
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15. By clause 5(4), if in any quarter in any financial year the Appellant is ready and willing to deliver coal ordered by the Respondent (pursuant to clause 4) and the Respondent fails to accept delivery, the Respondent is obliged to pay the appropriate amount which represents the price for that quarterly shortfall. Where undelivered coal has been paid for under clause 5(4) the Appellant is obliged to reserve an equivalent quantity of coal for future delivery. When future delivery is made the then prevailing base price as adjusted must be paid, by reason of subclauses (2) and (3) of clause 10 being made applicable mutatis mutandis in clause 5. The Respondent contends, however, that further additional costs beyond the increased Base Price as adjusted do not become payable by way of analogy to clause 8(1)(f). The Respondent submits that on a proper construction of clause 5 of the Contract, any payment pursuant to clause 8(1)(f) has been excluded by necessary intendment as, on its face, clause 5 appears to relate only to temporary or relatively small shortfalls in acceptance.
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16. In any event the obligation to pay pursuant to clause 5(4) is not absolute or unconditional. If the Respondent is entitled to invoke clause 24 (force majeure circumstances beyond the power and control of the party responsible for performance) then the Respondent's
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obligations are suspended to the extent made necessary and deliveries that would otherwise have been made during the period in which the performance is delayed fall to be made at such time as the parties agree unless the deliveries are cancelled by agreement. In answering question 6, Burt C.J. has expressly held that, in the event of a force majeure situation affecting performance by the Respondent only, it is not required to pay for coal of which it cannot take delivery. The Respondent submits that this construction is correct, and clearly in line with the stipulation in clause 5(4) that there has to be a case where the Respondent "fails" to take delivery - not that it is unable to take delivery - before it can be required to pay for undelivered coal under clause 5(4) (The proviso to clause 24 operates to minimize any financial hardship or possibility of banking default by the Appellant in the event of a force majeure situation operating for some appreciable length of time).

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PART IV - Duration of Contract

17. The Contract has a term of 25 years from 1st of July 1978 to 30th of June 2003 (clause 2). To some extent it operates retrospectively as it was not finally executed or dated until 29th March 1979.

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PART V - Nature of the Contract

18. The Contract is basically one for the sale of goods i.e. coal by instalments extending over 25 years. The core of the Contract is contained in clause 3(1) which provides: "Subject to the provisions of this Agreement the [Appellant] shall deliver to the [Respondent] and the [Respondent] shall accept, 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".

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[The provisions for increases in the tonnage contained in sub-clauses (2) to (5) of clause 3 have never been operated by the Respondent and are not relevant to this appeal)].

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19. The Respondent contends that, unless excused by clause 24 (force majeure) or default by the Respondent, the Appellant is under a positive and distinct obligation to mine and deliver the coal up to the annual base

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tonnage each year, as ordered by the Respondent. The Appellant is not merely under the obligation to use its best endeavours to supply the annual base tonnage. The reference to "best endeavours" in clause 4(3) clearly only relates to equalisation or averaging of deliveries, not to the primary obligation to deliver. The Respondent contends that notwithstanding clause 5(2), if the Appellant defaults in delivery, it becomes liable for damages for non-delivery.

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20. By clause 11, the Contract expressly provides that, except by prior approval, the Appellant must supply all coal from the "coal seams" (defined) on the "Coal Mining Leases" (defined). That is also the cumulative effect of clause 19, clause 14, the definitions "coal" and "run of mine coal" in clause 1(1), clause 18(1), clause 12 and clauses 15 to 17 inclusive.

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PART VI - Delivery: Passing of Property

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21. Deliveries are required to be made at the times and place specified in clause 18(1) and (3). [Clause 18(2) has never operated and deliveries are being made under clause 18(3) without a separate agreement (as if the coal receiving hoppers for the Coal Crushing Plant referred to in clause 18(3) had been substituted as the primary delivery point)].

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22. The Contract does not expressly deal with passing of property, save in a negative way: cf clauses 5(5) and 10(1). Rejection of coal at delivery point is dealt with in clause 15, but under clauses 16, 17 and 15, in other respects brings the rejection point further forward - into the Appellant's pit - for sampling and testing for low specific energy. Rejection at delivery point would therefore seem to be generally confined to complaints under clause 14(b) and (c) and as to size under clause 18(1).

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23. Whether or not recourse is had to Sections 17 and 18 of the Sale of Goods Act, the Respondent submits that property passes on delivery.

PART VII - Coal Orders and Payment for Current Coal Deliveries

24. Pursuant to clause 4 coal is ordered fortnightly by the Respondent. For the purpose of calculating the average daily rate of delivery and fortnightly orders, the Base Tonnage (defined term) in Schedule A is divided by the number of working days in the year (at the material time 226) and multiplied by the number of working days in the fortnight (normally 10). This then produces the "average daily rate of delivery" referred to in clauses 4(1) and (3). There are quarterly reconciliations and adjustments made pursuant to clause 5. [It will be the Respondent's contention that a typographical error occurred in the first line of clause 5(1) which now reads: "The Commission shall at the end of year quarter ..." and which it says should in fact read: "The Commission will at the end of each quarter ...". It is not certain whether the Appellant accepts that this correction ought to be made].

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25. The Contract contains no express provision dealing with the time or method of payment for current deliveries of annual Base Tonnage coal. In practice the Respondent has paid initially the "Base Price" or "Base Price as adjusted" (both defined terms) each week in respect of the number of tonnes of coal delivered in that week pursuant to the fortnightly orders. As soon as practicable, various adjustments have been made under clause 7(3) to account for changes to the Base Price. Whilst the Respondent does not concede that it is under an obligation in law to pay weekly for coal delivered, it concedes that the Contract may be read so as to operate on the basis that it is obliged to pay no less frequently than every fortnight for such tonnage of coal as has actually been delivered by the Appellant pursuant to the fortnightly orders place by the Respondent. The Respondent will, if necessary, contend that s. 28 of the Sale of Goods Act ought to be held not to be applicable.

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PART VIII - Calculation of Coal Price

26. The Respondent contends that on a proper construction of the Contract it is obliged to pay for coal or that the Appellant is entitled to be remunerated for coal supplied in the manner set out in the following

paragraphs. In that exposition the Respondent disregards as not material to the matters before their Lordships certain disputes which have subsequently arisen between the parties relating to the extent, if at all, the Base Price as adjusted may be changed by reason of actions taken under clause 12(1) or clause 21 of the Contract.

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27. Given an ordinary case and year when no question of adjustments pursuant to clause 24 (force majeure), clause 10 (postponement of acceptance of coal by Respondent), or clause 5(4) (Respondent failing to take delivery of coal), coal is paid for as follows:-

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(a) by an initial payment on a weekly or fortnightly basis at the Base Price in Schedule B (as adjusted from time to time pursuant to clause 7(3)(a) and (b));

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(b) by an annual adjustment to the "pre-tax cash surplus" (defined term) one way or the other pursuant to clause 8(3) and Schedule F of the Contract.

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(c) by an annual adjustment to the "after tax cash surplus" (not defined in the Contract) one way or the other pursuant to clause 8(1) of the Contract.

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28. PART IX - Calculation of "Gross Revenue" and "Pre-tax Cash Surplus"

The expression "gross revenue" in this Contract really means aggregate or total revenue. In a normal year it is simply the aggregate of the price paid for annual base tonnage coal. The "pre-tax cash surplus" is the gross revenue less deductions set out in Schedule F, and is basically a nett profit type of calculation. As can be seen from the terms of Clauses 8(3) and 8(1), because changes in various taxation allowances or rates have to be allowed for, a simple nett operating profit figure cannot be used. There has first to be a pre-tax figure (pre-tax cash surplus) and an after tax figure (after tax cash surplus). The Respondent contends that undue emphasis or significance should not be given to the use of the word "cash": it appears more in the nature of part of a convenient mode of expressing an accounting result which is not "gross profit" or nett profit in the traditional sense. The Contract itself envisages an artificial or notional calculation having to be used under

certain conditions. For example, revenue from the Appellant's third party coal sales under Clause 19 (Record pp 57-58) are not included in "gross revenue", nor would expenses associated with meeting those sales be a deduction under Schedule F. Further Clause 8(3)(d) (Record p.51) clearly envisages that the Appellant may be carrying on other business activities. These could have a significant effect on the Appellant's real - as distinct from notional - after tax cash surplus.

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29. In a financial year in which the Appellant delivers the full annual base tonnage of coal, or, pursuant to the options available to the Respondent under Clause 3(2) to (5) of the Contract the full annual tonnage plus "additional" coal, there is no problem. It is only when, for whatever reason, the full annual base tonnage for a particular year is not delivered that the present issues arise.

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30. Within the framework of the Contract, when there is a shortfall in deliveries of annual base tonnage, it will fall into one of the following categories:-

- (a) default by the Appellant in meeting orders, not excused by force majeure or otherwise under the Contract;
- (b) default by the Respondent in accepting delivery, not excused by force majeure or otherwise under the Contract;
- (c) a circumstance of force majeure affecting the Appellant only;
- (d) a circumstance of force majeure affecting the Respondent only;
- (e) a common circumstance of force majeure e.g. a general strike, affecting both Appellant and Respondent at the same time;
- (f) two concurrent but independent circumstances of force majeure simultaneously affecting both parties but not common to them: e.g. a strike or fire in the power station, with an unconnected strike in the pit, or fire, explosion or some other natural disaster in the pit.

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31. The contentions of the Appellant, in substance rejected by Burt CJ., are that in all of the above instances, "gross revenue" for the purposes of Clause 8(3)(c) is calculated by having regard only to actual cash received, or to which the Appellant is entitled by reason of there being a tonnage of coal for which the Respondent "must pay". In other words, the gross revenue will be the sum of moneys received in the ordinary course of events, for actual coal deliveries, or pursuant to Clause 5(4), or pursuant to Clause 10(1). (It is mentioned in passing that payments made to restore the Appellant's after-tax cash surplus - a "Defined Event payment" - are expressly excluded from forming part of gross revenue for the purposes of the Contract by the last sentence in Clause 8(1) (at p. 48 of the Record). Nothing, however, is said about the treatment of a payment made to the Appellant to restore its pre-tax cash surplus made pursuant to Clause 8(3)(c)(ii)).

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20 PART X - Operation of Clause 8(3)(c)

Submission (1)

32. The Respondent's primary submissions is that Clauses 8(3)(c) and 8(1) are predicted on the assumption that the full contract tonneages are delivered and accepted. In each year the varying annual percentages in Schedule F take their significance from the fact that they are a percentage of the total gross revenue for that year. That gross revenue figure in each case is the annual tonnage in Schedule A multiplied by the unadjusted base price for that year in Schedule B. Whether the annual tables in Schedule F have contractual force or not, the yearly percentages were all struck on the assumption that full annual tonneages would be delivered. Any cy-pres application of Clause 8(3)(a) and (c) must give due force to that fact. The Respondent argues that is decisive if it can be demonstrated the Contract can work reasonably or fairly using full annual tonneages. The Respondent contends this can be so demonstrated.

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Submission (2)

33. The Respondent contends that the plain words of the concluding sentence in Clause 7(4) of the Contract indicate that, in a year where less than the base tonnage

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10 for that year has been delivered, the gross revenue is still to be calculated taking the annual tonnage figure in Schedule A (which should have been delivered) and multiplying that by the base price as adjusted. This calculates annual gross revenue on what has been called for convenience, a notional basis. The arithmetical calculations can be performed without any great difficulty in that the fortnightly orders will be known, as will be the Base Price as adjusted at the times when those deliveries should have been made and, arithmetically, the contractual provisions can be made to work quite sensibly. The Appellant is treated in every year as having delivered the full contract tonnage. When deferred coal deliveries are made good in subsequent years, there is no distortion of the annual financial return calculations. The tonneages and payments for deferred coal deliveries can be ignored in subsequent Clause 8(3)(c) and Clause 8(1) calculations, as each financial year exists as a self-contained unit.

20 Fluctuating expenses such as "Other Capital Expenditure" and "Company Funded Equipment are brought to account in the years scheduled against the predicted gross revenue for that year.

Submission (3)

30 34. In the context of this Contract, inherent in the Appellant's submissions that gross revenue is calculated on a cash received basis are three propositions which seem mutually exclusive or internally contradictory:-

- (i) it is entitled to a payment under Clause 8(3)(c) even though it may have defaulted in delivery of the whole or a substantial part of the annual base tonnage of coal; 50-51
- (ii) whilst it is not entitled to any payment under Clause 5(4) if it has in any way defaulted in deliveries, this does not disqualify it from saying (on an annual basis) it has still satisfied "good mining and management practices" under Clause 8(3)(c)(i) and is thereby entitled to a payment; 38 50
- (iii) it is entitled to a payment under Clause 8(3)(c)(i) even though it may have defaulted in deliveries of annual base tonnage of coal if the shortfall in 50

the pre-tax cash surplus and the default have occurred notwithstanding good mining and management practices. (In this paragraph the word "default" is used in the sense of an unjustified default by the Appellant as mentioned in paragraph 30(a) above).

Submission (4)

10 35. In the context of this analysis of a cash received type calculation, the Respondent refers to Clause 8(3)(d) of the Contract which provides:- 51

20 "Notwithstanding anything contained in this subclause, [the Respondent] shall not be liable for any increase in the price of coal where any insufficiency of pre-tax cash surplus referred to in paragraphs (b) and (c) of this subclause is the result of improper management by [the Appellant], the effect of activities of the [Appellant] unrelated to the mining of coal for the purposes of this Agreement, any departure by the [Appellant] from the Mining Plan as may be adjusted or the failure by the [Appellant] to observe the best modern practice in mining methods."

30 The Respondent contends in respect of that paragraph that it does not detract from the operation of the words at the commencement of Clause 8(3)(c)(i) viz. "...notwithstanding good mining and management practices, in the immediately preceding financial year...". The Respondent submits that those words clearly place the onus of proof of entitlement to a payment initially upon the Appellant: it is not for the Appellant merely to give notice of a bookkeeping or arithmetical shortfall - it also has to demonstrate factual justification bringing it within Clause 8(3)(c)(i). 50

Submission (5)

40 36. The Respondent will also contend that nothing in Clauses 8(3) or 5 (2) prevents the Respondent, in case of an unexcused shortfall in deliveries, recovering damages for non-delivery - at least on the basis of a calculation of shortfall at the end of a financial year, and probably also in respect of a quarterly shortfall - if arrangements are not made for delivery of the quarterly shortfall 50-51; 37

within a reasonable time after the conclusion of the relevant period. If arrangements are made pursuant to Clause 5(2)(b), then it would appear that the postponed price (which apparently presumes inevitable price increases) would equate to liquidated damages or compensation. Because of the operation of Clauses 5(4) and 10(1) and 8(1)(f) it is difficult to conceive of any instance where the Appellant would be entitled to unliquidated damages or some additional consequential damages (independently of or over and above the money sums provided) by reason of non-acceptance by the Respondent.

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Submission (6)

37. The Respondent further contends that a fair reading of the Contract means that if the Appellant makes any significant unexcused shortfall in annual base tonnage, it thereby becomes disqualified from obtaining any payment under Clause 8(3)(c)(i), either absolutely or at least pro tem. To allow a shortfall to occur which is either not excused by events of force majeure under Clause 24, or is due to some default in performance of the Contract by the Appellant, the Respondent contends, of necessity demonstrates a lack of "good mining and management practices". The Respondent will, if necessary, contend that the risks as to the adequacy of the plant and equipment fleet and manning levels in the Contract or unforeseen mining difficulties are risks which are clearly placed upon the Appellant pursuant to the Contract so far as coal deliveries are concerned, and it is no excuse for the Appellant to argue that shortfalls occurred because of inadequacies in the projected Mining Plan, or equipment fleet or lack of manpower or unexpected geological conditions. (The costs of unexpected geological conditions are expressly provided for pursuant to Clause 8(1)(e).) The Respondent submits that good mining and management practices require that, if necessary, applications to vary the Mining Plan pursuant to Clause 12(1) be made in proper time to avoid shortfalls occurring. [The meaning and operation of Clause 12(1) has subsequently become a matter of sharp dispute between these parties in other litigation]. The Respondent also submits that, on a proper construction of the Contract, even if there is a dispute over the coal price or the costs recoverable, the Appellant remains under an obligation to deliver coal as ordered.

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10 38. If the assumption is made that the financial outgoings of the Appellant in producing and delivering, say, 90% of the annual base tonnage will not be significantly different from the outgoings involved in producing and delivering 100% of the base tonnage, (cf the last sentence in paragraph 35 of the affidavit of Strmotich now at p.140 of the Record) then utilising a cash received or coal-for-which-the-Respondent-must-pay approach, can work to the significant financial detriment of the Respondent. It is only if there is a close correlation between the percentage drop in coal delivered and the expenses, or if the expenses drop to a greater degree than the shortfall in coal deliveries that the Respondent is not financially disadvantaged if a cash received calculation of gross revenue is applied. This point is illustrated in the examples in the next paragraph.

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20 39. The starting point for these examples is a situation where, in theory, the Contract works perfectly in that the percentage difference between Gross Revenue and Deductions under Schedule F on the one hand and the allowed annual pre-tax cash surplus on the other are identical. Illustrations are then produced to show:-

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- 30 (i) in Case I - the difference where the gross revenue is reduced but the expenses remain constant;
- (ii) in Case II - the comparative situation where, on the postulated figures, the Appellant would be entitled to a payment;
- (iii) in Case III - the comparative situation where, on the postulated figures the Respondent would be entitled to a payment;
- (iv) in Case IV - the comparative situation where both gross revenue and expenses are reduced.

40 Case I Examples worked from Basis that Pre-tax Cash Surplus Percentage in Contract and Pre-tax Cash Surplus are identical and Using Notional and Cash Received Bases

Basic Assumptions:-

- (1) the annual tonnage is 2.0 million tonnes;

- (2) the average price of coal for the year is \$25 per tonne;
- (3) the allowable pre-tax cash surplus (PTCS) percentage is 30%;
- (4) the expenses or deductions will be constant whether 90% or 100% of annual tonnage is delivered;
- (5) the level of deductions under Schedule F will, if the full annual tonnage was delivered equal the allowable PTCS percentage of 30%;
- (6) shortfalls of 100,000 tonnes (5%) and 200,000 tonnes (10%) are used;
- (7) in 2 of the examples, using a shortfall of 5%, the workings are done on the basis of a reduction in expenses of about 5% and about 10%;
- (8) no allowance is made for the value of undelivered coal to the Respondent.

(Unless the Appellant's prior view - that it is entitled to a payment under Clause 8(3)(c)(i) even if it has not delivered - is adopted, these examples are only relevant to situations where the shortfall is due to circumstances of force majeure affecting either party).

<u>Using 5% Shortfall in tonnage</u>		
(a)	$2.0 \text{ m.t.} \times \$25 = \$50.0\text{m}$	(\$15m = 30%)
		=====
	Deductions	<u>35.0</u>
	PTCS	\$15.0m (15.0)
		=====
		Less <u>15.0</u>
	PTCS Deficit:	<u>\$00.0</u>
		=====

(b)	1.9 m.t. x \$25 =	\$47.5.m	(\$14.25m = 30%)
			=====
	Deductions	<u>35.0</u>	
	PTCS	\$12.5m	(\$14.25)
		=====	
		Less	<u>12.5</u>
	PTCS Deficit:		\$ 1.75m
			=====

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	<u>Using 10% Shortfall in tonnage</u>		
(c)	1.8 m.t. x \$25 =	\$45.0.m	(\$13.5m = 30%)
			=====
	Deductions	<u>35.0</u>	
	PTCS	\$10.0m	(\$13.5)
		=====	
		Less	<u>10.0</u>
	PTCS Deficit:		\$ 3.5m
			=====

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Case II Example of Payment Falling Due to Appellant - C1.8(3)(c)(i)

Note: The Contractual trigger point is a shortfall of 1%.

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The PTCS is then restored to the annual percentage = [30%]

(a)	2.0 m.t. x \$25 =	\$50.0.m	(\$15.0m = 30%)
			=====
	Deductions	<u>40.0</u>	
	PTCS	\$10.0m	\$15.0m
	(20%)		
		Less	<u>10.0</u>
	Payment to Appellant		\$ 5.0m
			=====

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(b)	1.9 m.t. x \$25 =	\$47.50m	(\$14.25m = 30%)
	Deductions	<u>40.0</u>	=====
	PTCS	\$ 7.50m	
	(15.79%)		\$14.25m
		Less	<u>7.50</u>
	Payment to Appellant		\$ 6.75m
			=====

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Case III Example of Payment Falling
Due to Respondent - Cl.8(3)(c)(ii)

Note: The Contractual trigger point is an excess of 5%.
The PTCS is then reduced to the annual percentage [30%]
plus 2% = [32%]

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(a)	2.0m.t. x \$25 =	\$50.00m	(\$15m = 30%)
	Deductions	<u>30.0</u>	(\$16m = 32%)
			=====
	PTCS	\$20.0m	
	(40%)	=====	
		Less	\$20.0
			<u>16.0</u>
	Refund to Respondent		\$ 4.0m
			=====

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(b)	1.9m.t. x \$25 =	\$47.5m	(\$14.25m = 30%)
	Deductions	<u>30.0</u>	(\$15.20m = 32%)
			=====
	PTCS	\$17.5m	
	(36.85%)	=====	
		Less	\$217.5m
			<u>15.2</u>
	Refund to Respondent		\$ 2.3m
			=====

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Case IV Examples Reducing Annual Expenses

(a)	1.9mt x \$25 = \$47.50m	(14.25m = 30%)
	Deductions: 33.25	=====
	(reduced abt 5%) _____	(\$.25

PTCS	14.25	(\$14.25
		<u>14.25</u>
	Less	

10	PTCS Deficit to be made up	\$ 00.00
		=====

(b)	1.9mt x \$25 = \$47.5m	(\$14.25 = 30%)
	Deductions: 31.5	
	(reduced abt 10%) <u>31.5</u>	

	\$16.0	16.0m
	=====	

	Less	<u>(\$14.25)</u>
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20	Excess of PTCS over allowable	\$ 1.75m
		=====

Note: \$16m PTCS on example is a [32%] PTCS. The Appellant does not become obliged to repay unless the percentage exceeds [30%] by 5%. (The reduction in such a case would be to [32%] not to [30%].)

PART XI - Whether Delivery Condition Precedent to Payment

30	40. The Respondent further submits that, on a proper construction of the Contract, the Appellant does not become entitled to a payment pursuant to Clause 8(3)(c) until such time as it has performed in full its contractual obligations for that financial year. So long as any of the annual base tonnage of coal remains outstanding for a particular financial year (unless deliveries have been cancelled or waived by agreement) it is not entitled to payment. Time has not been made of the essence of the agreement. The Respondent's primary submission is that before the Appellant is entitled to receive a payment pursuant to Clause 8(3)(c), it must have delivered the full annual base tonnage for that year, which it must do within a reasonable time of the end of year or end of force majeure. For example, if	50-51
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at 30th of June in any financial year there was a shortfall of 50,000 tonnes for that year, and thereafter the Appellant designated all deliveries of coal as being made on account of current coal deliveries in the following year, until 50,000 tonnes of coal was expressly appropriated to the shortfall (so that it would not have to be paid for as if a current coal delivery but pursuant to Clause 5(2)(b)) the Appellant would not be entitled to a payment under Clause 8(3)(c). Likewise, if through events of force majeure that tonnage of coal could not be delivered or accepted in its proper year, the rights of the Appellant to make a claim, and the obligation of the Respondent to pay under Clause 8(3)(c) would be suspended by operation of Clause 24 until such time as delivery of the full 50,000 tonnes outstanding could be made.

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41. If (which is not conceded) the Contract be construed so as to allow the Appellant to recover moneys pursuant to Clause 8(3)(c) where in the relevant financial year the full annual base tonnage of coal was neither delivered nor paid for in lieu and:-

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- (i) the Appellant remains in default; or
- (ii) having once been in default has rectified that default by making late delivery -

then, as has been indicated in paragraph 38 above, if a cash received basis for calculation is adopted, that could result in the Respondent being required to pay more for coal than if the Appellant had performed its obligations fully and timeously. Further, if the shortfall is subsequently delivered, the Respondent would be obliged to pay for that coal in the second year, although perhaps at the base price as adjusted which prevailed earlier, rather than a higher subsequent base price; but if the answer by the Chief Justice to question 6(2)(b)(ii) is correct, i.e. that postponed deliveries do not constitute "additional quantities of coal" payment would not form part of the calculation of gross revenue on either the Respondent's or the Appellant's contentions: see paragraph 42(b) below.

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PART XII - Force Majeure and Clause 8(3)(c)

42. In substance, as understood, the Appellant's contentions are that:-

- (a) in the case of a force majeure shortfall in Year 1, that tonnage, or its value is ignored in calculating the pre-tax cash surplus under Clause 8(3)(c) for Year 1; 50-51
- (b) it is also ignored in Year 2 in calculating the pre-tax cash surplus, because by virtue of the definition "base tonnage" in Clause 1(i), the make-up of the shortfall would not be coal which the Respondent "must accept or pay for as hereinafter provided" in Year 2. 30

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It seems inescapable on the Appellant's contentions that additional coal which the Respondent "must accept or pay for as hereinafter provided" is only coal falling under Clause 5(4) and probably also Clause 10(1) - not last year's coal delivered late. (Nor is it "additional coal" in Year 2 on the construction adopted by Burt C.J. and the subject of Questions 6(2) and (6).) 195-6

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Yet if coal the delivery of which has been postponed by reason of force majeure is presented by the Appellant for delivery, the Appellant would appear to be able to insist upon the Respondent paying for it. Thus the Respondent, (neither in Year 1 nor Year 2) would not be given credit for moneys paid for the deferred tonnage in making calculations for the purposes of Clause 8(3)(c). 50-51

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43. If the views contended for by the Respondent, and endorsed by Burt C.J. are adopted, however, the deferred tonnage is theoretically brought to account in Year 1 and the financial provisions of the Contract run smoothly thereafter: see his Reasons at pp.187-8 of the Record. 187-8

PART XIII - Respondent's Alternative Contentions as to "Extra Coal" or "Incremental Tonnage" for Purposes of Calculating "Gross Revenue"

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44. The definition of "gross revenue" (p 32 of Record) in Clause 1(1) means "base tonnage... for the applicable year plus any additional quantities of coal delivered multiplied by the base price as adjusted". In Clause 7(4) (p. 45 of Record) it is provided that "the base price as adjusted when multiplied by the base tonnage plus any incremental tonnages equals the gross revenue". In clause 1(1) (p.30 of Record) "base tonnage" is defined as meaning "the relevant base tonnage of coal to be

supplied... in any financial year as provided in Schedule A and which the [Respondent] must accept or pay for as hereinafter provided."

10 45. If one rejects the views of Burt C.J as to what is "additional coal" or "incremental tonnage" i.e. that in substance these categories do not include deliveries of delayed or deferred coal falling under clauses 24 (force majeure), 10 (deferment by Respondent), and 5(4) (coal Appellant has been ready and willing to deliver but not accepted by Respondent), then these tonneages must become "additional quantities of coal delivered" to be multiplied by the base price as referred to in the definition "gross revenue" (or be "incremental tonnage" under clause 7(4)).

20 46. This then distorts "gross revenue" and the pre tax cash surplus in the years of delivery because the actual gross revenue (in dollars) will be higher by the price of the deferred coal tonneages. If the expenses in the original year of delivery were the same for 95%-100% deliveries, then unless they are also constant in dollars at the level of 100%-105% deliveries in the second year, the Respondent is at risk, in effect, of a double debit for the extra expenses associated with the delay in delivery.

30 47. Burt CJ seems to have treated the phrase "must accept or pay for" in the definition of "gross revenue" as a composite or conjoined expression scil. must - accept-or-pay-for. To adopt the cash received approach in effect requires this phrase to be read as if stating:-

"..which the Respondent must -

(i) accept; or

(ii) pay for; or

(iii) both accept and pay for..."

40 48. It also requires the phrase "in any financial year" to be read as applying to base tonnage in any previous year which may be delivered in any (other) later financial year - which is somewhat out of harmony with the immediately following words "as provided in Schedule A", which Schedule stipulates tonneages for each year individually. The better construction seems to be to

read the phrase as meaning "in a [any] particular [subject] financial year". (The definitions are expressly made subject to the context in the opinion words to Clause 1(1) - vide Record at p.

49. Working examples of the result of adding deferred coal to base tonnage and gross revenue are set out hereunder.

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Year 1

(Adopts cash received basis for calculation of a shortfall of 5% (100,000 tonnes) on an annual base tonnage of 2.0 million tonnes

1.9 mt x \$25	= \$47.50m	(30% = \$14.25m)
Deductions	<u>35.00</u>	(14.25
	<u>12.50</u>	<u>12.50</u>
PTCS Deficit		\$ 1.75m =====

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(N.B. On a notional calculation there would have been a nil balance either way).

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Year 2

(a) (Assumes 5% shortfall from Year 1 is delivered; expenses in Year 2 are constant; cash received calculation).

2.1mt x \$25	= \$52.50	(30% = \$15.75m)
Deductions	<u>35.00</u>	
(33 1/3% PTCS)	17.50	
	<u>(15.75)</u>	
Excess PTCS	\$ 1.75	=====

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(But as contractual trigger point is an excess of 5%, Respondent does not obtain a refund)

(b) (Similar assumptions to (a), but increasing expenses by 5%).

	2.1mt x \$25	= \$52.50	
	Deductions now	<u>36.75</u>	
10		15.75	
		<u>(15.75)</u>	Allowable PTCS of 30%
		\$00.00	
		=====	

(But Respondent has paid an extra \$1.75m in Year 1).

20 (c) Same assumptions as in (a) but increasing expenses by 10%)

	2.1mt x \$25	= \$52.5m	
	Deductions now	<u>38.50</u>	
		14.00	
		<u>(15.75)</u>	Allowable PTCS
	PTCS Deficit payment	<u>\$1.75m</u>	
		=====	

30 (d) (Uses notional tonnage to calculate and increases expenses by 5%)

	2.1mt x \$25	= \$50.00m	(30% = \$15.m)
	Deductions now	<u>36.75</u>	
40		13.25	
		<u>(15.00)</u>	Allowable PTCS
	PTCS Deficit payment	\$ 1.75	(Year 2)
		=====	

(N.B. No payment either way in Year 1 on this example).

10 49. Particularly if it is accepted that the underlying philosophy of the Contract is that the Respondent ordinarily only pays for coal actually delivered, referring back to the instances in paragraph 30 of this Case, it is only in the instance of the Appellant being prevented from making deliveries by virtue of force majeure circumstances affecting the Respondent alone that the Appellant might argue it suffers some disadvantage if the Respondent's contentions as to Clause 8(3)(c) are accepted. Prima facie the Appellant's cash flow arising from coal deliveries would be suspended. Any severe consequences to the Appellant of the Respondent not being able to accept coal are ameliorated by the terms of the proviso to Clause 24 of the Contract (page 64 of the Record) which provides that where the obligations of either party are temporarily suspended and this results in any delay in or suspension of payment by the Respondent to the Appellant, then the Respondent is obliged to make certain payments to the Banks on behalf of the Appellant. These payments are to be credited by the Appellant to the Respondent against future deliveries of coal. This appears to imply, or is capable of being read so as to relate to or being limited to the deferred coal when delivered. Or, put shortly, the parties have envisaged that a unilateral force majeure situation might cause financial problems for the Appellant and have expressly agreed upon the remedy.

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30 50. The Respondent will argue that even in the absence of a force majeure clause, on general principles, the Contract should be construed against having an operation which requires the Respondent to pay for coal which it had not received, and for which it could not be made accountable.

40 51. In years when the circumstances in paragraph 30(a) apply (Appellant's default in delivery), it would be unreasonable to give the Contract a construction which, indirectly, or in substance allows the Appellant to recover moneys by reason of or as a result of it not having fully performed its obligations. In this situation the notional calculation of gross revenue as endorsed by Burt C.J. is the only method of giving the Respondent adequate protection against any potential inclination of the Appellant to better itself financially by only performing its obligations under the Contract to the extent of 90% - 95% each year. It is also the only

method of making some allowance to the Respondent for the value of the coal which it ought to have received. The notional gross revenue approach also provides indirect encouragement to the defaulting vendor to deliver coal and receive payments as quickly as possible. Short of proceeding under Clause 23, the Contract does not otherwise provide easy remedies for the Respondent to procure delivery of coal shortfalls within a reasonable time.

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52. In situations where paragraph 30(b) (Respondent's default in acceptance) apply, on either approach the Appellant has good protection. It can recover the cost of coal it was ready and willing to deliver under Clause 5(4). If, when the postponed deliveries are accepted, the price is higher, then the difference has to be paid by the Respondent; and probably the Appellant does not have to give any allowance if the price has fallen between the date when delivery should have been made as against when it was made. That right to payment under Clause 5(4) is not affected by a calculation of gross revenue on a notional basis. Further, it causes no complication in the accounts the next year.

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53. Where the Appellant's inability to deliver the base tonnage of coal in any one year is caused or contributed to by events of force majeure affecting it, whether singly, or in common with or concurrently with the Respondent also being effected by force majeure, the Respondent argues that (leaving aside Clause 5(4)) its obligation to pay for coal is based on it receiving the full contract tonnages as ordered; and this assumes particular significance in respect of the annual base tonnage when a claim is made under Clause 8(3)(c)(i). It is repeated that the Respondent's contention is it has agreed to pay for the coal itself not the promise to deliver. Put another way, the Respondent contends that the unspoken premise on which Clause 8(3)(c)(i) is postulated is that there shall be full and timely performance by the Appellant of all its obligations. If clause 24 was not in the Contract, the Appellant would have no prospects of arguing that it had performed all obligations or conditions under the Contract - upon which its right to a payment under Clause 8(3)(c) must depend - if it had not delivered the Contract tonnages. Clause 24 only excuses non-performance in certain conditions: it does not create new or extended rights.

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54. Clause 24 requires Clause 8(3)(c) to be construed and to operate cy-pres in a year in which deliveries fall short due to a force majeure situation, or the consequences of that situation. Calculation of gross revenue on a notional basis best achieves a fair result: otherwise Clause 8(3)(c)(i) would operate so as to give the Appellant an indemnity against the consequences of its own (sole) force majeure; whereas, when read together, clauses 24 and 8(3)(c) must reasonably operate by way of excuse only. Conversely, a force majeure situation, particularly when it lies wholly or partly with the Appellant, sees the Respondent deprived of both the value and the convenience of having the full contractual tonnage of coal in its hands. It would be an unreasonable construction of Clause 8(3)(c) to leave that detriment with the Respondent in a situation where, albeit for no fault of the Appellant's own, the Appellant was not ready, willing and able to deliver; and at the same time also possibly add some additional fiscal obligation on the Respondent in favour of the Appellant. The extent to which the Respondent is obliged to indemnify or keep the Appellant harmless in all force majeure situations is to be found in the proviso to Clause 24. That special provision, extending to a "Appellant only" force majeure situation, is the counter-balance for any detriment the Appellant might suffer by reason of its being temporarily deprived of revenue through the operation of a "Respondent only" situation of force majeure.

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30 PART XIV - Alternative methods of Calculating Income or Revenue

55. The Respondent submits that there is no general understanding in Australia that terms such as "revenue" or "gross revenue" must be understood as being referable to cash received. In dealing with s.25 of the Income Tax Assessment Act, 1936 and the expression "gross income derived" within that provision, the High Court of Australia has consistently held that a cash received basis may not be appropriate in all cases to arrive at a true reflex of a taxpayer's annual income: see J. Rowe & Son Pty. Ltd. v F.C.T. (1971) 124 C.L.R. 421 (income of a business selling goods on terms); Henderson v C.T. (1970) 119 C.L.R. 612 (income of partnership of accountants). In some cases calculation on an earnings or work-in-progress basis, or upon a profit emerging basis has been held to be more appropriate: cf. Wetton, Page &

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Co. v Attwooll (1963) 1 W.L.R. 114; 1963 1 All ER 166.
Although "gross income" for taxation purposes is not necessarily the same as "gross revenue" under a contract, it does have relevance when the contract speaks of amounts which are the "pre-tax cash surplus" and "after-tax cash surplus".

10 56. The process set out in clause 8(3) and Schedule F of the Contract is essentially the same as the process used in ascertaining gross profit or net profit of a business. In another Australian income tax case, Commissioner of Taxes (SA) v. Executors Trustees and Agency Co. of South Australia Ltd (Carden's case) (1938) 63 CLR 108 both Latham CJ (63 CLR at 103) and Dixon J (63 CLR at 155) adopted or referred to dicta of your Lordships' Board in St Lucia Usines & Estates Co v. St Lucia (Colonial Treasurer) 1924 AC 508 at 512 in terms: "It does not follow that income is confined to that which the taxpayer actually receives. It is said, and truly, 20 that a commercial company, in preparing its balance sheet and profit and loss account, does not confine itself to its actual receipts - does not prepare a mere cash account - but values its book debts and its stock-in-trade and so on and calculates its profits accordingly. From the practice of commerce and of accountants and from the necessity of the case this is so..." Latham C.J, earlier in his judgment in Carden's case (63 CLR at 125-6), also adopted dicta of Lord President Clyde and Lord Sands in Dailuaine-Talisker Distilleries Limited v. CIR (1930) 15 30 Tax Cases 613 at pages 620 and 622-3 respectively, where their lordships dealt with the generally understood methods of calculating profit and loss. Lord Clyde said: "It is elementary that a profit and loss account is not an account of receipts and expenditure in cash only; its purpose is to show how the business stands, for better or for worse, on the operations of the year. Thus, if goods have been sold or delivered to a customer within the year, the sum due by the customer is credited to the business and debited to the customer and enters the profit and loss account at the end of the year, whether payment 40 in cash (or otherwise) has been received within the year or not." Lord Sands said: "At the outset of the argument the question was put to the learned counsel for the Appellants: 'If a trader has sold goods in the course of a year of charge but has not received payment of the price at the expiry of that year, does not the amount of the price fall to be taken into account in estimating the

profits of the year?' The answer to that question was in the affirmative. In the present case we are not dealing with price of goods but with payment for services rendered, but, as it appears to me, the same principle must apply. If there is a book debt for such services rendered during the year standing in the books of the business, this fails to be taken into account in estimating the profits of the year. In neither case does it matter whether non-payment is the result of default or of agreement to postpone payments. The book debt comes into account in estimating profits of the year." In the case J. Rowe & Son Pty. Ltd. v. FCT (above) Gibbs J said (124 CLR at 452) "... I agree that for taxation, as well as for business purposes, 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... The method adopted should be one which is 'calculated to give a substantially correct reflex of the taxpayer's true income'..."

57. The Respondent contends that a clear analogy can be drawn between income for taxation purposes and gross revenue under this Contract.

58. Thus it is submitted, in light of the fact that on the Appellant actually delivering postponed or deferred coal, it will be paid, there is no objection in principle to something other than a purely cash received basis being adopted for calculation of "gross revenue". The notional calculation is distinctly calculated to give a substantially correct reflex of the Appellant's true gross revenue, in the sense that the expression "gross revenue" is used in this contract, to derive the pre tax-cash surplus and after tax cash surplus.

59. The Respondent repeats the point made in paragraph 28. that if the Appellant made any private coal sales from the Muja Pit, or was engaged in any business activity other than simply supplying coal to the Respondent pursuant to the Contract, then the calculations of both pre-tax cash surplus and after tax cash surplus would, of necessity, have to be notional or artificial.

PART XIV - Extent of Respondent's Acceptance of Questions answered by Burt C.J.

51. In general the Respondent adopts and supports the reasoning adopted by the Chief Justice and his answers to the questions. Specifically as to the questions and declarations made in the order dated 22nd of April 1983 the Respondent says:-

10 Questions 1, 2, 3 and 4: The Respondent is content with the answers and declarations.

Question 5: The Respondent does not wish to pursue this matter further.

Question 6: The Respondent is content with the answer.

20 Question 7: The Respondent does not wish to pursue this further.

Question 8: The Respondent is content with this answer generally. It will, however, propound further arguments as to how extra or additional coal is to be treated, particularly in the context of deferred deliveries, or cash received basis for calculating "gross revenue" is used.

30 Question 9: The Respondent does not wish to pursue this further.

Question 10 (Appellant's question): The Respondent is content with the answers to this question.

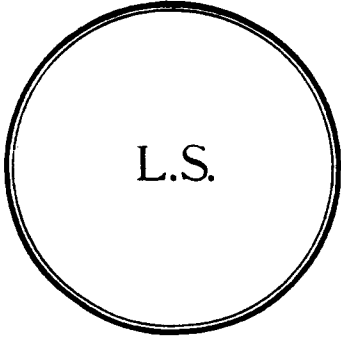
Question 11 (Appellant's question): The Respondent is content with this answer.

40 Question 12 (Appellant's question): So long as the answer to this question applies on the basis that the Appellant must demonstrate that the Respondent has failed to accept delivery of coal which complies with the requirements of the Contract, the Respondent does not wish to address further argument to their Lordships in respect of this question. But it will, if appropriate, propound further argument on this question in the context of a cash received basis for calculating "gross revenue".

PERTH. W.A.
for September, 1984.

M.J. Stevenson
.....
(M.J. STEVENSON)
Counsel for Respondent

52/84



At the Court at Buckingham Palace

The 19th day of December 1984

PRESENT

**THE QUEEN'S MOST EXCELLENT MAJESTY
IN COUNCIL**

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 10th day of December 1984 in the words following viz:—

“ WHEREAS by virtue of His late Majesty King Edward the Seventh’s Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an Appeal from the Supreme Court of Western Australia between Griffin Coal Mining Company Limited Appellant and The State Energy Commission of Western Australia Respondent (Privy Council Appeal No. 39 of 1984) and likewise the humble Petition of the Appellant setting forth that pursuant to an originating summons filed in the Supreme Court the Respondent sought declarations of right in response to various questions referred to in the said summons in respect of a contract between the parties providing for the long term supply of coal by the Appellant to the Respondent: that the Appellant gave notice of further questions: that by Order dated 22nd April 1983 the Supreme Court made Declarations and Orders by way of answers to the said questions: that by Order dated 3rd May 1984 the Full Court of the Supreme Court granted the Appellant leave to appeal to Your Majesty in Council: And humbly praying Your Majesty in Council to take this appeal into consideration and that the Order of the Supreme Court of Western Australia dated 22nd April 1983 may be reversed altered or varied and for further or other relief:

“ THE LORDS OF THE COMMITTEE in obedience to His late Majesty’s said Order in Council have taken the Appeal and humble Petition into consideration and having heard Counsel on behalf of the Parties on both sides Their Lordships do this day agree humbly to report to Your Majesty as their opinion that this Appeal ought to be dismissed and the Order of the Supreme Court of Western Australia dated 22nd April 1983 affirmed:

“ AND in case Your Majesty should be pleased to approve of this Report then Their Lordships do direct that there be paid by the Appellant to the Respondent its costs of this Appeal incurred in the said Supreme Court and its costs thereof incurred in England the amount of such costs to be hereafter taxed and certified if not agreed.”

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor or Officer administering the Government of the State of Western Australia and its Dependencies in the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

G. I. de DENEY.

RECEIVED

11 SEP 1984