

FEDERAL COURT OF AUSTRALIA

Olivaylle Pty Ltd v Flottweg GMBH & Co KGAA (No 4) [2009] FCA 522

CONTRACT — Contract for provision of an olive oil processing line — Purported termination for breach — Alleged failure to comply with contract specifications — No failure outside scope of repair or replacement clause — Held termination not validly invoked.

CONTRACT — Acceptance by electronic mail — Effect of electronic contract — Formation of an electronic contract in relational contract settings — Consideration of postal rule and instantaneous communication form rule — Held contract made at place where acceptance was received.

CONTRACT — Application of international law to — Contract between Australian and German companies — United Nations Convention on Contracts for the International Sale of Goods — Incorporation of an international convention into Victorian law — Sale of Goods (Vienna Convention) Act 1987 (VIC) — Express contractual exclusion of the application of the international convention to the contract — Held exclusion permissible.

TRADE PRACTICES — Misleading or deceptive conduct — Warranties in agreement — Representations as to future matters — Implied representations that respondent had an intention to carry out contractual promises — Whether if false may constitute misleading or deceptive conduct per se — Held respondent had a genuine intention to fulfil its contractual obligations — Held respondent had reasonable grounds for making representations — Held no misleading or deceptive conduct — Trade Practices Act 1974 (CTH) ss 51A, 52, 87

CONTRACT — Particular terms — Withdrawal clauses — Provision for purchaser to seek reduction in price or withdrawal from contract each after allowance of a reasonable period of grace — Separate obligation and entitlement of vendor to repair or replace within a reasonable period of time goods not compliant with contractual specifications — Construction and reconciliation of such terms — Held period which constituted reasonable period of grace must necessarily be beyond reasonable time for effecting repair or replacement.

Trade Practices Act 1974 (Cth) ss 51A, 52, 87

Sale of Goods (Vienna Convention) Act 1987 (Vic) s 5

Sale of Goods Act 1979 (UK)

United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention) Articles 6, 46(3), 47, 48, 50

Accounting Systems 2000 (Developments Pty Ltd) v CCH Australia Ltd (1993) 42 FCR 470 applied
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266 applied
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337 applied
Entores Ltd v Miles Far East Corporation [1955] 2 QB 327 applied
Express Airways v Port Augusta Air Services [1980] Qd R 543 applied
Futuretronics International Pty Ltd v Gadzhis [1992] 2 VR 217 applied
JAD International Pty Ltd v International Trucks Australia Ltd (1994) 50 FCR 378 applied
Long v Lloyd [1958] 2 All ER 402 cited
Olivaylle Pty Limited v Flottweg GMBH & Co KGAA (No 3) (2008) 76 IPR 152 cited
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451 applied
Reardon Smith Line Ltd v Hansen-Tangen; Hansen-Tangen v Sanko Steamship Co (The Diana Prosperity) [1976] 1 WLR 989 applied
Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd (1988) 5 BPR 11,106 applied
Reigate v Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592 applied
Roder Zelt-Und Hallenkonstruktionen GMBH v Rosedown Park Pty Ltd & Eustace (1995) 57 FCR 216 cited
Shevill v Builders Licensing Board (1982) 149 CLR 620 cited
Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206 applied
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165 applied
W A Dewhurst & Co Pty Ltd v Cawrse [1960] VR 278 applied

Christensen S, "Formation of Contracts by Email Is it Just the Same as the Post?" (2001) 1(1) *Queensland University of Technology Law and Justice Journal* 22
 Nicholas B, "The Vienna Convention on International Sales Law" (1989) 105 *Law Quarterly Review* 201
Benjamin's Sale of Goods (7th ed, A Guest (ed), Sweet & Maxwell, 2002)
Chitty on Contracts (30th ed, H Beale (ed), Sweet & Maxwell, 2008)
 Meagher RP, Gummow WMC and Lehane JRF, *Equity Doctrines & Remedies* (4th ed Butterworths, 1992)

OLIVAYLLE PTY LTD (ACN 080 670 640) v FLOTTWEG AG (FORMERLY FLOTTWEG GMBH & CO KGAA) (ABN 95 101 547 424) SAD261 of 2006

**LOGAN J
 20 MAY 2009
 BRISBANE (HEARD IN ADELAIDE)**

**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY**

SAD261 of 2006

**BETWEEN: OLIVAYLLE PTY LTD (ACN 080 670 640)
Applicant**

**AND: FLOTTWEG AG (FORMERLY FLOTTWEG GMBH & CO
KGAA) (ABN 95 101 547 424)
Respondent**

JUDGE: LOGAN J

DATE OF ORDER: 20 MAY 2009

WHERE MADE: BRISBANE (HEARD IN ADELAIDE)

THE COURT ORDERS THAT:

1. The application is dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using eSearch on the Court's website.

**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY**

SAD261 of 2006

**BETWEEN: OLIVAYLLE PTY LTD (ACN 080 670 640)
Applicant**

**AND: FLOTTWEG AG (FORMERLY FLOTTWEG GMBH & CO
KGAA) (ABN 95 101 547 424)
Respondent**

JUDGE: LOGAN J

DATE: 20 MAY 2009

PLACE: BRISBANE (HEARD IN ADELAIDE)

REASONS FOR JUDGMENT

The origin and nature of the present dispute

1 At an age when the limit of many a man's ambition is frequently little more than a long and tranquil retirement, Jorge De Moya (Mr De Moya) embarked upon a bold, new project – the establishment of a large olive grove near Wallowa in the Mallee Country in Central Western Victoria, the on site production of olive oil of the highest quality from the fruit of the grove and the exporting of that product to an apprehended market in the United States of America.

2 To observe Mr De Moya as I did closely, especially during his time in the witness box, but also during his regular attendance in the course of a lengthy trial, as well as to learn in evidence something of his background, is to gain an understanding of why such a limit proved utterly foreign to him. He is an articulate man of great natural dignity, obvious intelligence and no little pride. He approached the undertaking of the project with drive and determination. I formed the clear impression that in so doing and characteristically he set high standards for himself and expected the same of those who came to be engaged in the project. An awareness of Mr De Moya's character and background assists in understanding the origins of the present litigation and the claims that have come to be made.

3 Mr De Moya was born in Santiago, Cuba in January 1932. He was educated in the United States, graduating from the Massachusetts Institute of Technology in 1953 with a Bachelor's Degree in Civil Engineering. After graduation Mr De Moya returned to Cuba, where he practised as an engineer in a private company between 1953 and 1960. In 1960, shortly after Fidel Castro came to power, Mr De Moya quit Cuba suddenly with his wife and their then six children. The family arrived in Miami, Florida in the United States of America with neither money nor other assets. Initially, Mr De Moya was forced to engage in menial employment just to support his family. Gradually, he secured employment in the field of engineering. Over the course of the ensuing decades Mr De Moya came eventually to hold the position of chairman of a very successful private civil engineering company called the De Moya Group, which to this day engages in the construction of roads and bridges, principally in the State of Florida. Mr De Moya's now seven children are the shareholders in the De Moya Group.

4 By 1997, Mr De Moya was semi-retired from his involvement with the operations of the De Moya Group. He came to Australia on holidays. Our country soon came greatly to attract him. When in Adelaide in the course of his holiday he was provided with a Department of Primary Industries brochure concerning the growing of olives for olive oil. Even though he was without prior experience in the growing and processing of olives, the challenge of doing this intrigued and appealed to him. He undertook further research and this, in turn, led to his embarking on a tour of Europe, particularly its Mediterranean regions, where he made further investigations of the olive oil industry. This further research and tour confirmed his interest in the growing of olives and in the associated production of olive oil. Even at this stage he envisaged the exporting of the olive oil to the United States.

5 In November 1997, Mr De Moya caused the Applicant, Olivaylle Pty Ltd (Olivaylle), to be incorporated in South Australia. In its name, Olivaylle recalls a purpose it has come to fulfil, "valley of olives". Following Olivaylle's incorporation, a unit trust known as the Olivaylle Unit Trust was settled of which Olivaylle became and remains the trustee. All of the units of the trust are held by the Atalaya Corporation, a company incorporated in the Cook Islands, which is controlled by the members of the De Moya family. Mr De Moya has been the managing director of Olivaylle ever since its incorporation. On the evidence, there can be no doubt that he exercises a high degree of control over it in its corporate trustee

capacity. There is no suggestion on the evidence that Olivaylle has acted other than in that capacity.

6 These preliminaries completed, Mr De Moya embarked upon a search for a suitable site for the olive grove. He came to select a property of some 800 hectares at Telopea Downs near Wallowa. His investigations disclosed that the region in which it was located had a “Mediterranean” climate – long, wet winters and dry, hot summers. Further, the property’s soil was sandy, offering, as he saw it, good drainage and preventing the threat presented to the viability of olive trees if their roots are kept damp (“wet feet”). Olivaylle acquired the property on 8 April 1998.

7 When acquired by Olivaylle the property was in a very raw state. There was mallee tree scrub to be cleared, service roads to be planned and built, related road base to be quarried, sheds for plant, equipment and other uses to be constructed, housing for employees permanent and seasonal to be established, water licences to be acquired and a bore to be sunk, olive groves and associated irrigation to be designed and laid out and a planting programme to be devised and embarked upon. All of this took time and money.

8 To date, Olivaylle has expended in excess of \$A12 million in the acquisition and development of the property as an olive grove and in the acquisition and commissioning of an on-site olive oil processing line and bottling plant. Funding for these acquisitions and activities has come by way of loans from the Atalaya Corporation to Olivaylle.

9 Over the course of 1999 and 2000 the first stage of the olive grove was planted. A variety of olive tree types was selected for planting – Nevadillo Blanco, Corrgiola and Paragon (Frantoio). Almost 80,000 olive trees were planted.

10 After planting olive trees take about 3 years to start to bear fruit. They do not reach full fruit bearing maturity until about 7 or even 10 years after planting. This imposed both a necessary lag on the project but also, as I find, as the prospective fruit bearing maturity date approached, lent a degree of urgency on the part of Olivaylle and Mr De Moya in particular to the satisfactory commissioning of a plant for the processing of the olives.

11 One task which Mr De Moya undertook while waiting for the first stage of the grove to reach maturity was the investigation of the type of plant and equipment used internationally by olive oil processors and manufacturers. Once again, his inquiries were principally directed to processors in Mediterranean countries. That direction of inquiry was not co-incidental. Olives have been grown and processed for oil in such countries for centuries. He came to learn of the following manufacturers of equipment for the processing of olives – Hiller, Palacin, Westfalia, Pieralisi, Alfa Laval and the Respondent, a company now known as Flottweg AG (Flottweg).

12 Flottweg is a long established, successful German company. It is headquartered in Vilsbiburg, 60 km Northeast of Munich. Increasingly over the course of the last half century it has come to specialise in the design, development and manufacture of industrial separators – decanter centrifuges. Most of its production is for the export market. Its separators have a range of industrial applications including in the production of olive oil. Of the thousands of separators that Flottweg had produced, by 2003 it had produced about 600 for use in olive oil processing, especially for producers in various Mediterranean countries – Greece, Spain, Italy, Syria and Tunisia. On the evidence I am quite satisfied that there was then and remains considerable corporate knowledge within Flottweg of separation technology and its industrial applications, including in the processing of olive oil.

13 By the second half of 2003 Mr De Moya had drawn together the results of his investigations. He produced for Olivaylle a document entitled “New Olive Oil Plant Equipment Design Criteria” (the Design Criteria Document). Though it will be necessary later to consider the Design Criteria Document and its role in this matter in greater detail, on its face the document gives the impression of reflecting wide ranging research and bears the hallmarks of an author with formal qualifications and experience in engineering.

14 In late 2003 Olivaylle circulated the Design Criteria Document to various companies soliciting interest in the supply to it of a production line for the processing of its olives into olive oil. As a result, and via Flottweg’s Spanish agent, Palacin, the Design Criteria Document came to Flottweg’s attention in November 2003.

15 In the result, it was Flottweg with which Olivaylle came to enter into contractual relations. Negotiations and exchanges of correspondence directed to that end commenced in

December 2003 and continued throughout 2004. These negotiations were both extensive and intensive. They ranged across both the mix of equipment that would comprise the production line, the characteristics of that line, both as desired by Olivaylle and as Flottweg was prepared to offer, and related costs. They were undoubtedly conducted at arm's length on behalf of two companies controlled by persons well experienced in business.

16 Fully to detail the ebb and flow of these negotiations, their form and participants, as charted in the evidence, written and oral, would add unnecessary length to these reasons for judgement, unnecessary because it could not, as I find, alter their culmination or assist in the construction of the contract that was that culmination. It will though be necessary to refer in the course of this judgement to some aspects of the anterior negotiations and correspondence in light of particular submissions made by the parties and for the insight they offer in relation to the attitudes and behaviours of particular key representatives of the parties.

17 It is admitted on the pleadings that these negotiations culminated in Olivaylle's entry into a written contract with Flottweg on 8 February 2005 (the Contract). In form, on 8 February 2005, Flottweg's Export Manager in Germany, Ms Barbara Hofer, sent by email from Germany to Dr Stuart Paterson, Flottweg's Australian representative, based in Roseville, New South Wales, a detailed quotation. This quotation was, in turn, sent by Dr Paterson to Olivaylle under cover of an email of 10 February 2005 addressed to Mr De Moya. There is no doubt that Olivaylle agreed with the terms specified in this quotation or that it was in response to this that Olivaylle came to make its further payments to Flottweg. As it has not been submitted by either party that anything of significance turns on the giving of a more precise description to the date of agreement between the parties and of character of the document dated 8 February 2005, I propose to act on the basis of the admission made by the parties on the pleadings, even though strictly, the date of communication of the quotation to Olivaylle was 10 February, not 8 February, 2005. An analysis of the application of the law with respect to the formation of the Contract and a lengthy excerpt from it appear later in this judgement.

18 In the course of Olivaylle's closing oral submissions, it was alternatively submitted that the contract for the supply of the production line was made in October 2004 and confirmed in February 2005.

19 It is true that, in 2004, Olivaylle had paid the sum of €137,864.10, which was described as a deposit, to Flottweg in response to an earlier version (Revision E) of the quotation and a related Flottweg invoice of 3 August 2004.

20 An exchange of emails which occurred thereafter in October 2004 is revealing for its highlighting the origins of what, I am quite certain on the whole of the evidence, including my observation of him in oral evidence, was a distrust that Mr De Moya came to develop in respect of assurances given to him by those acting for or on behalf of Flottweg. The project was, as Dr Paterson counsels in this exchange, a complicated one. It was, for this reason alone, fraught with a need for the making of adjustments, based on on-site observation, to the production line after its delivery. The Contract came to anticipate as much in its allowance for on-site modification. In the result and in ways upon which I elaborate below, difficulties were experienced with the project. Some, as I find, truly may be attributed to Flottweg, others may not. In a climate where there is a disposition to distrust, all can seem jaundiced to a jaundiced eye. What is also revealed by the exchange is the importance placed by the parties' respective key representative, Mr De Moya for Olivaylle and Dr Paterson for Flottweg, on the terms of the prevailing written quotation and, ultimately, the Contract.

21 The exchange of emails was as follows (with sender or addressee names substituted for email addresses and addition of explanatory identifying detail where necessary):

From: Dr Paterson
Sent: Friday 8 October 2004, 11:00AM
To: Mr Lorenz, Mr Nieuwkerk
Subject: FW: Olivaylle quote version F

Dirk, Martin

I think it is time for Martin to make it clear to Jorge that we have not tried to be tricky. We have put everything in writing according to our understanding.

Stuart

From: Mr De Moya
Sent: Friday 8 October 2004, 6:59AM
To: Stuart Paterson
Subject: Re: Olivaylle quote version F

Hello Stuart

I read you loud and clear.

Neither you nor Dirk informed me of your unilateral change of our discussed and agreed oxygen content and warranty. That you passed them by me unannounced goes on your record. I note that you have waited until I initialized you latest quote version F to inform me of your intentions. Another point for you.

If you want to play by the letter and not the spirit of the agreement, so be it. Two can play the game.

Cheers
Jorge

[Emphasis added]

From: Dr Paterson
To: Mr De Moya; Flottweg
Cc: Mr Nieuwkerk; Mr Lorenz; Christiane Yeardley
Sent: Thursday 7 October 2004 4:26PM
Subject: RE: Olivaylle quote version F

Jorge

I have had a look in the files and make my comments below regarding the points we discussed this morning:

1 Oxygen

In quote 040080 revision E (3-8-04), we had inserted (for the first time) the level of oxygen of under 1 – 2 % as a process warranty. This was on the basis of having enough nitrogen of sufficient purity available. The reason why we wrote it as under 1 – 2 % was because we had no idea if getting under 1% would be feasible even though Dirk thought it might be.

On 10-8-04, we invoiced Olivaylle for a 20% deposit according to quote version E and this deposit was paid. On this basis, we naturally assumed that the warranty as written in version E, was accepted.

I will now ask Martin Lorenz if he is prepared to increase the warranty to less than 1% oxygen in the gas space of all sparged vessels and ask him too officially inform you.

2 Warranty

Warranty of 16 months from commissioning or 2 full olive seasons or 24 months from date of readiness for dispatch – whichever is sooner was written in quote version E – upon which you paid a deposit. This same warranty was written in quote version D (28-7-04).

I remember there was some discussion of 120 days and 3 seasons but the above warranty is what we believed was the agreed warranty at the end of the meeting

where warranty was discussed. I will ask Martin if he now accepts 120 days operation (ie: 3 seasons).

3 Other

As you have now today (7-9-04) signed and returned quote version F (dated 1-Oct-04), we will supply all items as mentioned in this document. We will do our utmost to ship the whole project by 28 Feb to meet the olive season and also get duty free import (single shipment). Martin will have to now tell us if he can meet this deadline. Where you have written in changes to the warranty period, this will not be accepted by Flottweg unless Martin formally accepts it in writing. Same comment for oxygen levels. The word "station" on page one of the quote version F is Ok as it was just a typo.

As discussed, this is a very complicated project and there have been and will be many more discussions. However, none of these discussions can take precedence over written communications as we might from time to time have different understandings of what has been discussed.

Regards

Stuart Paterson

From: Christiane Yeardeley [an Olivaylle employee]
To: Dr Paterson
Sent: Thursday 7 October 2004 9:08AM
Subject: Fw: Olivaylle quote version F

Hello Stuart,

We have just discussed these items on the phone.

The items on which we agreed are so marked on the initialized version of quote "F" which I am faxing to you now. The ones where you wanted my thoughts in writing to send to Germany follow:

Acceptable oxygen content in the inertized portion of the processing line. We discussed and agreed to less than 1% (One Percent), not 1-2% (One to Two Percent) We had also agreed to 120 working days warranty for the equipment. Since our olive harvest/processing must take no longer than 35 days, the warranty of 120 working days is therefore in effect three olive seasons.

Cheers

Jorge

From: Stuart Paterson
To: Mr De Moya
Cc: Mr Lorenz; Mr Nieuwkerk
Sent: Friday 1 October 2004 12:56PM

Subject: Olivaylle quote version F

Jorge

As discussed today (1-10-04), see attached the quote version F. This incorporates all variations as detailed in my variations letter dated 29-9-04.

Please print it and if OK, initial each page and fax back to our Sydney Office (02-9410-2255).

Please take action soonest so we have no delays.

Thanks

Stuart Paterson

Flottweg

[sic]

22 Mr De Moya made handwritten alterations to Flottweg's Revision F of 1 October 2004 which were sent back to Flottweg. After yet further discussions between the parties' representatives, Mr De Moya for Olivaylle and, on that occasion, Mr Dirk Nieuwkerk (of whom more later) for Flottweg, which occurred on 21 October 2004, Flottweg came to send its quotation dated 8 February 2005, which took up such of Mr De Moya's alterations as it was prepared to adopt. That Flottweg would respond in writing in the terms set out in the 8 February 2005 quotation seems to have been anticipated by the October 2004 discussions. The sum of €137,864.10 was not refunded in the period between October 2004 and February 2005. Rather, it seems to have been consensually regarded as able to be applied as against the price specified in the quotation of 8 February 2005.

23 I do not characterise that quotation as a confirmation of an agreement made in October 2004. The effect of what occurred is that, whatever acceptance of an earlier offer made by Flottweg may be evidenced by the payment of a deposit, the parties agreed wholly to replace that agreement by an agreement set out in the terms of the quotation of 8 February 2005. In the body of that document the word "offer" is used. Olivaylle did not return to Flottweg a signed "acceptance". One way of characterising events is that this document was in form and substance an offer with Olivaylle's acceptance of it to be inferred from its acquiescence in Flottweg's retention of the amount specified in this document as already paid by way of deposit (recorded as €125,331 plus GST "already paid"), its payment of the balance of the purchase price, its receipt and acceptance of the delivery and installation of the

machinery referred to in the quotation and in its commissioning of the requisite owner's works to allow the installation of the production line. Another and, in my opinion, the preferable way of characterising events is that, after Mr De Moya's handwritten alterations and the subsequent discussions a position was reached which in substance was that of a counteroffer by Olivaylle but one which was expected to be accepted by Flottweg in light of those discussions. Having regard to the assiduousness with which Flottweg had documented the evolution of its original quotation and to Me De Moya's by then interest in "the letter of the agreement", it is to be inferred that the parties expected that Flottweg would evidence its acceptance in writing. Thus, though the quotation of 8 February 2005 uses the word "offer" at its conclusion, it is in substance an acceptance of a counteroffer, reciting precisely the terms in which, after discussion, that counteroffer had come to be formulated. That is consistent with the titling of the quotation of 8 February 2005 as an "order confirmation", with the reference in its opening paragraph to a position agreed between Mr De Moya and "Dirk" [Nieuwkerk] on 21 October 2004 and with the absence of any later written acceptance of this quotation by or on behalf of Olivaylle. There was no need for that because the document recited exactly what Olivaylle was expecting.

24 For these reasons, I reject the alternative submission made on behalf of Olivaylle. Instead, the case is one where Olivaylle should be held to the allegation it made on the pleadings, which Flottweg admitted.

25 Flottweg's acceptance was communicated by email to Olivaylle at its olive grove in Victoria. Experience suggests that email is often, but not invariably, a form of near instantaneous communication. The parties seemed content to assume that the place of contract was either Victoria or New South Wales, content because the common law of Australia was the same in either place and so, too, was the only statute law considered material. There was no suggestion in submissions that the place of contract was, for example, Germany. As a result, the ramifications of the adoption by the parties of email for their written pre-contractual communications, particularly the acceptance, were not explored. As it happens, the subject of formation of contracts by email has been explored in depth in an article by a local academic, Christensen S, "Formation of Contracts by Email Is it Just the Same as the Post?" (2001) 1(1) *Queensland University of Technology Law and Justice Journal* 22. Ms Christensen details there arguments for and against the assimilation of email

communications with “the postal rule” or with what one might term “the instantaneous communication rule” and also the local adoption of international convention which touches on the subject. Having regard to the position taken by the parties in this case, it is not necessary to give detailed consideration to the point. It is enough to observe that I consider that there are analogies to be drawn with the way the law developed in relation to telex communications in an earlier era where what I have termed “the instantaneous communication rule” came to be adopted, perhaps at the expense of scientific precision but not so in relation to common commercial understanding. Thus, by analogy with cases concerning the position with what were, or were treated as, other forms of instantaneous communication, I consider that the contract was made where the acceptance was received, ie in Victoria: *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327; *W A Dewhurst & Co Pty Ltd v Cawrse* [1960] VR 278; *Express Airways v Port Augusta Air Services* [1980] Qd R 543; *Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd* (1988) 5 BPR 11,106.

26 Identifying Victoria as the place of contract accords with one of the alternatives advanced on behalf of Olivaylle. The other was New South Wales. For the reasons given, the former of these alternatives is, in the circumstances, the correct place of contract.

27 The Contract was one for the sale of goods between a party with its place of business in Victoria, Australia and a party with its place of business in Germany. The *Sale of Goods (Vienna Convention) Act 1987* (Vic) (Sale of Goods (Vienna Convention) Act) adopts as part of the law of Victoria the United Nations Convention on Contracts for the International Sale of Goods: see s 5. That convention was made in Vienna in 1980; hence the reference to it as “the Vienna Convention”. The terms of that convention form a schedule to that Act. Article 6 of the Vienna Convention provides, materially, that “The parties may exclude the application of this Convention”.

28 The Contract provides, “Australian law applicable under exclusion of UNCITRAL law.” The Sale of Goods (Vienna Convention) Act, being a law of a State is an “Australian law”. The contractual reference to “UNCITRAL” is reference to the United Nations Commission on International Trade Law, the acronym for which is “UNCITRAL”. In my opinion, for reasons which follow, “UNCITRAL law” is a reference to the Vienna Convention. That the Vienna Convention is an adopted part of the relevant Australian law

does not mean that the contractual statement “Australian law applicable under exclusion of UNCITRAL law” is to be construed as thereby rendering applicable a convention that the parties to it sought expressly to exclude. Rather, the Contract evidences an intention to exclude the Vienna Convention altogether from application. So much is permitted by “Australian law”; relevantly, that convention as applied in Victoria by the Sale of Goods (Vienna Convention) Act.

29 A conclusion that the Vienna Convention as a whole is excluded accords with the construction of the Contract for which Flottweg contended. Olivaylle took a different view, submitting that the “exclusion of UNCITRAL law” should be construed as referring only to “an exclusion of United Nations Commission for International Trade Law (UNCITRAL) so far as it may affect issues of title”. The inspiration for this submission was that the reference in the Contract to the exclusion immediately follows a sentence which reads: “Flottweg will retain ownership and title to the delivered goods and equipment until Flottweg has received payment of all amounts owed by the buyer under the contract.” Each of these sentences appear at the conclusion of the Contract under the heading “Other Dispositions”, as the excerpt reproduced below evidences.

30 UNCITRAL is an agency of the United Nations established by the General Assembly in 1966. It has as its mandate from the General Assembly the progressive harmonisation and unification of the law of international trade. It has fostered the development of a number of international conventions and model laws which range in subject from the international sale of goods through to cross-border insolvency and, as Ms Christensen’s article (*supra*) reminds, electronic commerce. When this fact and that the Vienna Convention “governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such contract; in particular [the Vienna Convention] is not concerned with the effect that the contract may have on the property to the goods sold” (*Roder Zelt-Und Hallenkonstruktionen GMBH v Rosedown Park Pty Ltd & Eustace* (1995) 57 FCR 216 at 222) are taken into account, it is an unlikely construction of the Contract that the sentence referring to “UNCITRAL law” is to take its meaning from the sentence which precedes it. Given the nature of the Contract, the fact that a party to it, Flottweg, was and was known by Olivaylle to be a company which sold its wares internationally and the reference to the exclusion of “UNCITRAL law” appearing at its conclusion under the heading “Other

dispositions”, the more likely construction of “UNCITRAL law” is that it was intended to be a reference to the particular UNCITRAL convention that governed the international sale of goods, ie the Vienna Convention. “Other dispositions” looks to me to be a heading which describes miscellaneous, unrelated terms of general application to the goods sold. The positioning of the sentence at the end of the Contract further supports a construction that it was meant to govern all of its terms.

31 The Contract provided for the supply by Flottweg to Olivaylle of an olive oil production line more particularly described as a “Continuous Flottweg Special 5 TPH in sealed N² Version Olive Oil Line”. “TPH” refers to tonnes per hour. N² is a reference to nitrogen. In this production line nitrogen gas was used as a means of displacing oxygen from the line. It was thought by Mr De Moya that this would yield qualitative benefits in the production of olive oil.

32 In its initial form, the production line was delivered to Olivaylle’s olive grove at Telopea Downs in April 2005.

33 In all, Flottweg received a total of €678,606 in respect of its supply of the production line to Olivaylle.

34 Olivaylle contends that the production line was defective in that it failed to comply with what it alleges were the following contractual specifications:

- (a) that the line would process 5 tonnes of olives per hour whilst recovering a minimum of 85% of the oil contained in the olives (respectively, “the processing speed term” and the “oil recovery term”);
- (b) that the line would be nitrogen flushed to displace oxygen; and
- (c) that the oxygen levels in the gas phase of all equipment comprising the line starting at the malaxeurs would be under 1% v/v ((b) and (c) collectively being “the oxygen levels term”).

35 Flottweg does not accept that this formulation of the contractual specifications is correct and, in any event, denies that the line was defective in the ways alleged.

36 Further or alternatively, Olivaylle contends that, during the period of pre-contractual negotiations and in order to induce it to enter into the Contract, make payments thereunder and procure a bank guarantee for the payment of monies under the Contract, Flottweg made representations to it in like terms to those which it alleges were contractual specifications. These representations are said to constitute misleading or deceptive conduct contrary to s 52 of the TPA. To the extent that the alleged representations were as to future matters, Olivaylle relies upon s 51A of the TPA.

37 Flottweg denies making the alleged representations and alternatively alleges that it had reasonable grounds for such as may have been made.

38 Olivaylle also alleges that the Contract had the following further features:

- (a) that, in the event that Flottweg failed to make repairs of or modifications to any defective equipment, Olivaylle was entitled to withdraw from the Contract:
 - (i) upon the expiry of a reasonable period of grace;
 - (ii) specified in writing by Olivaylle; and
 - (iii) stating its intention to exercise its right of withdrawal in the event that Flottweg failed to carry out its obligations;
- (b) provision for a bank guarantee with a first class bank (in the result, the Wachovia Bank) to be presented to Flottweg 30 days before the delivery of the production line and for Flottweg to draw upon that guarantee upon the attainment of certain contractually specified milestones.

39 Flottweg does not accept that Olivaylle has correctly summarised the provision in the contract for its withdrawal from it. It does accept that the Contract made provision for a bank guarantee in respect of the payment of the purchase price for the production line.

40 It is Olivaylle's case that, in order to give business efficacy to the Contract, it was and is to be implied into it that, in the event that Flottweg failed to carry out its obligations and Olivaylle exercised its right to withdraw from the Contract:

- (a) Olivaylle was entitled to a refund of any monies paid to Flottweg under the Contract;
- (b) Olivaylle was not obliged to make, and Flottweg had no entitlement to receive, any further payments otherwise due under the Contract (whether by conversion of the bank guarantee, or otherwise); and
- (c) Flottweg would retake possession of the production line.

41 For its part, Flottweg denies that any such terms are to be implied into the Contract.

42 Olivaylle gave what purported to be a notice to remedy defects to Flottweg by a letter dated 21 February 2006. It required the remedying of the alleged defects in the production line by 30 June 2006, failing which Olivaylle signified that it would withdraw from the Contract, seek the return of monies paid and withhold payment of €132,412, the final payment due under the Contract in respect of the production line.

43 When 30 June 2006 passed without, as Olivaylle saw matters, the rectification of the alleged defects in the line, it purported to "withdraw" from the Contract and demanded that the production line be removed and the purchase price refunded (letter from Wallmans, solicitors for Olivaylle, received by Flottweg on or about 25 July 2006). Its ability to take this course and any obligation to meet these demands was made controversial by Flottweg. In November 2006, these proceedings were commenced by Olivaylle.

44 Originally, it was estimated that the trial would take two weeks. In the result, it was not until the seventh week of hearing that evidence and submissions concluded. Even viewed in prospect I doubt, with respect, whether the estimate of length of trial given to the then docket judge by the parties had a reasonable foundation. The impact of that underestimation was not only to necessitate an episodic disposition of the hearing upon the expiry of the originally allocated hearing time but also to erode time which would otherwise have been available for earlier preparation of a reserved judgement in this matter. The efficient and equitable allocation of finite judicial resources amongst litigants generally is dependent upon the accuracy of such estimates.

45 I now proceed to consider the issues raised on the pleadings.

The Contract

46 Having regard to the issues on the pleadings, and because of the helpfully detailed description offered of the items sold, it is desirable to set out a somewhat lengthy excerpt from the Contract:

1. **Continuous FLOTTWEG special 5 TPH in sealed N2 version OLIVE OIL LINE**

Note that this line is N2 flushed starting at the malaxeurs, it has one 5-6 TPH de-pitter and a 5-6 TPH mill, and the leaf blower/olive washer is one single 10-15 TPH unit (Palacin) which also has a continuous olive belt weigher as part of it (up to 10 tonnes/hr weighing).

We have also included for the larger decanter (Z53 for 5 TPH olives) in gas sealed version. Please note that only one AC1500 disc centrifuges will be needed for 5 TPH olives (approx 1200 LPH oil).

It should be noted that if olives are de-pitted the capacity of the decanter will fall by at least 50%. In the case where 50% of the olives is pit, the total feed to the plant will still be 5 TPH olives even though the decanter will feed at only 2.5 TPH of mash.

If olives are not de-pitted and Flottweg instructions are followed for each unit operation, Flottweg guarantees that the min oil yield will be 85% of the oil in the olives. If olives are de-pitted, this min % oil yield can not be given and it is expected to drop.

Continuous special Line Flottweg-Palacin Type for 5000 KGS/h Olives

with the following machinery description:

1 off Main system for leaf blowing, stone removal, cleaning and washing and weighing of olives – Palacin type for 10-15 tonnes/hr olives

Note: fruit to be supplied to the Flottweg washer/blower by clients own belt conveyor. Please note that this conveyor must be adjustable in throughput, either by manual gear drive or by frequency converter as it will set the feed rate to the entire plant.

Fruit separation by difference of density. Automatic system to select the washing or not washing the olive. Made all parts in contact with the olive in stainless steel INOX-304.

...

This is a dual purpose machine which de-leafs and washes it also removes sticks.

- Special weigh belt conveyor system for the continuous weighing of olives. This system has the possibility to weigh up to 10 TPH olives with an accuracy of +/- 1-2%. Including computer, printer and weighing software. This belt weigh conveyor will be suitable for olives. The weigh belt conveyor also has software/hardware and a frequency converter to allow it to speed up or slow down depending on the amount of olives being fed to the plant and thus to increase accuracy of weighing at lower feed rates.

With belt conveyor to transport the olives from the weighbelt to the hammer mill/de-pitter station with a light tubular stainless steel chassis. Installed power 1.5 HP, with motor AEG, 1400 rpm (with freq converter), 400 V, 50 Hz and gearbox with a relation to 93.3 rpm, length 7 m, capacity about 6000-8000 kg/h max.

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| Price FOB | EUR | 29.000, -- |
| Price of special additions to weigh belt conveyor, FOB | EUR | 4,000, -- |
| Additional 5 meter long conveyor to receive olives from the washing machine and transport them through the wall to the weigh belt conveyor. | | |
| Extra price as agreed | EUR | 5.650,-- |
| SUB TOTAL | EUR | 38,650,-- |

1 off Multipurpose hammer mill and de-pitter feeding system

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| For olive flow splitter | EUR | 2.500,-- |
| For walkway with barrier fence and ladder – all in painted mild steel | EUR | 2.500,-- |
| For olive slide | EUR | 500,-- |
| SUB TOTAL | EUR | 5,500,-- |

1 off Hammer mill JP 40 R

Main drive motor 37 kW, 400 V, 50 Hz
Built entirely in stainless steel inox, with little chute and injector. Motor of 1.5kW (2 HP) with reduction gear. With rotating sieve, scraper, support and injector of 1.1kW (1.5 HP).

The unit includes a security permanent magnet for retention of metallic parts.

The mill is built on top of the paste distribution screw.

Capacity of mill is 6 TPH

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| Price FOB | EUR | 10.000,-- |
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| Cost of a longer screw conveyor (3.5 meters longer) so hammer mill can be installed in a different room (rather than above malaxeur # 1), FOB | EUR | 2.450,-- |
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| Cost of a mild steel frame to install the hammer mill over the long screw, FOB | EUR | 1.500,-- |
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| SUB TOTAL | EUR | 13.950,-- |
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1 off 5-6 TPH De-pitter station

Stainless steel de-pitter capable of handling up to 5-6 TPH olives. The mash from the de-pitter falls into a hopper and is pumped by a mono type pump (2-5 TPH capacity) to the distribution screw above the malaxeurs. Pits ejected clients bin.

The de-pitter has a permanent magnet to protect from mild steel getting in.

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| Price for de-pitter, FOB | EUR | 39.000,-- |
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| Price for the hopper with level control and mono type pump, FOB | EUR | 6.500,-- |
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| Price for the permanent magnet, FOB | EUR | 600,-- |
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Two sets of spare paddles/blades for the de-pitter will be included in the emergency spare parts.

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| One piece of different hole size sieve to be supplied for | EUR | 2.990,-- |
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| SUB TOTAL | EUR | 49.090,-- |
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1 off Greek style, big batch malaxuers, in N2 flush construction – automated – of total volume of 10 m3

4 side by side heatable malaxeurs in stainless steel of volume 2500 litres each on a steel frame(s).

The malaxing system is complete with feed distribution screw, product out screw, water flow meter and auto butter fly valves. Each malaxeur has its own drive system and is covered for N2 flushing.

Each malaxeur has its own temperature probs on heating jacket water (in and out) and feed in and out and level probes (high, low level).

This batch system can be run automatically based on level control and sequencing or manually via the control panel.

Each malaxeur has solenoid valves and flow meter for gas purge in and two way (to oxygen measurement or vent) solenoid valve for N2 out.

Each malaxeur will have its own stainless steel lid, view window and CIP system (CIP liquid make up and supply not included).

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| Price FOB | EUR | 137.600,-- |
| SUB TOTAL | EUR | 137.600,-- |

1 off Eccentric screw pump (mono type)

For feeding the decanter. Motor power of 5,5 KW. It includes connection hoses and accessories for feeding the decanter. This pump easily pump 5 TPH of olive mash or up to 10 m³/water for CIP. Two temp probes in the pump discharge.

Variable feed rate through freq converter.

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| Price FOB | EUR | 5.300,-- |
| SUB TOTAL | EUR | 5.300,-- |

1 off Flottweg 2 phase olive oil decanter Z53-4/454 SIMP-DRIVE® in sealed N2 version.

The Z53-4/454 SP4, 21 decanter has a 530 mm inner bowl diameter and 2120 mm bowl length. The decanter can be run with up to 3100 G force and is really big enough for 5 TPH of olives. The cone angle of the decanter is 15 degrees so that there will be no problems in conveying de-pitted olive paste out of the decanter (much more difficult than milled whole olives). The bowl and the scroll are made from spun cast stainless steel (min 316Ti grade) and the **whole decanter is made in Germany by Flottweg.**

The decanter itself has a weight of some 4350 kg.

The decanter has a main motor of 30 kW and a scroll drive motor of 18.5 kW. The SIMP gear box and controller allows the differential speed to be automatically adjusted (on torque regulation) or manually set at between 7 and 20 RPM.

The decanter uses two Danfoss frequency converters (30 and 18.5 kW) for the bowl and scroll motor drive. These are included.

The scroll is hard faced with frame spayed tungsten carbide.

The decanter is mounted on a frame and a hopper with mono pump is included to pump (5 TPH) away the wet solids outlet. The pump can discharge up to 12 bar pressures is and a three stage pump.

The decanter has a N2 flow meter with flow regulation and solenoid valves to allow a controlled amount of N2 to be bled into it.

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| Price FOB | EUR | 184.000,-- |
| SUB TOTAL | EUR | 184.000,-- |

1 off Vibrating screen for liquids in N2 flushed version

Built in stainless steel AISI 304. For separation of the solids from the outlet of the FLOTTWEG decanter. Powered by one motor vibrator 200 with 0.2kW (0.25 HP). Eccentric screw pump for conveying the olive oil to the separator is included and with capacity of max. 2500 l/h.

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| Price FOB | EUR | 16.300,-- |
| SUBTOTAL | EUR | 16.300,-- |

1 off Tank for feeding of the separator in N2 flushed version

Built in stainless steel AISI 304 and of volume of 100 litres. Designed to obtain a stable feeding to the separator. It includes static decantation with purge valve as well as the support structure above the separator.

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| Price FOB | EUR | 4.000,-- |
| SUB TOTAL | EUR | 4.000,-- |

1 off Separator Flottweg AC 1500 in N2 flushed version

Max capacity on olive oil of 1800 LPH so big enough for 5 TPH olives. For the final purifying of the olive oil. Closed N2 flushed cover for feed with security device and rotating bowl in stainless steel. Powered by a soft start motor of 11 kW (15 HP). Automatic bowl cleaning. Capability of automatic discharges of the solids retained in the bowl. With piping in stainless steel and hose suitable for food type "aceiflex". Metallic support for the whole group. Including deposit for evacuation of black water. Set of special tools. The water feed to the centrifuge has a temperature gauge and also a temperature probe/transducer (signal to electrical panel).

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| Price FOB | EUR | 49.400,-- |
| SUB TOTAL | EUR | 49.400,-- |

1 off Tank for the purified olive oil from the separator in N2 flushed version

Built in stainless steel AISI-304, for the reception of the olive oil from the outlet of the separator. Designed with divided decantation areas as well as purge valve and cleaning outlets. Level probe for automatic controlling an eccentric screw pump (also included) for conveying the oil to the stock. Motor power of 1.1 kW (1.5 HP) salmonic type to avoid emulsions). Volume of tank is approx 100 litres.

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| Price FOB | EUR | 4.000,-- |
| SUB TOTAL | EUR | 4.000,-- |

1 off Oxygen measuring system

The oxygen measuring system will be used too measure the

oxygen content of any of the gas output lines of N2 spared plant or tanks. Data from the oxygen measurement unit to the Flottweg electrical panel.

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| Cost of this system including inlet manifold for Flottweg supplied equipment, FOB | EUR | 3.500,-- |
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| SUB TOTAL | EUR | 3.500,-- |
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1 off Control panel – fully auto version – made at Flottweg works, Germany

Stainless steel electrical panel (s) for auto or manual control (subject to safety interlocks) of all items mentioned in this quote using an Alan Bradley PLC with colour touch screen. The panel also contains:

- detailed software written to control the whole process via the PLC and software for the touch screen.
- solenoid valves for all air actuated valves
- all frequency converters for the various motor drives (belt conveyor speeds, decanter motors, pump motors, etc)
- auto sequential systems of motor start and valve positions
- digital indicators for temperature, amperage, voltage and counter for R.P.M.
- main switches and differential relay
- optical and audible security systems and synoptic of operating and control.
- Analogue modem for remote communication

Capability for automatic or manual operation of the whole process (subject to safety interlocks).

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| ... | | |
| Price FOB | EUR | 55.200,-- |
| SUB TOTAL | EUR | 55.200,-- |

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Engineering documentation

Preparation of engineering documentation of Flottweg supplied goods such as detailed P&ID, layout drawings, cable list (client to supply cables), utility list, etc, is included as part of Flottwegs standard scope of supply for such projects. No additional cost.

Installation, piping and connection

To be done by buyer according to Flottweg supervisors instructions. It is estimated that client will need to supply two fitters with mobile workstations for two weeks each and an electrician will also be needed for min of two weeks.

Emergency spare parts

One set of emergency spare parts for one years operation for all items mentioned above including seals, bearings, V belts, lamps, 2 units of hammer for hammer mill, 2 units of sieves for hammer mill and de-plitter, 2 units of de-plitter blade, fuses, etc. It is not guaranteed that this set will cover all items that could wear out in 1 years operation.

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| Price FOB | EUR | 12.800,-- |
| SUB TOTAL | EUR | 12.800,-- |

Installation, commissioning, start-up and training supervision (three Flottweg technicians for two weeks each including airfares, hotels, meals and local transport).

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| Price FOB | EUR | 22.500,-- |
| SUB TOTAL | EUR | 22.500,-- |

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| SUBTOTAL, FOB European port | EUR | 601.790,-- |
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| Freight (3 containers 40'') & insurance to South Australian or Melbourne port | EUR | 12.500,-- |
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Duty is zero

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| Local Australian delivery and unloading | EUR | 6.000,-- |
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| Total price DDP (delivered, duty paid but without GST) including installation and start up assistance | <u>EUR</u> | <u>620.290,--</u> |
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Plus GST Bordertown, SA including installation and start up assistance

Delivery time of all options quoted above approx. 6-7 months ex works Germany unless otherwise individually specified after clarification of technical and commercial details, receipt of written order and payment of deposit. Please add 2 months to the ex works times to get realistic dates for delivery to site.

...

Prices

Prices are FOB Germany – unless otherwise specifically mentioned. GST is not included for in any prices.

Exclusions

- any electrical cables other than those within supplied control panels
- installation of electrical cables and conduits between Flottweg supplied electrical panels and electrical items on the process line
- supply and installation of air lines (plastic or steel)
- welding, cutting and fitting of any client or Flottweg supplied pipes and fittings
- any concrete, civil or building works
- any venting lines or ventilation work in the building
- supply of any services (air, water, power, nitrogen, raw materials, CIP, etc)
- provision of hot water for malaxeurs
- supply of olives
- construction of any frames not supplied by Flottweg
- unloading at site
- removal of rubbish and packing materials from site
- obtaining of any certificates or inspectors acceptance that use of N2 purge gas meets Australia OH&S regulations
- any goods or services unless specifically mentioned in the offer

Note; Flottweg will supply all equipment according to European health and safety rules (excepting N2 purge). Any additional costs to modify equipment to meet Australian Health and Safety rules will be to clients account. This will largely relate to the venting of the plant atmosphere and measurement of oxygen level in the plant air for human safety.

Reservations

Flottweg reserves the right to carry out N2 gas purging modifications to all equipment (with exception of the decanter) in Australia rather than Europe if necessary. Final delivery time DDP (FOB plus 2 months) will not be effected.

Flottweg also states that even though equipment with N2 gas purging may in theory give better oil quality than using standard Flottweg olive oil equipment, this is not guaranteed.

Payment

| | |
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| 20% | deposit with order against invoice – 125.331,-- EUR plus GST already paid |
| 40% | with delivery to site (against bank guarantee) – 247.459,-- EUR plus GST |
| 20% | 6 months after delivery to site (against bank guarantee) – 123.750,-- EUR plus GST |
| 20% | 12 months after delivery to site plus 7% interest (against bank guarantee) – 123.750,-- EUR plus GST plus 8.662,-- EUR plus GST |

Instalments of total 80% to be covered by a bank guarantee in favour of Flottweg GmbH & Co. KGaA issued by a first class bank valid until 13 months after delivery to site. This bank guarantee has to be presented 30 days before delivery ex works Vilsbiburg, Germany.

Process guarantee: that all times of equipment supplied by Flottweg will function as per the descriptions in this quotation and oxygen levels in the gas phase of all equipment starting at the malaxeurs will be under 1% v/v – assuming client supplies sufficient Nitrogen gas of sufficient purity to make these levels of oxygen feasible.

Documentation

Included are 2 operating instructions and 2 maintenance manuals. The operating instructions will be forwarded after confirmation of order. The maintenance manuals will be supplied with the machine. Additional copies are charged as follows: EUR 200,-- for the first, EUR 75,-- each for further copies.

Warranty

Flottweg guarantees that the equipment will be in accordance with the contractual agreements in terms of its design and quality of materials.

Should the equipment not be in accordance with this warranty because it is defective, Flottweg shall be both entitled and obliged, at its option, to repair the defective parts free of charge, to supply replacement parts free of charge or to make good any services not carried out correctly.

This warranty shall not cover defects that did not originate in Flottweg's equipment or services such as the consequences of installation, start-up or repairing of the equipment not carried out by Flottweg's staff or authorised service personnel, improper operation as well as wear and tear. Warranty claims can only be asserted if at commissioning of the machine a workable service hour meter has been installed in the plant respectively in the switchboard.

Flottweg's warranty shall be limited to a period which is the lesser of one of the following:

- 16 months from the date of commissioning; or
- 2 full local olive oil seasons during which the equipment is operated or;
- 24 months from the date of readiness of the equipment for dispatch.

Should Flottweg fail to make repairs of or modifications to any defective equipment, the buyer shall be entitled to either carry out repairs or modifications themselves or have them carried out by a third party if Flottweg fails to meet its obligations within a reasonable period.

The buyer shall be entitled to exercise the right to a reduction in the purchase price or a withdrawal from the contract only on the expiry of a reasonable period of grace. The buyer shall be obliged to specify such period in writing, stating the right which they intend to exercise in the event of such period expiring without Flottweg's carrying out of their obligations.

Late delivery

Damages for delay shall be limited – and excluding any further liability for delay – to 0.5% of the price of the delivered equipment or service effected by the delay, per each week of delay, and to a total maximum of 5% of the total price in respect of all cases of delay. Damages for delay may not be claimed if the delay does not exceed 2

weeks.

Limitation of liability

Flottweg's liability is limited to the amount of damages that could reasonably be foreseen at the time of the conclusion of the contract. Flottweg shall in no case be liable for consequential or indirect damages, loss of profit and increased production costs. Flottweg's liability howsoever arising should be limited to 5% of the contract price including damages for delay.

Other dispositions

Flottweg will retain ownership and title to the delivered goods and equipment until Flottweg has received payment of all amounts owed by the buyer under the contract. Australia law applicable under exclusion of UNCITRAL law.

This offer is based on our "General Conditions for Supply of Flottweg Products".

The Design Criteria Document

47 It is desirable to introduce an assessment of the merits of the allegations made by Olivaylle as to the nature of the obligations imposed upon Flottweg by the Contract and whether it has breached those obligations by reference to what I have termed the Design Criteria Document. One reason for that is because, on any view, it was Flottweg's receipt of a copy of this document which initiated dealings between it and Olivaylle. Another is because Olivaylle submitted that it was of more than historic interest.

48 On behalf of Olivaylle it was submitted that this document "is clearly an important part of the background to the Contract". It is certainly part of that background; but in this case too much can be made of that fact. The role of such a document relative to the Contract is as described by Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tangen; Hansen-Tangen v Sanko Steamship Co (The Diana Prosperity)* [1976] 1 WLR 989 at 995-996, in a passage which commended itself to Mason J in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 350 and to Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462, [22]:

In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

49 By 8 February 2005 much had passed between Olivaylle and Flottweg. The Design Criteria Document is not overtly incorporated by reference in the Contract. Nor is it consistent with it. The Design Criteria Document envisages a two step extraction process

with malaxation (a technical term of which more later) initially occurring at temperatures of 20°C to 25°C (or lower) and then later and additionally at 25°C to 30°C (or lower) – see para 8.2 of the Design Criteria Document. In contrast, the production line the subject of the Contract provides for one malaxation point in the line in four side by side heatable, “Greek style”, batch malaxeurs.

50 Accurate descriptors of the Design Criteria Document were offered by Mr De Moya himself as part of its title. It is of a preliminary nature and contains an amalgam of specifications, questions and comments. Its importance varied from individual to individual. Not unnaturally, the Design Criteria Document was an important one to Mr De Moya. It was the product of considerable investigation by him. It does not follow from this that the document necessarily must have had the same importance in the eyes of others, or that the credibility of others into whose possession it came is to be diminished by their not attributing like importance to it, much less that it underpinned the Contract.

51 Dr Paterson was taxed in cross-examination about the Design Criteria Document. While I thought that some of Dr Paterson’s answers concerning this document were affected by his not focussing precisely on the questions asked of him, when reflecting on his answers in cross examination about it, the very early stage of events when it was received by him and the nature and extent of subsequent meetings and correspondence concerning the proposed production line as well as the very nature and contents of the Design Criteria Document, I accept his account of the significance that the document had for him. To Dr Paterson, its purpose was “a client showing that he’d reviewed the literature”. Further, as he earlier remarked in respect of his first encountering the Design Criteria Document, “[It] was a document that normally I don’t receive from a client seeking a quotation. And as Flottweg is a manufacturer of equipment, normally we don’t engage in consulting services. And, looking at that document, I knew that it wasn’t a clear basis upon which to quote a product that we had.” Dr Paterson stated that he approached the document from the perspective that if a supplier received such a document it was more effective for both the supplier and the prospective customer to find out what the customer actually needed. This is exactly what occurred.

52 Via Palacin, the Design Criteria Document had also come to the attention of Mr Lorenz in Flottweg's German Head Office by the end of 2003.

53 Mr Lorenz was not initially a witness whom Flottweg proposed to call. After the expiry of the time fixed by direction for the filing of evidence in chief and for that matter after Olivaylle had closed its case, Flottweg made application for leave to file an affidavit made by him upon which, as events transpired, he came to be cross-examined. For reasons which I gave in the course of the trial, I permitted Flottweg to adduce evidence from him: *Olivaylle Pty Limited v Flottweg GMBH & Co KGAA (No 3)* (2008) 76 IPR 152.

54 Mr Lorenz was at the time of his involvement with events of present relevance and remains by occupational title a sales engineer. From about 2003 he has had worldwide responsibility within Flottweg for that company's dealings in the field of edible oils, which includes olive oil production. He had the benefit of being trained for his current role by his predecessor, a Mr Langenbrink, whom he replaced on the latter's retirement and a Mr Ecker, the Group leader of Flottweg's Edible Fats Oil Division, who retired in 2006. Each of Messrs Ecker and Langenbrink had extensive experience in the provision and servicing of production line machinery for the olive oil industry internationally.

55 Mr Lorenz also has what I regard as the benefit of having carried out technical repairs, servicing, start up testing and operator training in respect of Flottweg decanters, tricanter, belt presses and Veronesi separators (and the associated plant such as polymer stations and screw conveyors) over a period of some 15 years prior to assuming the role of sales engineer. He undertook this work on joining Flottweg after his completion of a trade apprenticeship with one of its competitors. His title "sales engineer" gives an accurate idea of his current role. He is not just an equipment salesman. He is able to and does bring to the task of equipment sales an ability to assess and advise upon the performance characteristics, limitations and other technical aspects of Flottweg's machinery and production lines into which such machinery will be integrated based on both formal trade qualifications and, especially, years of relevant, practical experience with the machinery.

56 Overall, I found Mr Lorenz to be an impressive witness. His native language was German but he had acquired over time a command of English for business purposes. To my observation, while his command of English was not perfect, particularly in idiom, he was

well able to give most of his evidence in English fluently and responsively. He gave what I thought was careful and accurate evidence.

57 Mr Lorenz remarked of the Design Criteria Document:

When I read this document I was thinking that it is overloaded and somebody who had not experienced was picking out the best of what he found or read, maybe in the Internet, in one package, and trying to get the best maybe possible what would be on the market. I have received similar things from people with not experience. [sic]

58 It seems that it was Palacin, whose premises Mr De Moya had visited with his brother while in Spain in late November and early December 2003 when conducting investigations, which endeavoured to answer questions which Mr De Moya posed in his Design Criteria Document (see Palacin email of 24 December 2003 to Dr Paterson, copied to Mr Lorenz, Ex JDM 11). Olivaylle has not sought to make anything of that initial Palacin response. Dr Paterson's direct response to the Design Criteria Document seems to have been nothing more than to send some Flottweg brochures to Olivaylle along with a video concerning an olive oil processing line that Flottweg had recently supplied and commissioned in Griffith, New South Wales for a company known as Nugans (see his exchange of emails with Olivaylle's then Project Manager, Mr Wilkes on 28 January 2004 and his email to Mr Lorenz of that date reporting on these dealings, Ex JDM 13 and Ex JDM 14). Those actions as recorded in contemporary correspondence are consistent with the oral evidence he gave concerning the importance to him of the Design Criteria Document.

59 It is significant that, after the receipt of this material from Dr Paterson and in making contact with him by email on 28 January 2004, Mr Wilkes does not refer to the Design Criteria Document. Rather, he envisages discussions by him and Mr De Moya with Dr Paterson and the possibility that "we can knock up a rough plant floor plan and a rough quotation". I note that he does advert in his email to a need for the plant to be ready for the 2005/2006 season and to a need for it to have "the ability to use gas blanketing on the malaxers, decanters and separators" [sic].

60 Also significantly, it was the email from Mr Wilkes, not the receipt of the Design Criteria Document, which prompted Dr Paterson on 28 January 2004 to inquire of Mr Lorenz as to the following:

I will take these people from Olivale [sic] to Nugans on about 11 or 12 Feb.

Do you have any info on the use of an inert gas (like nitrogen) blanket to minimize activity of polyphenoloxidase?.

What I would like to know is as follows:

- which equipment can be blanketed and how?
- what effect does it has on product quality parameters and which ones (is just phenol & polyphenol content in final oil?)
- what rough costs would you expect to have N2 blanket starting at mill through to decanter?

“Polyphenoloxidase” is a reference to a process of oxidation leading to the generation of polyphenols in the production of olive oil.

61 Mr Lorenz responded to Dr Paterson later on 28 January 2004 (German time) in these terms:

To be honest nobody ever asked for this because it is much to expensive.

To start with, you should calculate minimum 140.000. – to 180.000, - more for this kind of equipment.

For a Tricanter Z4E-4/444 it is possible to get it in gas tight.

The other parts:

Hammermill: nearly impossible

Screwconveyors: the same

Malaxer: it is ca 75% closed but not air tight

Separator AT1600: is a open one

You never know how much gas you have to use for such kind of plant and Flottweg would never guarantee any thing to the oil quality. There is no experience from our side and we are not interest in such a project.

We should stick to our standard plant and not have a second Nugan. Okay, Nugan is running now but the effort was to much at that time [sic]

62 This email also assumed some importance in cross-examination of Mr Lorenz and Dr Paterson and in other submissions made on behalf of Olivaylle, the merits of which I consider in due course.

63 By the time that Flottweg came to make its initial offer to Olivaylle in writing on 4 March 2004, Messrs De Moya and Wilkes and Dr Paterson had inspected the Nugan plant at Griffith on 11 February 2004 and held discussions as envisaged by Mr Wilkes in his email. That offer, like all subsequent ones made by Flottweg, was vetted by Mr Lorenz, who made his own soundings as he felt necessary within Flottweg as well as drew on his own

experience. These offers were carefully and deliberately framed so as to set the limits of the obligations Flottweg was prepared to assume. The terms of the offers progressively made were also carefully vetted by Mr De Moya on behalf of Olivaylle: see, for example, the handwritten annotations which he made and sent back to Flottweg in respect of “Version F” of the offer dated 1 October 2004 (Ex JDM 45).

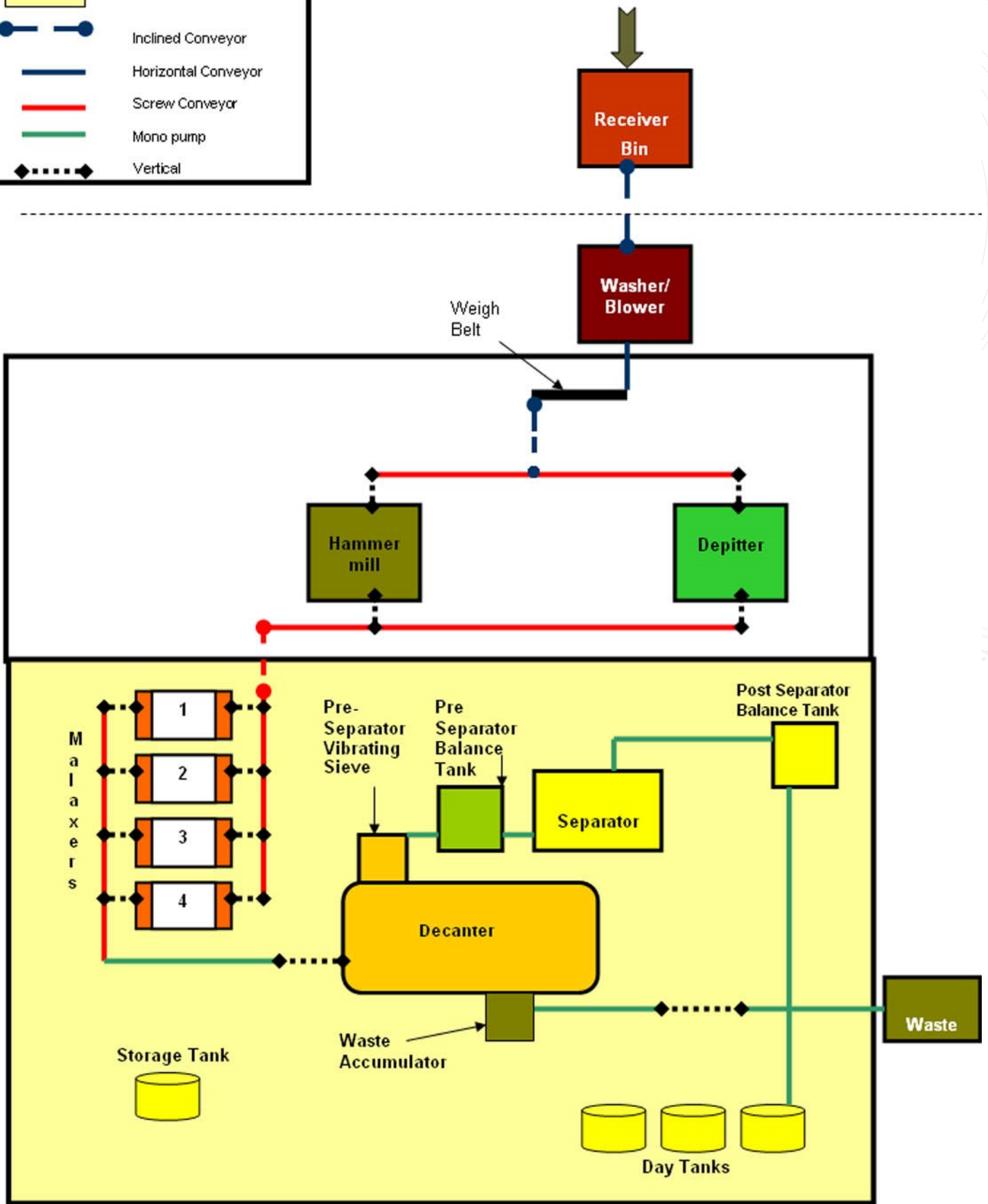
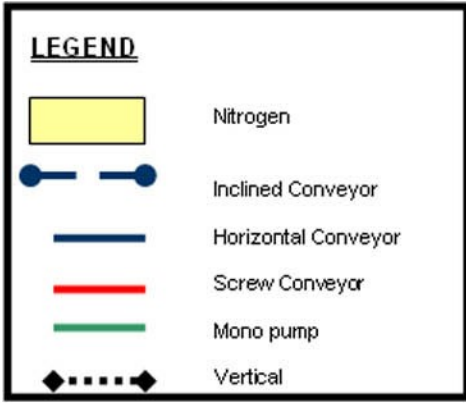
64 Even by March 2004, and certainly by 8 February 2005, viewed objectively, the course of events had overtaken the Design Criteria Document. A review of the correspondence which culminated in the Contract discloses that the Design Criteria Document was not an articulated premise upon which negotiations between the parties were conducted. Neither, again viewed objectively, was it even an unarticulated premise.

65 So viewed, it does not in my opinion have a role to play in the interpretation of the Contract. That is not to deny that the document did not have a continuing importance for Mr De Moya representing as it did the fruits of his research.

66 This submission disposed of, the merits of Olivaylle’s contentions that Flottweg has breached what it alleges were specifications in the Contract are best viewed against the background of a general description of the process by which the production line as installed produces olive oil. That the line as installed did in fact produce olive oil is common ground. What is not is whether the line performed in accordance with the Contract.

Olive Oil Production Process

67 I had the benefit in the course of the trial of viewing and having explained in oral evidence and by affidavit video footage and still photographs of the production line as well as having the stages in the line through which harvested olives pass leading to the production of olive oil. The line was also depicted diagrammatically in a general way (Exhibit 1). It assists an understanding of the stages in the line to reproduce that diagrammatic depiction in conjunction with a description of it, the latter largely based on that given by Dr Paterson.



68

The stages of production then are these:

- *Stage I Receipt and washing of the olives*

There are two distinct sub-stages in Stage I:

- (a) Initially, harvested olives are conveyed from the grove and placed in an external receiver bin or “feed hopper”.
- (b) From the receiver bin, olives move up an inclined conveyor to a machine which blows off leaves and twigs accumulated in the harvest with the olives and then washes the olives with water so as to remove dirt and sand.

- *Stage II Weighing of the olives*

The washed olives then move along another conveyor belt, entering the factory building in so doing to a further conveyor known as a weigh belt conveyor. The weigh belt conveyor continuously measures the tonnes per hour of olives being fed into the line and also calculates a total weight for any given production run.

- *Stage III Flow-splitting*

After the olives have passed along and been weighed by the weigh belt conveyor, a further conveyor takes them to a double screw conveyor which allows the feeding of olives along the production line to be split in two, hence the term “flow splitter” for the device. The flow splitter allows the line operator, if he desires, to split the further conveyance of olives such that a proportion of olives is conveyed to a depitting machine and a proportion is conveyed to a hammermill. It is possible to vary the respective proportions, if desired. This ability to bifurcate a production run is a custom designed feature of the Olivaylle production line. The common practice in the production of olive oil is not at all to use a depitter. In those rare cases when one is used it is usual for the depitter to be used for the whole batch of olives in a production run. The integration of the “flow splitter” and a depitter in Olivaylle’s production line is therefore one of the unique features of the line.

- *Stage IV Hammermill/depitter*

Depending on the choice made by the operator and the resultant operation of the flow splitter, olives next proceed by conveyor or the depitter (or a portion of a batch goes to one and the other portion goes to the other).

A depitter may be described a rotating finisher. It has a stationary barrel the sides of which are perforated. Inside the barrel are rapidly rotating blades. When olives are delivered to the depitter the blades push the flesh but not the pits of the olives through the perforations where it forms a paste. The paste of olive flesh is then directed by a screw conveyor to the malaxeurs. A separate chute removes from the barrel of the depitter the pits as they accumulate.

As its name implies, a hammermill uses fixed rotating hammers to hammer whole olives into a paste of disintegrated flesh and pits. This paste then falls by gravity from the hammermill into a screw conveyor which conveys it to the malaxeurs.

- *Stage V – Malaxing*

“Malax” is not a word in general use in Australia (It does not appear in The Macquarie Dictionary’s Online Edition.) The word is found in the Oxford English Dictionary (Draft Revision, September 2008) where its primary meaning is to make or soften, usually by kneading. As a term to describe the process whereby oil is liberated from cells in the paste of olive flesh (with or without crushed pits), it is in common use by those involved in or who understand the process of olive oil production. As so used, its meaning has an obvious heritage in that assigned to the word in the Oxford Dictionary as its ordinary meaning.

Thus a malaxeur is a device which causes the release of oil from cells in the olive flesh by a process of heating and kneading - malaxing. Inside each malaxeur is a “ribbon mixer” which gently turns over and mixes the olive paste. At the same time as the olive paste is mixed in this fashion it is able to be heated by hot water jackets which are fitted to the outside of the malaxeurs.

I have already mentioned when referring to a difference between the contract and the Design Criteria Document that the Contract provides for four “Greek style”, batch malaxeurs. They are connected in parallel.

“Greek style” is a technical term referring to a malaxeur which allows the separation of small batches of olives (5 tonnes or so) from other batches of olives. Such malaxeurs are commonly used in Greece. They permit small scale farmers to bring their olives to an olive oil production plant and have them processed by a production contractor independently of the produce of other olive growers. In this fashion the term “Greek style” malaxeur has evolved in the industry to describe such malaxeurs.

Another type of malaxeur, and one less complicated and hence less expensive to manufacture, is a “Spanish style” malaxeur which moves the paste from one malaxeur to such other malaxeurs as comprise the production line in the course of oil extraction by gravity, resulting in the indifferent mixing of the introduced olive paste.

Olivaylle’s four malaxeurs are fully enclosed with stainless steel covers which are gasketed so as to form a seal. This is another custom designed feature the intention of which is to permit a blanket of nitrogen to cover the paste while it is malaxing. Each malaxeur incorporates an inspection window.

Yet another custom designed feature of Olivaylle’s malaxeurs is that they are fitted with automatic valves which regulate the filling and emptying of each malaxeur. Usually “Greek style” malaxeurs are filled and emptied manually by an operator who opens and closes gates in a line so as to regulate the flow of olive paste.

The length of time it takes to liberate oil from the olive paste during malaxation is dependent on a number of variables which include olive variety, time of harvest and the temperature at which malaxation is conducted. It will be necessary to consider this subject in more detail later in these reasons in relation to an alleged breach of the Contract in relation to oil recovery.

Once the olive paste has been malaxed it is directed via an eccentric screw pump to the decanter. Instead of a stainless steel tube, an eccentric screw pump uses a rubber

tube with a helical stainless steel rotor inside which, when turned, physically pushes the paste through the tube.

An advantage of having four malaxeurs arranged in parallel with each having valves is that it permits a continuous supply of malaxed paste to the decanter during a production run.

- *Stage VI – Decanting*

The decanter in the production line is a form of centrifuge. Essentially, it is a stainless steel solid bowl which rotates at a very high speed. In so doing it subjects the malaxed paste introduced to it to a force more than 3000 times that of gravity. This occasions a separation of the paste between oil, water and solids which is more rapid and complete than a process that, if the paste were left to stand, would occur naturally in any event to some extent by force of gravity alone by virtue of the differing specific gravities of oil, water and solids.

When operating the decanter continuously separates the olive oil from water and solids. The oil and the water and solids exit the decanter at different points on the machine. The water and solids fall into a hopper which is above another eccentric screw pump. They are then pumped away from the plant. The olive oil falls into a vibrating screen the purpose of which is to remove any remaining solids from the oil. From the vibrating screen the olive oil is pumped into a tank (the Pre-Separator Balance Tank) prior to its being “polished”.

The Flottweg supplied decanter is described as a sealed N² version. This decanter version allows for the introduction of nitrogen gas into the machine so as to displace any oxygen inside it.

- *Stage VII – Polishing*

“Polishing” refers to a process by which the raw olive oil is clarified. This occurs in a disc centrifuge, the “Separator” shown on the production line diagram. The disc centrifuge is a solid bowl which contains many stainless steel discs. These rotate and cause further separation of the raw oil. To assist that process of removing any

remaining suspended solid particles from the raw oil water is added. From the separator the clarified oil is pumped, via another balance tank, to day tanks in which the oil is stored.

The separator also is designed to allow nitrogen to be introduced into it. The design theory is that the introduction of nitrogen into the separator if adequately sealed so as to allow the creation thereby of a positive pressure inside it will both displace oxygen inside it and prevent oxygen being drawn into it from the outside. The creation inside the separator of a greater pressure than that in the outside atmosphere would prevent the outside air intruding into it.

Process 5 tonnes per hour while recovering a minimum of 85% of the oil contained in the olives

69 As pleaded, Olivaylle's case overgeneralises and thereby overstates the nature of the obligations cast on Flottweg by the Contract in respect of the processing speed of the production line and its rate of recovery. Contrary to that pleaded case, Flottweg did not by the Contract assume an obligation to supply a production line which would process 5 tonnes of olives while recovering a minimum of 85% of the oil contained in the olives. The obligations it assumed both as to processing speed and oil recovery were qualified.

70 The processing speed term and the oil recovery term were each expressly qualified contractually by reference to whether or not the olives were to be depitted in the course of the processing operation. Assuming though that olives were not depitted in processing, I accept Olivaylle's submission that the Contract provides not just for a minimum of 85% oil recovery but that this will occur while the line is operating at a rate of 5 tonnes per hour, ie that the two terms are conjunctive in their operation. The oil recovery term is not to be read in isolation from the production line speed term. Oil recovery is to occur in the context of the operation of the production line sold, not as a theoretical construct.

71 As to production line speed, it was made explicit in the Contract that the depitting of olives would reduce the speed at which the production line would operate by at least 50%. Why that was so was explained on the face of the Contract:

It should be noted that if olives are de-pitted the capacity of the decanter will fall by at least 50%. In the case where 50% of the olives is pit, the total feed to the plant will

still be 5 TPH olives even though the decanter will feed at only 2.5 TPH of mash.

By this Flottweg was making it plain that depitting would slow the production line with the effect that depitted olives could not be fed into the decanter at a rate higher than 2.5 tonnes per hour.

72 As to oil recovery, it was not only an absence of depitting but also adherence to Flottweg's instructions for the operation of each unit that expressly qualified the oil recovery term. Flottweg expressly refrained from assuming any contractual obligation as to oil recovery in the event that depitted olives were processed. All it did was to sound a cautionary note that its expectation was that the oil recovery could be expected to be less than 85% without in any way professing what the recovery rate might be.

73 What is entailed with not depitting olives is obvious enough on the face of the Contract, especially having regard to the units which comprise the production line and the provision made for optional flow splitting; but what of "Flottweg's instructions" for each unit?

74 Olivaylle's submissions in relation to the contractual specification in respect to oil recovery adopted what one might describe as a strategy of considered deflection. Thus, in its written submissions, it was submitted that the 85% recovery specification "should be interpreted on the basis that the olives would be processed at about the [Design Criteria Document] maturity and at an acceptable temperature which did not encourage oxidation and an adverse change in the polyphenol content" and "must also be construed in the context of accepted good Australian processing practice". It became apparent in oral submissions that Olivaylle's endeavour to deflect attention from the express contractual prescription that "Flottweg instructions are followed for each unit operation" was considered in the sense that it was grounded in a submission that "Flottweg instructions" were neither incorporated by reference in the Contract nor in any event evidenced in the case.

75 Flottweg took a different approach in its submissions in relation to the oil recovery term. Its submission was that the reference to "Flottweg's instructions" meant that Flottweg was entitled to direct the manner of operation of each unit in a way to achieve 85% recovery. That manner was said to be evidenced by the draft testing protocol put forward by Flottweg in

May 2006 but never, I find, adopted by Olivaylle. Alternatively, and seemingly on the assumption that such instructions as existed went only as to how to operate each unit in the line but not how to operate each in a manner so as to achieve 85% recovery, Flottweg submitted that the reference to 85% recovery should be construed as a reference to 85% recovery under “normal operating conditions”. The latter is an extension of the position pleaded in its Defence.

76 Under the heading “Documentation”, the Contract makes reference to the inclusion of two copies of Flottweg’s operating manuals. Flottweg did not, in relation to the oil recovery term, seek to make anything of whatever these manuals provided. I infer from this that those manuals have nothing expressly to say about how to operate the machinery so as to achieve 85% recovery.

77 I have already made reference to *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451. Later, in their joint judgement in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179, [40], Gleeson CJ, Gummow, Hayne, Heydon and Callinan JJ remarked of that case:

This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

78 Approaching the matter in the way mandated in the passage and reading the Contract as a whole, it seems to me that the reference in the oil recovery term to the following of Flottweg’s instructions “for each unit” and the express inclusion by reference of operating instruction manuals is not coincidental. “Flottweg’s instructions” means the instructions referred to in these manuals. I reject Flottweg’s submission that its draft of the test protocol should be held to constitute “Flottweg’s instructions”.

79 The very nature of the production line supplied to Olivaylle by Flottweg is that it incorporated various custom designed features which I have described. It was though no part of these custom designs that they respond to any uniquely Australian conditions. Such uniqueness as is evident in the units supplied meets the requirements of a company which happened to be based in Australia, not requirements stemming from Australian conditions; witness for example the ability to split the flow of olives in the line or the modifications to permit N² flushing. Subject to particular custom designed features, the process of malaxation and the later decanter and disc centrifuge processing were to occur via the standard operation of these units, wherever in the world they might be situated.

80 On the evidence, there is an international market for the supply of olive oil production lines and for the supply of units for use in such lines. Flottweg operated in that market. That international market included the meeting of demand in Australia, as both this transaction and the earlier in respect of the Nugan plant evidence, but was hardly confined to Australia. Olivaylle and Mr De Moya in particular knew these matters when entering into the subject transaction. This was but one transaction on a wider, international market. It just so happened that Flottweg's customer in this instance was Olivaylle, an Australian based company.

81 I reject therefore Olivaylle's submission that the 85% oil recovery term is to be measured by reference to "accepted good Australian processing practice" in any sense of implying practices unique to Australia. There are accepted processing practices in Australia but these reflect practices adopted elsewhere in the world.

82 The more likely construction, having regard to the market in which the transaction occurred and the nature of the processing equipment selected and supplied for inclusion in the production line, is that the 85% oil recovery was intended to be measured by reference to operating conditions that were standard internationally for such processing equipment.

83 Even if, contrary to my opinion, it is not possible to reach that conclusion by an application of the principle of objectivity to the construction of the Contract, the same result follows, in my opinion, as a matter of implication in order to give the oil recovery term business efficacy.

84 In *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 at 605, in a passage cited with approval by the Judicial Committee of the Privy Council in an Australian appeal, *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283, Scrutton LJ said:

A term can only be implied if it is necessary in the business sense to give efficacy to the contract i.e., if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case?', they would both have replied: 'Of course, so and so will happen; we did not trouble to say that; it is too clear.

Lord Justice Mackinnon made observations to like effect in relation to the implication of a contractual term in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227 in a passage which also commended itself to the Judicial Committee in *BP Westernport Case* (ibid).

85 The specification of 85% oil recovery in conjunction with the 5 tonne per hour production line speed was clearly important to the parties. It was an inherent feature of the malaxeurs in the line that they were able to be heated and that it was possible to vary the heating temperature. On the evidence, what the parties were doing by excluding from the purview of the oil recovery and line speed specification the circumstance of processing depitted olives was excluding a manner of processing which was unusual in olive oil production internationally. What remained when this was excluded was a production line which, for all its other custom designed features, including N² flushing, was expected to extract olive oil in the usual way in which the machinery in the line would usually extract olive oil, which included the heating of the paste during malaxation. That is why the malaxeurs supplied had that capability. Olivaylle and Mr De Moya in particular believed that there may be beneficial effects in terms of oil quality from the processing occurring in a very low oxygen environment and at malaxation temperatures that were lower than was usual. The terms of the Contract do not associate the incorporation of N² flushing with the rate of oil recovery. Further, had it been intended that the oil recovery term would apply irrespective of malaxation temperature I am quite sure that this would have been expressly stated.

86 If indeed it is necessary in order to give business efficacy to the 85% oil recovery term by the implication of the particular circumstances in which recovery at that rate will occur, what, in my opinion, was "all too clear" was that this rate of recovery would be achieved and be achieved in a production line operating at a rate of 5 tonnes per hour if processing occurred

at malaxation temperatures and in conditions which were normal internationally in the production of olive oil, not in idiosyncratic or experimental conditions.

87 As to normal operating conditions, I had the benefit of hearing from a number of witnesses. Of these, I found the evidence which Mr Pantelos and Dr Mailer gave on the subject helpful. On analysis, their views as to the usual range of malaxation temperatures were similar. That temperature range is 27°C to 35°C.

88 Mr Berlanda, who received his formal training and gained his initial experience overseas and who now consults to the Australian olive oil industry, also offered an opinion as to malaxation temperatures. In his report (p 10) he opined that it was “generally accepted that the malaxing temperature should be maintained within a minimum of 20°C and a maximum of 27°C”. This though is a temperature range suitable for oil that is intended to be classified as “cold pressed”. Dr Mailer highlighted this in his report (p 5), citing in support the European Commission’s Regulation No 1019/2002 on “Marketing Standards for Olive Oil” (see Articles 5(a) and 5(b)). I do not accept that, having regard to the evidence of Dr Mailer and Mr Pantelos, a malaxation temperature range of 20°C to 27°C is “generally accepted” for normal olive oil production. Mr Berlanda also opined (ibid) that, “temperature above 27°C decreases the oil quality”, referring then to the types of risk presented. Having regard to the evidence of Dr Mailer and Mr Pantelos, whose views I prefer where they differ from those of Mr Berlanda, one has to malax at considerably above 27°C before adverse effects occur. It was also apparent, when viewing the evidence of these two witnesses as a whole, that there was nothing uniquely Australian about malaxation usually being undertaken at this temperature range. Rather, it reflects the international position. I note in this regard that Mr Pantelos, who has held a representative position in a South Australian olive industry organisation, also had the benefit of overseas study trips in relation to olive oil production and that Dr Mailer brought to bear extensive research experience which embraced the position internationally as well as experience gained from consulting to the industry in Australia,

89 Though he had his own strong and I have no doubt sincerely held views as to how to produce olive oil of the very highest quality, Mr De Moya frankly conceded in cross examination that “normal” olive oil processing plants malax olive paste at about 30°C.

90 As I have mentioned, it was also evident that malaxation can be and is undertaken at lower temperatures than this normal 27°C to 35°C range, especially when the aim is to produce olive oil which is termed “cold pressed”. This though reflects a particular rather than a general or usual method of processing. Having regard to the way in which I have concluded the oil recovery term is to be construed or necessarily supplemented by implication, the 85% oil recovery specification does not extend to recovery for this purpose.

91 Important though it is, malaxation is but one facet of olive oil production. A number of other factors intrude. In his report of 26 October 2007 (Ex SCP1 to his affidavit), Mr Pantelos offers a comprehensive account of factors relevant to oil yield in olive oil production. An understanding of these is important to a determination of whether Flottweg breached the Contract in relation to recovery of olive oil.

92 Mr Pantelos gave what I regard, having had the benefit of observing him also give oral evidence, as reliable evidence in relation to factors which affect the performance of an olive oil processing line with respect to recovery of olive oil. In voicing that conclusion as to the reliability of his evidence, I bear in mind that he has not operated a plant with a 5 tonne per hour capacity, although he has observed a plant which operates at that speed in operation. The maximum capacity plant he has operated is a 2.5 tonne per hour plant. He first operated a plant of that capacity in 1999. At that time, that was the highest output olive oil processing line in Australia. Axiomatically also, because Olivaylle’s plant pioneered this in Australia, Mr Pantelos had not operated a plant which featured N² flushing. It seemed to me that Mr Pantelos’ evidence as to the olive oil recovery process and factors which impinge upon yield and oil quality were not affected by his not having operated a 5 tonne per hour capacity plant. What follows are what seemed to me to be key factors as derived from his report.

93 The key components of an olive from the perspective of olive oil production are the solid content, the water content and the oil content.

94 Oil yields from olives can vary widely depending on factors such as olive variety, irrigation and climatic conditions. Generally though, oil producers expect to extract between 80% and 90% of total available oil in an olive.

95 There are three key measures of olive oil quality:

- (a) Low free fatty acid (FFA) level – This is relevant to the grade of the oil. To qualify as oil of the highest grade known as extra virgin olive oil, the FFA level must be less than 0.8%. As soon as an olive is harvested its oil quality starts to deteriorate, largely due to an increase in FFA.
- (b) Peroxide level – The lower the peroxide level, the longer the life expectancy of the oil. Unlike some types of wine, olive oil deteriorates with age.
- (c) Polyphenol content – This is a key determinant of flavour. In general, the higher the polyphenol content, the more flavoursome the olive oil.

96 An extraction plant itself cannot improve oil quality. Rather, apart from pre-processing factors such as harvesting techniques, storage conditions and time taken to commence processing, the extent to which the oil quality deteriorates depends on an operator's choice of the main processing parameters. These are:

- (a) temperature;
- (b) amount of added water; and
- (c) malaxing time.

These processing parameters are critical during malaxation and decanter separation.

97 Low processing temperature, the addition of only minimal water in processing and a short malaxing time will maximise oil quality. Conversely, the adoption of this practice will heavily reduce yield. By the same token, increased temperature, water addition and malaxing time in processing will increase oil yield but reduce its quality. A balancing exercise is therefore involved. I interpolate that yet another factor arising from the choice of malaxing time is that the choice of time may impact upon the speed at which the line overall is able to operate, whatever may otherwise be its capabilities.

98 Mr Pantelos opined and I accept that both the quantity and the continuity of the supply of olives are relevant to the oil yields achieved on a production line. He observed of Olivaylle's line and those like it that they were designed to operate continuously throughout a season. To achieve its maximum capabilities, such a plant needs to have a large and uninterrupted supply of olives. Further, such a plant needs a few hours to "settle". By this I understood Mr Pantelos to mean time for the flow of olives to commence working their way

along the production line, for malaxeurs to heat up and for the operator to observe the flow and make fine tuning adjustments to machinery as required based on observation. In practice, an operator would build up to a consistent 5 tonne per hour processing speed. Mr Pantelos' opinion, which I accept, was that for a plant such as Olivaylle's, a supply of at least 20 tonnes of olives would be needed so as to build up to a consistent 5 tonne per hour processing speed. During the building up phase lower yields would be expected. If a production run is interrupted by, for example, power failure, loss of oil can occur, as unseparated paste remaining in the cone of the decanter will be discharged. Further, temperatures levels in the malaxeurs would fall, which would impact adversely upon the breakdown of oil cells necessary for efficient oil separation.

99 With these factors in mind, I now consider the performance of the plant in the 2005 season, following its delivery and initial installation, and in the 2006 season.

100 There were multiple difficulties with the plant in the 2005 season.

101 A good summary of the problems was offered by Mr Nieuwkerk in a draft letter of 18 August 2005 which he prepared that month to be sent by Flottweg under Mr Lorenz's hand to Olivaylle for Mr De Moya's attention (Ex SLP1, p 192) and in his email of 18 August 2005 (Ex SLP1, pp 190-191) to Mr Lorenz, copied to Dr Paterson, which enclosed this draft. These documents also offer a contemporaneous measure of Mr Nieuwkerk's character and disposition to candour. Mr Nieuwkerk was in a good position to assess the performance of the plant as he was responsible on site for its initial commissioning and its use during the 2005 season. He did not even at that stage have complete control over the operation of the plant. I note that Mr De Moya gave him instructions that malaxing temperatures were not to exceed 20°C.

102 In the result, a letter in the form of the draft was not sent because of concerns held by Dr Paterson as to admission of liability.

103 I gained considerable assistance from Mr Nieuwkerk's evidence generally. Though his formal tertiary qualifications in engineering were not as high as others who gave evidence, he had much experience in applied engineering, particularly in relation to the N² flushing of industrial equipment. He also had prior experience in the installation and commissioning of an

olive oil production line and in the review of engineering specifications and designs for such lines. In the 2004 season he provided assistance in relation to decanter and separator settings on Nugan's olive oil production line.

104 Mr Nieuwkerk at times held retainers for both Flottweg as well as Olivaylle. I thought he gave candid, accurate oral evidence about the difficulties encountered in commissioning the plant and of its performance.

105 In his draft, Mr Nieuwkerk stated and I find that by August 2005 the plant was not achieving performance terms in the Contract in two respects:

- (a) because of problems with the conveyors, the plant did not operate at a 5 tonne per hour capacity; and
- (b) the plant was not achieving the specified N² level.

106 Mr Nieuwkerk's email also offers some insight into the state of relations which had by then developed as between Olivaylle and Mr De Moya in particular and Flottweg. In excerpt and with suitable explanatory interpolation Mr Nieuwkerk states in that email:

I have received the calculations and letter from Palacin [Flottweg's sub-contractor in relation to the plant's conveyor system] As you can see from my previous email from Jorge [Mr De Moya] which I forwarded to you he has gone to another US company which does screw conveyors and found the tables to size them. This means he now has it firmly planted in his mind that he needs larger conveyors. Had we sent this detaile [sic] information to him a month ago this situation would not have been so bad. ... [If] I send Jorge (who reads Spanish very well) this information he will compare it to the tables on the tables [sic] he has from the US [He] will decide this will not be of acceptable engineering design. ...

It should be noted that when I have tried to convince Jorge that extra speed was acceptable and also contacted a friend who works for SPECO (an Italian screw conveyor manufacturer) to get his opinion it was similar to that of Palacins however this while acknowledged by Jorge led him to get his brother to check this in the US and gives us the current situation. [sic] ...

Finally the Nitrogen system. As we did not install the decanter correctly for the Nitrogen blanketing we really cannot argue that it worked well. However, I have convinced Jorge that the entire failure is not Flottwegs fault it had a lot to do with te way in which the plant was operated on a discontinuous basis rather than continuous and therefore he must absorb costs as well. [sic] ...

Stuart please read this letter and consider carefully how we approach Jorge as he is easy to antagonise further. ... [Emphasis added]

107 I gave at the outset of this judgement my assessment of Mr De Moya's character. Particularly given my assessment of his character (and of problems with the orchard to which I refer below, which had by then become apparent), I am sure that as problems in the line manifested and continued to manifest themselves in the 2005 season so he became progressively more impatient and exasperated with Flottweg. Some problems with the line persisted into the 2006 season and these served, I am equally sure, to entrench his attitude towards Flottweg. Some of these problems did relate to the machinery Flottweg supplied; some did not. I detail below the nature of such problems.

108 I mention these matters when discussing whether the oil recovery term was breached because, in conjunction with further, later difficulties which were encountered with the plant's conveyors, they help to explain why it proved impossible for Olivaylle and Flottweg ever to settle upon an agreed protocol for the measuring of the yield in oil recovery.

109 Neither party suggested that whether the oil recovery term had been breached should be gauged by reference to the 2005 season. Instead, attention focussed on the results of tests conducted in May 2006. In that month 3 tests were conducted, on 1, 2 and 25 May 2006. It was the last of these which was supposed to be conducted according to a test protocol but was not because agreement as to its terms could not be reached. I should record that a harvesting and processing season in a given year starts usually in late April and is concluded by early June.

110 Mr Lorenz came to Australia in May 2006. He was present at the plant on 1 and 2 May 2006. He had control over the manner in which olives were processed on the production line on 2 May 2006. This was the only one of the three May 2006 tests in which Flottweg was able to exercise that control. Samples were separately taken during this test for measurement of yield by Olivaylle and Flottweg respectively. The yield as so measured in respect of Olivaylle's sample was 84.36% while that in respect of Flottweg's sample was 87.77%. There was no agreement between the parties after these results became known as to what was the true yield achieved during the 2 May production run. It was as a result of this that Olivaylle came to propose the conducting of a further test on 25 May and Dr Paterson came to prepare a draft test protocol for that day and to submit it to Mr De Moya.

111 It is not necessary to set out the whole of Dr Paterson's draft test protocol (Ex SLP 1, pp 208-209). Key features of it were:

- (a) approximately 20 tonnes of olives were to be available to be fed continuously to the plant over a four hour period;
- (b) before the decanter was to be started up, all of the malaxeurs were to be full of olive mash;
- (c) the temperature of any one malaxeur that was fed to the decanter was to be approximately 35°C for a minimum of 60 minutes; and
- (d) up to 10% by weight of dilution water was to be allowed prior to the decanter and at approximately 35°C.

112 In the result, on 25 May 2006 a test as envisaged by Dr Paterson in his draft protocol was not conducted. Mr Nieuwkerk, who was present at the plant on 25 May 2006 provided to Dr Paterson the following day a report in respect of that test (Ex SLP 1, pp 232-236). I am satisfied that the observations and results in that report were both fresh in his mind then and accurately recorded. The following features of the test as disclosed in that report are relevant to an assessment of the oil yield result achieved:

- (a) At Olivaylle's insistence, the olive paste temperature in the malaxeurs was not allowed to exceed 27°C, with the permitted range being 25°C to 27°C, rather than the paste being malaxed at 35°C.
- (b) The production line was subject to repeated stops and starts because of problems with electrical and water systems at the plant. This made it impossible accurately to measure or observe the line's real operating performance. [I should add that there were also problems with the weigh belt and hopper neither of which was supplied by Flottweg].
- (c) Dilution water was not added and, again at Olivaylle's insistence, water was switched off to the olive washing machine 30 minutes after the start of the production run.
- (d) So as to achieve a production run at a continuous 5 tonne per hour rate, a malaxing time of 52 minutes was adopted because Mr Nieuwkerk was then of the view that the usable space in the malaxeurs was 2.2 tonnes rather than 2.5 tonnes. It will be necessary later, in relation to the production line speed term to make some further

observations about this feature as described by Mr Nieuwkerk in light of his oral evidence.

113 The “insistence by Olivaylle” to which Mr Nieuwkerk’s refers in his report was insistence by or at the behest of Mr De Moya.

114 Dr Mailer, a Principal Research Scientist with the New South Wales Department of Primary Industry, supervised the laboratory testing of samples at the Department’s Wagga Wagga premises. I had the benefit of his expert evidence as to yield results and factors which impinge upon yield. As to the latter, he was able to draw upon a wealth of research and experience in relation to olive oil quality testing in Australia and abroad. I thought that he was a scrupulously dispassionate, credible expert witness. Dr Mailer frankly conceded that he had negligible experience in relation to the operation of olive oil processing equipment. I do not consider that this dearth of “hands on” experience had any relevant effect on the weight to be given to the opinions he expressed.

115 In his report (Ex RJM 3) Dr Mailer offered the following opinion, the accuracy of which I accept, as to the position which would obtain in respect of oil yield in circumstances where 3 malaxeurs were operated at a temperature of 27°C and one at 25°C:

Temperature and time are directly related to yield. The method used by COI [the International Olive Council] for laboratory testing requires that the malaxing bath be set at 36°C for laboratory testing. Warm water is added to the ground olives, as per the directions, to achieve this temperature in a reduced time. ...

From previous studies it seems that **increasing the temperature to 35°C would improve the extraction efficiency of the olives processed in the reports provided to me.** [Emphasis added]

In that same report Dr Mailer offered this opinion, the accuracy of which I again accept, as to the effect of not adding dilution water:

... [A]dded water will improve oil separation, particularly in olives with low moisture content, and this will generally improve the yield.

Laboratory systems rely on water addition to improve separation of oil and water during extraction as described in the COI standards for oil extraction. ... The addition of water has the disadvantage of removing some polar compounds, particularly phenolics compounds, which provide anti-oxidant qualities to the oil and this is why some processors are reluctant to add water.

116 These two matters feature in the report of Mr Pantelos, who does have “hands on” olive oil production experience, as factors affecting oil yield. There was in this regard a separately derived correspondence in their respective opinions. What the one lacked in hands on experience with an olive oil production line, the other lacked in terms of high level tertiary education and applied scientific research experience and vice versa, but this served to make the correspondence of their separately formed opinions compelling. It also negated, I thought, Olivaylle’s submission that Mr Pantelos’ views should be rejected as but assertion and assumption.

117 The results of, materially, the tests conducted on 1, 2 and 25 May 2006, as variously calculated, were helpfully tabulated by Dr Mailer in Appendix 13 to his report. As to the tabulated results, Dr Mailer stated in his report (page 16):

The affidavit [Mr De Moya’s of 7 September 2007] provided to me contained several calculations to indicate oil recovery from the oil extraction process based on analytical results for oil in fruit and retained oil in the pomace (waste). I have checked and recalculated those recovery figures. My calculations do not agree with either those given which appear to be from Olivaylle, or those labelled Flottweg.

118 Given Dr Mailer’s expertise and detachment, I regard his calculations as the most reliable. I note that in his report he observes in respect of percentage oil recovery calculations made by Olivaylle and Flottweg that they “may have taken into account solids and water measured in the oil extracted at the plant.... If so, this is not relevant. The figure for oil content has been determined in the laboratory using salient extraction apparatus. The oil calculated in this test is 100% oil and has no water or solids present.” This is a plausible explanation from a man well qualified to give it. I accept it.

119 The percentage oil recovery on the production run of 1 May 2006 was 83.3%. Uninstructed by the malaxation temperatures adopted that day, it might be thought that this demonstrates a breach of the oil recovery term. Once it is appreciated that malaxation occurred at temperatures that were lower than the normal range in olive oil production internationally, including in Australia, and if the lessening effect on oil recovery of malaxation at lower temperatures is taken into account, it demonstrates no such thing on the balance of probabilities.

120 In respect of the samples taken during the production run on 2 May 2006, Dr Mailer calculated an oil recovery percentage of 87.77% based on Flottweg's sample from that test run and 84.36% using Olivaylle's sample from that test run. Significantly, these percentage oil recoveries were achieved when malaxation occurred at temperatures which, on the evidence, were within a normal range in olive oil production internationally, including in Australia. I note that on this day the supply of olives limited the length of the production run that could be undertaken. Having regard to Mr Pantellos' evidence, this factor may well have impacted adversely in some unquantifiable way on the oil recovery percentage.

121 At 81.22% the percentage oil recovery on 25 May 2006 also might be thought to demonstrate a breach of the oil recovery term. Yet this test, too, was conducted at malaxation temperatures (25°C to 27°C) that ranged below that which was normal in olive oil production. Further, there were interruptions in the operation of the production line and the supply of olives (15.69 tonnes) which necessarily limited the length of the production run. Each of these factors could only have served to reduce the oil recovery percentage from that which one might have expected under normal operating conditions. Mr Pantelos (report, para 63) thought that the interruptions were the most significant factor adversely affecting yield that day. I have already highlighted evidence as to the effects of lower than normal malaxation temperatures. To this might be added the following further extract from Dr Mailer's report:

Increasing temperature improved yield and heat treatment was more efficient at temperatures above 30°C. The yield increased from 78% at 20°C to 85% at 35°C.

I should record as well that the malaxation time of 52 minutes reported by Mr Nieuwkerk was within what one would regard, in light of Mr Berlanda's evidence, which I accept in this regard, as within a normal range of malaxation periods. Dr Mailer further opined that increasing malaxation time was another factor which was conducive to increased yield. The malaxation having been conducted within a normal time range, it is more likely than not that it was the lower temperature which impacted upon the percentage oil yield achieved that day.

122 I tabulate below other oil recovery percentages evident in Appendix 13,

| Date | Oil Recovery Percentage |
|-------------|-------------------------|
| 3 May 2006 | 81.79% |
| 4 May 2006 | 83.97% |
| 5 May 2006 | 83.13% |
| 10 May 2006 | 83.79% |
| 11 May 2006 | 85.7% |

| | |
|-------------|--------|
| 16 May 2006 | 84.9% |
| 17 May 2006 | 78.8% |
| 18 May 2006 | 82.49% |

123 As to these other results in May 2006, the result for 17 May 2006 is anomalous. This aside, the other percentages were each achieved at malaxation temperatures that were lower than the normal range

124 Mr De Moya offered a calculation of 72% as the oil recovery yield. I mean no disrespect to him in treating this as of no probative worth in relation to whether the oil recovery term was breached. It is an average taken over 3 years and indiscriminately includes production figures from days when the depitter was used, to say nothing of when abnormal malaxation temperatures were adopted.

125 In short, I am not satisfied by Olivaylle that, on the balance of probabilities, the oil recovery term has been breached. There are, for the reasons given, credible and persuasive explanations for why oil yield percentages lower than 85% were achieved. Expressing matters that way reflects on whom the persuasive onus lies but it may do Flottweg something of a disservice in terms of perceptions as to the oil recovery quality of the equipment it supplied. Mr Pantelos, who was briefed with a version of the draft test protocol for 25 May 2006 which anticipated the addition of dilution water, opined that had this protocol been followed an oil recovery yield of at least 85% and possibly 90% would have been achieved. Even had malaxation occurred at 32°C, he thought that the yield specified in the contract would have been achieved. A later version of that never agreed protocol provided for no adding of dilution water, for testing to commence with all malaxeurs full and for heating water to 45°C to 55°C. Yet the draft in relation to which Mr Pantelos expressed his opinions did reflect a normal range malaxation temperature and that the addition of dilution water was also a common industry practice. In this case it was not incumbent upon Flottweg to prove what the oil recovery yield capabilities of the machinery supplied were. Nonetheless, there is a reasonable basis, in light of the evidence of Dr Mailer and Mr Pantelos, for an expectation that, operated under normal olive oil industry production norms, at least the contractually specified yield would have been achieved.

126 I was left with the distinct impression that, in May 2006, Flottweg was prevented from demonstrating this because of choices Olivaylle made to operate the production line otherwise

than in accordance with industry norms. Olivaylle was entitled to conduct experiments with that production line but not to treat the results thereof as probative of a breach of the oil recovery term.

127 I have been able to reach these conclusions in respect of the oil recovery term without having to rely upon what came to be termed in the course of the case as “the Greek Certificate”. That is a document issued by the Greek Institute of Agriculture Machinery Equipment (“the Greek Institute”). I had the benefit of evidence from Mr Colesan, a chemical engineer and, at the time Flottweg’s chief executive elect, concerning the importance for Flottweg of certifications by the Greek Institute of Flottweg’s decanter centrifuges. I regarded Mr Colesan as a reliable witness with relevant training and experience. From his evidence it emerges that the olive oil decanter centrifuge market is highly competitive, particularly in Greece. The Greek Institute is an independent body founded by the Greek Ministry of Rural Development and Food as a testing station for agricultural machinery equipment. In a practical sense, Flottweg is required to secure certification from the Greek Institute of its decanters in order effectively to compete in the Greek Market.

128 In 2001, well before Olivaylle had come to deal with Flottweg, the Greek Institute had tested for Flottweg a decanter centrifuge not materially different (in terms of the way in which it could be operated) from the kind that came to be the subject of the Contract. These tests showed that the decanter processed an average of 5148 kilograms of olives per hour with an average yield of 86.96% of the oil in the olives. It seemed to me that this certification and these results provided Flottweg with a reasonable foundation for its agreeing to the 85% recovery in the oil recovery term. It was also not inconsistent with the conjunctive specification of a processing line speed of 5 tonnes per hour, although other factors could intrude in that latter regard.

129 For completeness, I should record that evidence was given by Mr Berlanda and also by a Mr Ravetti, who also had Australian olive oil industry experience, as to the olive oil content of Australian olives at harvest - on average 15% to 16% (Mr Berlanda) or 18% (Mr Ravetti). Mr Lorenz (whose job I thought required him to be familiar with such things), opined in correspondence in June 2006 that in Europe the average olive oil content was 5% higher than Olivaylle’s olives. On the evidence, there had been nothing which would put

either party to the Contract on inquiry as to any material differences between the oil content at harvest of Australian and European grown olives. There had certainly been no disclosure of any such difference by Olivaylle to Flottweg. Further, as was submitted on behalf of Olivaylle there is no evidence that the absolute oil content affects the recovery rate. In other words, the position on the evidence is that the recovery yield is independent of the recovery yield. As to that recovery yield, and for reasons already given, I am not persuaded on the balance of probabilities that the oil recovery term has been breached.

Nitrogen Flushed to Displace Oxygen?

130 Mr De Moya believed, based on the research he had conducted, that there may be qualitative advantages in the production of olive oil in a production line from which, at least from the stage of malaxation onwards, most atmospheric oxygen was excluded. That he came to hold this belief even without a lengthy history of involvement in the theory and practice of olive oil production is but one indication of his lively intellect.

131 That is not to say that all of Mr De Moya's beliefs in relation to the growing of olives and the production of olive oil, even though sincerely and honestly held, were well founded, as the following exchange (the occurrence of which I accept), recited by Mr Nieuwkerk in his affidavit exemplifies:

Mr Nieuwkerk: "I have spoken to Flottweg and they have told me to adjust the weir heights in the decanter to give us a deeper pond."

Mr De Moya: "I don't believe that we have to change the settings in the decanter. Our olives are the same as last year. We watered them the same. Why should we have to change anything?"

Mr Nieuwkerk: "Olives are a natural product and change from season to season. I feel that their recommendations are correct and we need to change the weir height."

Mr De Moya: "I totally disagree with this and do not feel that we have to change this."

Mr Nieuwkerk: "Then I can't really help you and I might as well leave site."

Mr De Moya: "All right then try it."

I noted repeatedly during the course of Mr De Moya's evidence that he was passionate when expressing his beliefs. I have no doubt that just this quality attended the exchange with Mr Nieuwkerk. He was certainly passionate in his belief that there were benefits in olive oil

production using nitrogen flushing. As will shortly be seen, that belief is not idiosyncratic or without a reasonable foundation. The exchange quoted though discloses that sometimes Mr De Moya's passion occasioned him difficulty in accepting the advice of those with relevant experience which exceeded his. Of course it might be said that the quoted example shows that Mr Nieuwkerk's advice was in the end accepted, but this acceptance was hardly freely given. My impression, when reflecting on the whole of the evidence of those involved in the sale and commissioning of the olive oil production line, was that the tension evident in this exchange was not an isolated example.

132 Dr Mailer described in his report the effects of oxidation on the chemical composition of olive oil. Exposure to oxygen is one factor (light, high temperature and metal catalysts are others) which is responsible for the rate of formation of peroxides in olive oil. Peroxide is an intermediate product in oxidation which eventually leads to rancidity of oil. It typically occurs when oil is exposed to light, oxygen or both, especially at elevated temperatures. The peroxide value in olive oil has a commercial significance. To meet COI standards and be classified as extra virgin olive oil for the purposes of trade the olive oil must be less than 20mEq/kg. Amongst the learned articles that Dr Mailer cited by way of support in and annexed to his report was a paper by F. Angerosa et al published in 2004 in the Journal of Chromatography in which the following statement is made:

The LOX [lipoxygenase] is not the only oxidoreductase active in the olive oil pastes during malaxation. In fact, peroxidase and polyphenoloxidase are activated during crushing and oxidize phenolic compounds during malaxation reducing their concentrations in the pastes and in the oils. For this reason during the last 10 years several works were performed to control selectively endogenous oxidoreductases in the pastes during this technological process. In this ambit **the use of inert gas to remove oxygen in the headspace of the malaxeur was studied. The results show that the use of N² during malaxation not only reduces the oxidative degradation of phenolic antioxidants but, at the same time, hardly modifies the volatile composition of oil.** To optimise and increase volatile and phenolic composition the Time of Exposure of Olive Pastes to Air contact (TEOPAC) was consequently studied as processing parameter to control the oxygen concentration in the pastes during malaxation. [Emphasis added]

133 The apprehended benefits of N² to displace atmospheric oxygen must be seen in context. In this regard, yet again, Dr Mailer's evidence was of assistance. He reported that, when tested by the Australian Olive Oil Sensory Panel, a body accredited by the COI, olive oils that won gold medals, based on sensory analysis, had peroxide values of from 6 to 13 mEq O₂ /kg. Those which won silver medals had peroxide levels of 6 to 14 mEq O₂ /kg and

those which won bronze medals had peroxide values of 8 to 23 mEq O₂ /kg, subject to the disqualification of those with peroxide values in excess of 20 mEq O₂ /kg. That disqualification was because they did not meet the extra virgin criterion. As Dr Mailer remarked, "The results would indicate that oils with peroxide values of 6 to 14 mEq O₂ /kg did not have obvious defects and were considered extra virgin." The advice given by Dr Mailer to clients of his Department is to aim for levels of peroxide below 10 in order to improve the oil's oxidative stability and to improve shelf life.

134 Many clients, it seems, achieve this, even without adopting N² displacement in olive oil production. Even in years when severe frosts resulted in high levels of peroxide in some olives the mean across all sites in respect of olive oils tested at Wagga Wagga was around 9 mEq O₂ /kg. This is a significant fact, for the results represent some 50% of the oils tested from all olive growing areas across Australia. Further, those clients use a wide range of processing equipment with some producers achieving peroxide values of as low as 2 mEq O₂ /kg and the majority less than 10 mEq O₂/kg. Of the many hundreds of samples that are received at the Wagga Wagga laboratory for testing in a given year, less than 10 per year have a peroxide value of greater than 20 mEq O₂/kg and are thus ineligible to be classified as extra virgin.

135 What flows from this is that, while there is a likely benefit in terms of oil quality from the use of N² to displace atmospheric oxygen in the course of olive oil production, it is still perfectly possible, indeed commonly possible, to achieve gold medal standard extra virgin olive oil without that use. Mr De Moya's aim was to produce oil of that quality. That aim may well have been assisted by the use of N² to displace atmospheric oxygen, but Flottweg never guaranteed that Olivaylle would achieve oil of that quality. Further, even if Olivaylle did achieve that aim, it seems that, even in the Australian market, a gold medal extra virgin olive oil was hardly unique, to say nothing of the hypothesised American market. That said, if Olivaylle did produce oil of that quality it would be able to claim it was produced using N² to displace atmospheric oxygen, for whatever worth that carried. I deal later in these reasons with what that worth might be on the American market, having regard to other evidence.

136 The displacement of atmospheric oxygen in the production line was undoubtedly a subject which featured in the various discussions which ensued between Mr De Moya and

other representatives of Olivaylle and Dr Paterson and other representatives of Flottweg at various times in the year or so which preceded the Contract. An early indication of Flottweg's knowledge, and Dr Paterson's and Mr Lorenz' in particular, of Mr De Moya's interest in the subject is offered by the exchange of emails between them on 28 January 2004, which I have quoted above. It also featured in the various drafts of the quotations that Flottweg came to send to Olivaylle and which Mr De Moya vetted on behalf of that company. Over that time the position of each party on the subject evolved with what is stated in the Contract on the subject being the final, mutually agreed position, viz:

Flottweg reserves the right to carry out N2 gas purging modifications to all equipment (with exception of the decanter) in Australia rather than Europe if necessary. Final delivery time DDP (FOB plus 2 months) will not be effected.

Flottweg also states that even though equipment with N2 gas purging may in theory give better oil quality than using standard Flottweg olive oil equipment, this is not guaranteed.

...

Process guarantee: that all times of equipment supplied by Flottweg will function as per the descriptions in this quotation and oxygen levels in the gas phase of all equipment starting at the malaxeurs will be under 1% v/v – assuming client supplies sufficient Nitrogen gas of sufficient purity to make these levels of oxygen feasible

137 I have already described the quotations progressively given by Flottweg as carefully and deliberately framed. It is possible to chart out, at considerable length, but to no worthwhile end, the progressive evolution of the Contract in relation to the oxygen displacement term. That end would not be worthwhile because, as one quotation followed the other, the latter wholly superseded the former.

138 In the course of the cross-examination of both Dr Paterson and Mr Lorenz, quite some time was spent on the exchange of emails between them on 28 January 2004. Dr Paterson's request was posed by reference to the possibility of "blanketing"; Mr Lorenz' response by reference to whether the items he identified could be made "gas tight", a more rigorous requirement. I thought the following answers given by Mr Lorenz were both honest and accurate:

[With reference to the proposition that he was responding to blanketing question posed by Dr Paterson]

I was responding to these questions but I mentioned gas tight

And later:

And you didn't mean to answer some question that he hadn't asked did you?
In this way I made a mistake.

139 The course of Dr Paterson's cross-examination in relation to this email exchange culminated in what I noted at the time as a fluid commentary by him about Mr Lorenz' response:

MR WHITINGTON: Let me recapitulate then, Dr Paterson. You accept now that Mr Lorenz wrote to you on 28 January, saying, in effect, that Flottweg shouldn't offer a contract in which nitrogen flushing or sparging was involved, because it was difficult, if not impossible, to achieve the appropriate effect in certain of the units in the line?--I wouldn't put it that way.

How would you put it?---His first statement: nobody ever asked to do this because it's too expensive. I agree, that's a fair statement, I accept that. The tricanter is available in gas tight. That was the machine, that size of machine, we were quoting, at that point, for three tonnes an hour approximately. I knew that. I had used such kind of machines before so I had experience with them as well. The hammermill; nearly impossible to deliver it gas tight I agree. Well, the screw conveyors, the same, yes and no; malaxer, 75 per cent closed but not air tight, not gas tight; that's an approximation, it's something that's hard to put a numerical figure on, but depending on how you design a system, it could be close to – it go close to being quite gas tight but, in operation, there could be occasions were valves opened and air was sucked in, so it's not a gas tight system, so I agree with that. The separator, I knew had an open top, but we proposed to put stainless steel lid over it; I had used that separator before, I know what it looks like, so, yes, I agreed with that, but I knew how to deal with it. The next statement, he's right: we know how much nitrogen, or carbon dioxide, or any gas to flush a given Flottweg decanter correctly installed.

Pause there. Did you say "we know"?---Flottweg.

You know how much gas is required?---For a given machine size and installation, we know for gas tight machines, the machine itself, it has been theoretically and experimentally determined so that is known by Flottweg; vapour type machines, normally require more because some gas will leak out through the seals so it's a positive pressure system to keep it flushing to get rid of, for example, oxygen; but the other parts of the plant, even though conceptually, as an engineer, it's a simple matter to construct something in a closed to gas tight, or well-covered, without experimentally determining, you can never know: you can estimate, you can do calculations, but they may not be correct, so I agree with that. I agree that Flottweg should never guarantee an improvement in quality, because, simply, we had never had that experience that it did improve quality. There is no experience from our side and we're not interested in such a project. At the point when he wrote that, he didn't want to get involved; his preference is not to get involved in anything non-standard. I agree with him: in general, that is also my preference....

These are not the views of an ignorant layman nor just those of a salesman but of a person with an earned doctorate in chemical engineering, experience in practical application of his studies in the field of membrane systems allowing for a physical separation between solids and liquids or different types of liquids and gases (or both), who had the benefit of in house

training by Flottweg's Mr Langenbrink to whose expertise I have already referred and who had particular, recent involvement in the supply and commissioning of an olive production oil line in Australia (the Nugan's line). I consider that these answers were honestly given and that they are accurate both in an absolute sense and also as to Dr Paterson's state of mind when the email came to his attention in January 2004. Further, I am certain that Dr Paterson well knew the difference between "gas tight" and "flushing"; hence his response in cross-examination, "I wouldn't put it that way."

140 On the evidence, "gas tight" is a term which means what it says and can be achieved either by physical sealing or by creating a positive internal pressure which excludes the external atmosphere or some combination thereof. "Flushing" or "purging" or "sparging" (in essence, interchangeable terms) is different. Mr Colesan, who is qualified to know, described "nitrogen flushing" as a physical process used to limit the exposure of the matter being processed to oxygen. That is the sense in which the term is used in the Contract. The term was used to describe the use of a flow of the inert gas nitrogen to exclude atmospheric oxygen from the units in a contractually identified segment of the olive oil production line. The units concerned might be, but did not necessarily have to be, "gas tight" in order to be "flushed", but did have to be of a design that would admit of the reaching by N² flushing of at least the contractually specified minimum of atmospheric oxygen if sufficient nitrogen of sufficient purity were supplied. Nitrogen "blanketing" is a related term to nitrogen "flushing", referring to the use of a flow of N² gas to displace atmospheric gasses.

141 Flottweg's quotation dated 5 March 2004, which followed the email exchange of 28 January 2004 and negotiations and further correspondence in February 2004, was for a 3 tonne per hour line, made reference to nitrogen gas purging (subject to a reservation in respect of further modification, if necessary, in Australia of all save the decanter) of the hammermill, the malaxeurs, the decanter, the vibrating sieve and a disc centrifuge or separator and detailed no volume by volume atmospheric oxygen minimum to be achieved. The Contract was quite different. It was for a 5 tonne per hour production line, provided for N² purging starting at the malaxeurs, a later stage than the hammermill and did specify a minimum target.

142 In submissions, an attempt was made on behalf of Olivaylle to suggest that some minimum target could nonetheless be attributed to the parties at the earlier stages of their

dealings by virtue of a reference in Olivaylle's prior communications to a desire to produce "Gold Medal quality olive oils". Once it is appreciated that olive oil of that quality could be and evidently was regularly produced in Australia without any displacement by nitrogen of atmospheric oxygen at any stage in a production line, the meaningless content of "Gold Medal quality olive oils", so far as any minimum target for displacement of atmospheric oxygen volume by volume (v/v) is concerned, becomes obvious.

143 What induced Olivaylle and, in particular, Mr De Moya, to continue to allow money already paid to be treated as credited towards the sum owing under the contract and to make further payments pursuant to the Contract were the terms recited in that very document, nothing more and nothing less. The email exchange in October 2004 which I have set out above offers eloquent proof of the importance he had by then come to attach to the written record. Materially for present purposes, the whole purpose of the Contract was to record precisely the only operative obligation Flottweg accepted with respect to oxygen displacement and the only obligation Olivaylle expected it to assume.

144 In the commissioning of the production line Flottweg and Olivaylle had the benefit of Mr Nieuwkerk's services.

145 Mr Nieuwkerk described his experience with nitrogen blanketing in these terms:

Throughout my career I have had considerable experience in commissioning industrial systems that require nitrogen blanketing. The experience was primarily gained in petrochemical and pharmaceutical industries and solvent extraction of edible oil from oil seeds such as canola. In those industries it is often very important to ensure that the separation process takes place in an oxygen sparse environment to reduce the risk of the material being processed igniting or exploding.

146 Mr Nieuwkerk's experience with nitrogen blanketing embraced the achieving of very low levels of atmospheric oxygen in a production line.

147 There was an attempt of sorts on behalf of Olivaylle to diminish the weight to be afforded to Mr Nieuwkerk's opinions on the basis of his formal engineering qualification being a two year (albeit 6 semester) diploma from a Canadian technology institute, which did not, as he acknowledged, entitle him to be designated here as a chartered engineer. Though I have taken that into account, Mr Nieuwkerk is hardly without tertiary level theoretical training. Further, and in any event, there comes a time in relation to assessment of

competency in the practise of any profession when academic achievement must yield to a demonstrated ability over time successfully to apply knowledge in practice. Sometimes the former is a portent for the latter; sometimes it is not and never will be. It seemed to me that Mr Nieuwkerk had been demonstrating an ability successfully to apply knowledge in practice for years prior to coming to provide his services to Flottweg and to Olivaylle in relation to this production line. Further, as will be seen, his opinion is, in a key respect, supported by that of Professor King, a person of considerable academic eminence in chemical engineering, who is also not without practical experience.

148 Mr Nieuwkerk related in evidence and I find that the following are features of the effective nitrogen blanketing of industrial systems:

- Nitrogen blanketing of any system requires a continuous flow of nitrogen to displace the oxygen that is drawn into the system by the material being processed.
- The flow of nitrogen required to lower and then maintain oxygen levels is greatest at the beginning of the processing line and when the system is first started (or re-started).
- The amount of nitrogen required gradually reduces once the system has been running continuously for several hours.

He added, based on his experience in relation to the commissioning of a production line for GlaxoSmithKline (GSK), where achievement of a low level of atmospheric oxygen was necessary to reduce the risk of explosion:

The system I commissioned at GSK was able to consistently achieve oxygen level of between 0.5% and 1% while being used in continuous operation. If the system was stopped or started the oxygen levels would rise and an increased flow of nitrogen would be required to bring the levels back down.

149 Mr Nieuwkerk also offered the following opinion, the accuracy and relevance of which I accept, in relation to the nitrogen blanketing of an olive oil production system:

In an olive oil nitrogen blanketed system the effectiveness of a flushed design will be a function of the amount of nitrogen being pushed in to the system and the amount of oxygen being drawn in with the olive mash. As long as the amount of nitrogen being put in to the system is enough to: (a) create a positive pressure compared to the outside atmosphere; and (b) be of sufficient quantity (allowing for dilution) to displace the oxygen, then the oxygen levels can be reduced and then maintained at low levels. The dilution effect is significant and means that the amount of nitrogen required will necessarily be greater than the amount of oxygen to be displaced. It also means that the amount of nitrogen required to achieve any given reduction in oxygen

will increase as oxygen levels reduce. For example, the amount of nitrogen required to reduce oxygen levels from 2% to 1% is much more than that required to reduce oxygen levels from 20% to 19%.

150 On 24 June 2004, Mr Nieuwkerk had visited Olivaylle's olive grove and there met Messrs De Moya and Wilkes. Their discussions embraced nitrogen blanketing and the capabilities for the supply of nitrogen of a company known as Air Liquide. Mr Nieuwkerk stated and I accept that he never suggested to Mr De Moya that any particular amount of nitrogen would be sufficient for the first season, ie the 2005 season.

151 Having closely observed Mr Nieuwkerk in the course of his oral evidence, he did not strike me as a man given professionally to making other than considered statements based on his experience and what he considered achievable in practice. The impression of him based on observation coincided with a view I formed of his competency when reflecting on that prior experience, especially his successfully achieving a minimum oxygen level of the order of that came contractually to be specified as between Olivaylle and Flottweg and so doing in circumstances where the price of failure was arguably greater – a heightened risk of explosion.

152 In further discussion with Mr De Moya in either late July or early August 2004 Mr Nieuwkerk was informed by him that he wanted to use the line then under consideration of purchase by Olivaylle to experiment with olive oil production. Mr De Moya gave various examples to Mr Nieuwkerk of what he had in mind. I mention this not because Flottweg ever came to offer guarantees of particular outcomes under any production conditions, as opposed to what is or is to be taken to be specified in the Contract, but rather to highlight an imperative of Mr De Moya that seemed to me to continue to influence Olivaylle once the production line came to be delivered by Flottweg.

153 When, with the benefit of Mr Nieuwkerk's evidence, one is aware of factors that can affect the achievement and maintenance of very low levels of atmospheric oxygen in a production line by nitrogen blanketing, design deficiencies do not loom as the only possible explanation as to why difficulties were experienced in the 2005 and 2006 seasons in achieving the contractually specified atmospheric oxygen minimum,

154 In the 2005 season the production line was subject to repeated interruptions. Some of these interruptions were attributable to problems with the six inch split screw conveyor; some to the inadequacy of the originally supplied gear boxes for the conveyors; some to the slow pace of olive harvesting and insufficiency of olive supply to permit the running of the plant for an extended period. The bottled nitrogen proved insufficient to ensure either a continuous or sufficient flow of nitrogen. These factors made it impossible accurately to judge whether the means of nitrogen blanketing, which was in place for the malaxeurs, the separator and the tanks in the production line, was adequate to meet the specification as to atmospheric oxygen displacement in the Contract. Mr De Moya's statement (in an email to Dr Paterson of 19 March 2006 concerning the nitrogen supply in the 2005 season) that the supply was sufficient was not, for all his engineering background, an opinion based on relevant experience. Mr De Moya's engineering experience in the United States had been in the field of civil engineering, not chemical or process engineering. I prefer Mr Nieuwkerk's opinion.

155 Another consequence of the inadequacy of nitrogen supply for the 2005 season was that it meant that the nitrogen supply regularly had to be turned off when the plant was shut down overnight. That meant that the oxygen levels in the malaxeurs gradually rose. On those occasions when it was possible to leave the nitrogen gas flow on overnight it did prove possible to maintain oxygen levels in the malaxeurs at low levels.

156 A factor which influenced the ability flexibly to manage the supply of nitrogen to the malaxeurs in the 2005 season was the then connection of the nitrogen gas supply to the malaxeurs via a common tube which was split at "T" junctions into each of the 4 malaxeurs. That meant that there was no capacity to control the nitrogen flow into individual malaxeurs. Mr Nieuwkerk recognised this as a potential problem in his original design and, prior to the start of the 2006 processing season, modified the nitrogen flow system to the malaxeurs so as to allow the gas flow to be individually regulated. It may be that this modification came as a result of a suggestion made by Mr Carey, another engineer (of whom more later), or it may be that Mr Nieuwkerk came to this conclusion himself. At the time, it was hardly important for either of these men to treat the precise origin of the idea for modification as a subject of enduring significance. What I found significant is that the modification was made and made at a time when responsibility for doing that lay with Mr Nieuwkerk on behalf of Flottweg. This enhanced rather than diminished my respect for his expertise. It is to be recalled too that, in

the Contract, Flottweg had expressly reserved the right to make a modification of just this kind.

157 A factor which inhibited the ability to measure the flow of nitrogen in the 2005 season was that the gas flow monitors originally installed were designed to measure much larger flows of gas. The limited supply of nitrogen for that season resulted in smaller flow rates being used in some parts of the line and these hardly registered on the original monitoring equipment. These monitors were replaced with other monitors prior to the start of the 2006 processing season and proved more useful in measuring flow rates. Additional monitoring points were also installed.

158 Notwithstanding all of these factors in the 2005 season, parts of the plant did an O₂ v/v level of 1% on several occasions when enough nitrogen and olives happened to be available. Mr Nieuwkerk informed Dr Paterson of this.

159 Another change made to the plant prior to the 2006 season was the acquisition by Olivaylle of an on site nitrogen generator from a company called Gas Process Control. The generator had a capacity for expansion from 19.7 standard cubic metres per hour to 40 standard cubic metres per hour of nitrogen. That purchase and the generator's possession of an expansion capacity were each the result of Olivaylle's acting on advice furnished to it by Mr Nieuwkerk. In furnishing that advice Mr Nieuwkerk was acting in his separate capacity as Olivaylle's retained advisor in respect of the supply of nitrogen, not as an agent of Flottweg.

160 In the 2006 season there was again an insufficiency of olives for the plant to be run continuously for any extended period. Mr Nieuwkerk has opined, and I find, that this "stop start" nature of the operation of the production line meant that more than the expected nitrogen had to be introduced to the various stages of the line which were to be flushed and that the generator could not supply this.

161 For the 2006 season, daily data sheets and some computer stored data in respect of malaxeur atmospheric oxygen levels were available. The episodic nature of Olivaylle's discovery meant that this information was not available to Mr Nieuwkerk at the time when he swore his initial affidavit. It was taken up and commented upon by him in a further affidavit and also by Mr Carey.

162 Before turning to their evidence in respect of what to make of this material in terms of the achievement or otherwise of the target for the exclusion of atmospheric oxygen reference should be made to the qualifications, experience and role of Mr Carey. A conclusion should also be stated about just what the Contract required.

163 Unlike Mr Nieuwkerk, Mr Carey is a chartered professional engineer who has primary degrees in engineering (majoring in electrical and electronic engineering) and science (majoring in physics and computing). Also unlike Mr Nieuwkerk, Mr Carey does *not* have any depth of engineering experience in the field of the design and commissioning industrial systems that require nitrogen blanketing. It is evident from his curriculum vitae that Mr Carey's expertise lies in different branches of engineering. He has expertise in industrial control systems, automation, instrumentation, electronic design, EMC electrical noise control, electrical power control and diesel and gas turbine power generation. Mr Carey also readily and frankly admitted in cross-examination that he did not regard himself as an expert in olive oil processing lines.

164 It was Mr Carey's expertise in automation that saw him commissioned either in 2003 or in the first half of 2004 (it matters not precisely when) to work on the irrigation system at Olivaylle's olive grove.

165 It was as a result of this original commission that Mr Carey came first to meet Mr De Moya. In 2004, and following his work on the irrigation system, Olivaylle, at Mr De Moya's initiative, engaged Mr Carey to assist in the planning for the installation of an olive oil production line at its olive grove. Mr Carey's particular role was to provide advice in relation to the installation of monitoring equipment for the plant. Later, in 2005, Mr Carey came to be retained by Flottweg to expand the existing oxygen monitoring system for the production line. Later again, in 2007, at Olivaylle's request, Mr Carey inspected the production line for the purpose of furnishing a report concerning its ability to achieve the atmospheric oxygen level exclusion target, which was tendered in evidence. He also has an ongoing retainer for Olivaylle in relation to the monitoring of atmospheric oxygen levels in the production line.

166 Neither in 2005 nor in 2006 did Mr Carey have the role of advising Olivaylle as to the amount of nitrogen gas required to achieve the contractually specified minimum atmospheric oxygen level in respect of the line on and from the malaxeurs. It was not part of his brief, as

opposed to that of Mr Nieuwkerk, to make the contractually anticipated “N² gas purging modifications to all equipment (with exception of the decanter)”.

167 In his report of 3 July 2007 Mr Carey sought to detail the results of tests to determine if particular equipment in the production line was “**sufficiently** sealed to allow effective elimination of oxygen flow from the process” (emphasis added). He made the following recommendations:

- (a) most items are likely to be able to be sealed **sufficiently**;
- (b) more work is needed to ensure that the nitrogen supply to each item is regulated to compensate for any changes in internal gas volume as product flows in and out; and
- (c) the vibrating screen is not effectively sealed but significant changes to the design of the cover would allow **sufficient** sealing.

[Emphasis added]

Rather significantly, I thought, he did not offer in this report any opinion as to the amount of nitrogen supply which would be “sufficient” if these recommendations were adopted. He was asked about this in cross examination, when the following exchange occurred:

Now when you use the descriptor “sufficiently” there what was the criterion or what were you addressing there?--- I was using the criterion to ensure that there was no unintended flow of gases.

What do you mean by unintended flow of gases?---For instance, air leaking into a region of negative pressure.

And you see in the sentence before – that’s all right. Before I got to that, but if there is sufficient nitrogen applied, then some leakage can be overcome by supply of additional nitrogen?---Yes, if the supply of nitrogen is greater than the – this is sufficient to create a positive pressure, then there will no unintended leakage.

And what you don’t do, anywhere in your report of affidavit, is purported to express any view about the level of nitrogen supply necessary to overcome any of the leaks that you suggest in the processing line?---Actually, if I had done that, it would be a unique event in the whole process of this whole contract.

And the answer to that is, no, you don’t?---That’s correct.

Now, indeed, in the sentence before the heading “Summary of Recommendations”, you state that the report details results of tests to determine if the equipment is sufficiently sealed to allow effective elimination of oxygen from the process. So, you are addressing a situation of an attempt to achieve a zero oxygen level?---Definitely not.

And what do you mean by elimination of oxygen?---What I mean is I am producing a report which gives some numerical analysis and figures on which some further design could be based.

In re-examination Mr Carey gave the following answers in respect of this particular part of his cross examination:

My learned friend put to you, to form a view of the sufficiency of the nitrogen blanketing you would need to know the sufficiency of the supply and you said that was a very unusual way to approach things or the question, you said you approach it from the opposite direction?---That's correct.

What did you mean by that?---If this had been my task to determine the nitrogen supply, I would have attempted to perform some calculations as to the supply needed within each particular piece of equipment, in terms of the design, amount of flow, how long it would take to reduce the oxygen level to an acceptable level, given the volume, the likelihood of being able to achieve good, or acceptable, or excellent sealing, and so on. And then that would lead me to be able to produce a sum of the requirements of all of the pieces of equipment, and then that would allow me to specify the required size of a nitrogen generator. And from that, probably in engineering practice one would take some account of the potential unknowns or variabilities in the actual requirements, and increase the specification of the generator by some amount of percentage.

168 Perhaps it would have been better if the tasks of equipment supply and supplying sufficient nitrogen of sufficient purity had not have been bifurcated as between Flottweg and Olivaylle. That is not the position contractually chosen by the parties.

169 That they did so did not relieve Flottweg of all design responsibility, so far as the supply of a line "N² flushed" from the malaxeurs is concerned. It necessarily followed, in order to give business efficacy to the contractual specification of the level of exclusion of atmospheric oxygen to be achieved (*BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, supra) that the equipment in the line from the malaxeurs on which Flottweg supplied at least had design features, or could be modified as contractually anticipated, so as at least to achieve that specification with an occupationally safe and commercially feasible supply of nitrogen of sufficient purity. As to what this might be, Mr Carey did not offer an opinion. Mr Nieuwkerk, who undertook the design and who consulted Mr Lorenz and Dr Paterson, did.

170 When Mr Nieuwkerk had the benefit of a range of data not available to him when working on the plant during the test conducted on 25 May 2006 or, because of Olivaylle's belated attention to the rigour of its discovery obligation, when giving his initial affidavit in these proceedings, he came in his further affidavit to express the following opinion concerning the required sufficiency of nitrogen for the production line in its condition as last encountered by him in 2006:

It is apparent that the filling and emptying of the malaxeurs has much less effect on the oxygen levels than I first thought. In particular, ..., the fact that oxygen levels were able to remain under 1% during the filling and emptying of the second run of malaxeur 1 suggests that the volume of additional nitrogen required to ensure that oxygen levels were maintained at similar levels in the other malaxeurs may not be as much as I ... estimated [in an earlier affidavit]. Accordingly, my estimate [in] my earlier affidavit that the volume of nitrogen necessary to operate at below 1% might be in the order of 120 cubic metres per hour, now appears to be high.

The data also confirms my previous view that the nitrogen supply to the malaxeurs should be maintained continuously during the harvesting season, including when the system was not actively processing olives. This is because it was my observation, consistent with my experience, that were the oxygen levels were brought down to low levels prior to the start of processing those low levels were able to be maintained. For example, on each of the 21st April 2006, 27th April 2006 and 25 May 2006 where the levels were brought down to below 1% prior to the commencement of processing, in most cases, those levels were able to be maintained throughout the process run.

In my opinion, having observed the operation of the plant in 2005 and 2006 and now having the benefit of the data on the compact disc and Daily Data Sheets, if the available supply of nitrogen was doubled to 40 cubic metres per hour (which is the expanded maximum capacity of the existing nitrogen generator) this **may** be sufficient to maintain oxygen levels of below 1% in all parts of the plant through the process.

[Emphasis added]

In his oral evidence, Mr Nieuwkerk explained what he meant by the word “may” in his opinion as to sufficiency of nitrogen supply. The answer he gave was “should”, ie more likely than not. It was well within his expertise to express such an opinion. I recall also that, in relation to the task of the provision of sufficient nitrogen and sufficient purity, Mr Nieuwkerk was retained by Olivaylle, not by Flottweg.

171 The following excerpt, taken from Mr Nieuwkerk’s later affidavit, offers a convenient summary both of his views and those initially given by Mr Carey in relation to the further data:

At paragraph 18.6 and 18.7 [of his affidavit] Mr Carey sets out his observations in relation to the oxygen sensor data for the test on 25 May 2006 which appears on the compact disc which is marked as Exhibit ADC7 to Mr Carey’s affidavit. I was at the plant during the 25 May 2006 test. I have reviewed the material on the compact disc in detail. I have also been given and have reviewed a bundle of documents which are described as the “Daily Data” sheets for various days during the 2006 and 2007 harvests (“Daily Data Sheets”). A folder which contains copies of the Daily Data Sheets that I have been provided is exhibited to me and is marked “DWN-4”. The Daily Data Sheets in DWN-4 are in chronological order separated by numbered tabs. I did not have access to the Daily Data Sheets or the information on the compact disc at the time of the test in 2006 or at any time prior to swearing my earlier affidavit.

According to my recollection of the events of 25 May 2006 along with these additional materials now made available to me it appears to me that a number of statements made by Mr Carey in paragraphs 18.6 and 18.7 [of his affidavit] are incorrect as follows:

- (i) at paragraph 18.6 Mr Carey states that in the time immediately before 2.35pm the level of oxygen in the malaxeur “rose sharply to around the atmospheric level of 20.9%”. This is incorrect. The data shows that the only changes in recorded oxygen levels during this period were as follows:
 - (A) At 2.03pm and 4 seconds the oxygen level is recorded at 20.562%;
 - (B) At 2.03pm and 14 seconds the oxygen level is recorded as dropping to 0.281%;
 - (C) At 2.19pm and 14 seconds the recorded oxygen level is recorded as rising at 0.311%;
 - (D) At 2.35pm and 14 seconds the oxygen level is recorded as rising to 1.306%;
 - (E) At 2.51pm and 14 seconds the oxygen level is recorded as dropping to 0.965%

It is apparent from the data, and as Mr Carey states at paragraph 18.10.1, that there is a sampling interval of 16 minutes (that is, a single fresh reading is only taken every 16 minutes, despite the spreadsheets included on the compact disc reporting values for every 10 second interval). With respect to the recorded drop from above 20% to below 1% at 2.03pm (as opposed to the *rise* referred to by Mr Carey) I say that in my experience such a drop is impossible to achieve in 16 minutes in a vessel the size of a malaxeur with a maximum available nitrogen supply of 20 cubic metres per hour. I believe that this data reflects the sensor being switched at that time from sampling the outside air to sampling the atmosphere in the malaxeur. This is only the explanation that is consistent with the very sharp changes in the oxygen levels. If correct, the data for the time immediately prior to 2.03pm does not record the oxygen levels inside the malaxeur at all and is irrelevant to any assessment of whether the malaxeur was sufficiently sealed prior to that time. I note also that for the 16 minute cycle between 12.27pm and 12.43pm the reading is zero. This indicates, as Mr Carey states at 18.10.2, that the sensor was not functioning at that time.

Mr Carey states that the second time in the day that the level of oxygen was below 1% in malaxeur 1 was between 2.51pm and 8pm “when the malaxeur was empty and closed after the last batch of olive paste during the day’s run had been malaxed”. This is not correct. The Daily Data Sheet for 25 May 2006 (a copy of which is at Tab 15 of DWN-4) shows that malaxeur 1 was filled and emptied during that time. In particular, it commenced filling at 3.05pm, it was full by 3.44pm, it started to empty at 4.35pm and it was not completely empty until 5pm. This is consistent with my recollection of the events of that day

172 These aspects of Nieuwkerk’s’s critique were put to Mr Carey during his cross-examination. He accepted, readily, that he had made errors in paragraphs 18.6 and 18.7 of his affidavit. Subject to the error acknowledgement mentioned, Mt Carey’s overall opinion remained though as he had put matters in his report, from which I have already quoted. He illustrated the basis for his opinion by a computer graphic representation in the course of his oral evidence.

173 Mr Carey was pressed in cross-examination as to the ameliorative effect of either increasing the nitrogen flow or its purity in relation to the level of atmospheric oxygen:

And even assuming that the malaxers were sealed sufficiently at least to achieve the results here, you still feel you are not able to accept any general proposition about the correlation between the nitrogen supply and the oxygen levels achieved?---No.

What about if nitrogen supply was reduced?---Well, if you take an extreme case of no nitrogen supply, you'd expect that the atmosphere in the malaxers would remain atmospheric.

And as you apply that first increment of nitrogen, you would expect there to be a small decrease in the oxygen levels?---Unfortunately, I think too much in numbers and I can't really give you an answer.

So, you don't accept that when you apply - - -?---I am sorry. I understand that's the intention of the system.

Yes?---But it's not possible to say, in this particular case, whether that was achieved.

Even on the assumptions that I've asked you to make about 25 May 2006 [corrected from 2005 transcript] and the achievement of the results at 2006 and the achievement of the results in the graph which is ADC13?---Well, all I can say is, I understand that was the intention of the system.

But you are not prepared to accept, even as a general proposition, that that's how things would have operated?---Well, if I elaborate, if I was faced with this problem, I would not have assumed that it would be corrected by increasing the nitrogen flow. I would have found out why the oxygen levels are not what I expected.

Now, what about the purity of the nitrogen? Do you accept that, all other things being equal, if you increased the purity of the nitrogen flow from, say, 99.5 to 96.95 per cent, that you would have expected to achieve lower oxygen levels than those seen in the graph which is ADC13?---Yes.

And similarly, you would expect that to have a knock-on effect in relation to malaxers 2, 3 and 4?---True to a degree, but I can easily calculate the additional time necessary to reduce the level to below one per cent and my guess is that it would be 20 or 30 per cent additional time.

These answers were given in what I thought at the time was a rather guarded manner. His reference to his "thinking too much in numbers" was revealing. Mr Carey did not put forward his opinions on the basis of practical experience in the achievement of low levels of atmospheric oxygen in industrial equipment.

174 Mr Nieuwkerk is the engineer with the greater relevant experience. Further, on 25 May 2006, he was the engineer whose attention was principally focussed on the operation of the production line, including its nitrogen blanketing system. Mr Carey was present in the

plant that day, but the operation of the production line in all its facets was not his responsibility. As appears from Mr Nieuwkerk's contemporaneous report, as explained by him in his affidavit evidence, for part of the day at least Mr Carey was concerned with electrical work at the plant.

175 I have therefore a preference for Mr Nieuwkerk's opinions where they differ from those of Mr Carey. That preference is reinforced by what I thought was corroboration by Professor King of Mr Nieuwkerk's views concerning the oxygen readings in respect of the malaxeurs and the adequacy to their sealing.

176 Professor King is the Head of the School of Chemical Engineering at the University of Adelaide. He is a fellow of the Institution of Chemical Engineers and other learned bodies. He is no mere theoretician in numbers. His industrial experience and consultancies have covered energy and combustion, gas processing, surface coatings, adhesives, laminates and minerals processing. Having observed him giving oral evidence, which principally comprised his cross-examination on his original affidavit, I thought that Professor King was at pains to assist the Court with precise, accurate, impartial answers. For that reason, he displayed what seemed to me at the time (and still does) an understandably pedantic concern in the course of cross-examination to know precisely the factual foundation upon which he was being asked to express his opinion. In many ways, that meant, once Olivaylle's position as to measurement data had been made clear in cross-examination, his most valuable assistance came in re-examination, once he had been able to reflect on and explain his original opinions and their foundation in light of what had been put to him in cross-examination. It proved both necessary and convenient, because of a pre-existing overseas commitment of his and the exigencies of the case for his evidence in re-examination to be received in affidavit form. The way that the affidavit was cast confined the content of that affidavit to answers to questions arising out of cross-examination.

177 In that affidavit the following passage appears:

At T1699 to T1701 your attention was directed to a change in the oxygen reading from malaxeur 1 from 0.311% at 2:35:04pm to 1.306% at 2:35:14pm. Then, at T1699.30 and T1701.25, you were asked whether you gave any consideration to the significance of, or explanation for, this increase, and you said that you did not, and that you did not do any calculation.

What is the significance of this increase to your insignificant air ingress opinion, and why did you not do any calculation?

18. The increase in the oxygen reading from malaxeur 1 is (slightly) less than 1%. Given that this change was over a period of 16 minutes rather than 10 seconds, I did not, and do not, regard it as significant. While this reading represented an excursion in the recorded oxygen reading above 1%, it was followed 16 minutes later (at 2:51:14pm) by a decrease down to 0.965% and then a further 16 minutes later (at 3:07:14pm) by a further decrease down to 0.696%.
19. I note that the increase to slightly more than 1% occurred at or about the time of the completion of the emptying of malaxeur 1 following its first batch on 25 May 2006 – according to the daily data sheet which is attached as “C” at page 12 of my first affidavit.
20. It seems to me that the slight variation in the oxygen level might have been connected to the emptying process (ie a dynamic aspect of the process). Alternatively it might be attributable to variations in the readings that one would expect as a result of the uncertainty limits of the oxygen sensors – particularly ones that may not have been properly calibrated – and as a result of the fact that the gas reaching the sensor is unlikely to have a precisely uniform composition. The data log shows recordings of the oxygen level to 4 significant figures. I would be very surprised if the sensors were accurate to this degree. But even so, there is insufficient information to verify this level of accuracy.
21. I did not, and do not, regard this increase, and brief excursion above 1% for the oxygen readings in malaxeur 1, as being inconsistent with my insignificant air ingress opinion. There was therefore no need or occasion for me to carry out any calculations.

At T1701 to T1702 your attention was drawn to malaxeur 2, and you were told that the record shows that at 2:36:24pm the oxygen reading was 0.171%, and then at 2:36:34pm the oxygen reading was 4.512%. You were asked to assume that malaxeur 2 started emptying just before 2:36:34pm.

You were then asked what this said to you as to the state of sealing of malaxeur 2, and you said (at T1702.30) that if it isn't completely sealed, the leak is extremely small; that you could do a calculation but it would have to be taken over a period of at least 16 minutes.

What was the calculation you had in mind, and what was the basis for your opinion that any leak would be extremely small?

22. Again, it is important to remember that the increase in question (this time, a bit more than 4%) occurred over 16 minutes rather than 10 seconds. While this is more significant than the approximately 1% increase in malaxeur 1, and may well be referable to something other than the natural variation one would expect to see in readings from the oxygen sensor (for the reasons explained above), this change may still be referable to a dynamic aspect of the system. It should be remembered that in order for ingress of air to occur there must be a pressure difference such that the pressure inside the malaxeur

is less than that of the surrounding atmosphere. If nitrogen was flowing into and out of the vessel, that would be near impossible.

23. Given the proximity of the increase to the time at which emptying commenced, this tends to suggest it might be due to a dynamic aspect (for example, an opening of a outlet or valve to allow the paste to exit) rather than some leak in the malaxeur per se.
24. Furthermore, I note that the change referred to in malaxeur 2 and the change in readings for malaxeur 1 both occurred during a dynamic process, that is, malaxeur 2 had just started emptying and malaxeur 1 had just completed emptying.
25. But whatever the source of the air ingress, the increase is not particularly large – it would not require a large inflow of air to alter the oxygen by 4%. Further, it may not take much additional nitrogen to overcome or counteract any such increase.

Would it affect your opinion as to the significance of this increase in the oxygen level in malaxeur 2 if you were asked to assume (in accordance with the respondent's counsel's assumed scenario in relation to the "inter connectional communication" of the malaxeur atmosphere, as set out above) that malaxeur 2 was further from the common supply point than malaxeur 1?

26. Yet it would. Even if (in accordance with the scenario posed by the respondent's counsel earlier in this affidavit) the 4 malaxeurs all had separate inlet pipes coming from a common manifold, and ultimately a common supply point, nevertheless the pressure delivered to the individuals malaxeurs is inversely proportional to the distance the nitrogen needs to travel. For a given nitrogen supply through the common manifold, I would expect to see a greater dynamic pressure in malaxeur 1 than I would expect in malaxeur 2. The significance of this is that the same (dynamic) air ingress event in malaxeur 1 and 2 might have a greater impact on the oxygen level in malaxeur 2 than malaxeur 1.
27. If the nitrogen supply is consistent and continuous, then, given the exponential or asymptotic relationship between the nitrogen supply and the oxygen level in the malaxeurs, over time I would expect the difference in the pressures between the malaxeurs to decrease, and I would expect the percentage increases in oxygen levels attributable to given air ingress events to also decrease.

At T1710 to T1711 you were asked to consider the significance of the same increase in oxygen levels in malaxeur 2, but under 2 alternative scenarios – first, assuming malaxeur 2 was empty, and, secondly assuming it was full. You said that the change over 16 minutes "indicates a leak" but that it is less significant under the latter scenario because you have less head space. Please explain why this increase indicates a leak, and also the significance of the head space in the malaxeur.

28. When I said "indicates a leak" I meant that it indicates there has been air ingress (as opposed to there being simply a natural variation in the oxygen reading that one might expect for the reasons described earlier). However, as

I have mentioned, the air ingress might well have been the result of some aspect of the processing line operation rather than a leak in the sense of a crack or hole through which there might be sustained ingress of air – because in order for the ingress of air to occur there must be a pressure difference such that the pressure inside the malaxeur is less than that of the surrounding atmosphere.

178 The opinions thus expressed are from a man whose combination of practical and academic achievements command respect. I have already given my assessment of his attitude to the provision of expert evidence. I accept his opinions. Based on Professor King's opinions thus given, in conjunction with those of Mr Nieuwkerk, the conclusion which I reach is that in all likelihood, with sufficient nitrogen of sufficient purity, it is possible to achieve and sustain in the malaxeurs an atmospheric oxygen level of less than 1% v/v. I find that they were adequately designed, having regard to the oxygen level term. Further, having regard to Mr Nieuwkerk's evidence, that sufficiency in both volume and purity of nitrogen gas is able to be supplied in a commercially feasible and anticipated way.

179 Mr Nieuwkerk gave in his affidavit evidence a detailed description of how and why the production line as a whole was capable of achieving that contractual target with a commercially feasible supply of sufficient nitrogen of sufficient purity. Given the emphasis of the parties in the ramifications in terms of preference for opinions or conclusions reached in respect of the malaxeurs, to rehearse Mr Nieuwkerk's detailed description would, in my opinion, serve only to add further length to a lengthy judgement without compensating benefit. In this regard also his, rather than Mr Carey's, was the greater relevant experience. I have set out above Mr Nieuwkerk's overall opinion. I accept it. As to other particular items in the line, I confine myself to the following brief conclusions:

- (a) The vibrating screen. I thought criticisms made in the course of the evidence of Mr De Moya and Mr Carey in respect of the sealing of this item rather missed the point. Under the Contract, this item is to be N² flushed. It was. Moreover, there was no evidence of a complaint concerning this item by Olivaylle in either 2005 or 2006 such as would have permitted Flottweg to examine the item for any problem in the adequacy of the flushing. Even if, contrary to my finding as to the adequacy of the line so far as the oxygen level term is concerned, there was then a problem of the kind they described, Mr Nieuwkerk's evidence was that this could have been rectified in a few days at a cost of \$3,000 to \$5,000. The absence of a contemporaneous complaint

denied Flottweg the opportunity to make such a rectification as it was contractually permitted to do under the provision with respect to repairs in the Contract.

- (b) The decanter. Under the Contract this was to be sealed, not just flushed. There was some debate about the effect of the pomace pump on the ability of the decanter to achieve the specified minimum of atmospheric oxygen. I accept Mr Nieuwkerk's evidence that this effect was an expected, not unknown feature of the line able to be overcome as long as sufficient nitrogen was supplied. I find the decanter was adequately sealed. I note in this regard that Mr Carey accepted that the decanter was sufficiently sealed to prevent the ingress of the outside atmosphere if nitrogen was supplied at the rate of 20 litres per minute.

180 What follows from this is that I am not persuaded that Olivaylle has proved, on the balance of probabilities, a breach of the oxygen levels term. That Mr Carey through his fresh endeavours may be able to improve on a system not shown to be non-compliant with the Contract is commendable but nothing to the point.

Processing Speed – 5 tonnes per hour?

181 I have already referred to Mr Nieuwkerk's report concerning the problems experienced with the production line in the 2005 season. On the line's first operation in 2005 it could not operate at anywhere near the contractually rate of 5 tonnes per hour. Olive fruit overflowed at the top of the conveyor feeding the split screw conveyor. The screw conveyor feeding the hammermill did not operate at its rated speed. There were problems with the conveyors feeding the paste from the hammermill to the malaxeurs. New gear boxes, supplied by Palacin, were fitted to replace the original gear boxes which Palacin supplied to Flottweg for the purposes of the Contract.

182 Of the three test days in the 2006 season, the line was able to operate at the rate of 5 tonnes per hour on 1 and 2 May 2006.

183 As to the test on 25 May 2006, two matters which affected the speed of the production line ought to be noted:

(a) Olive paste built up in the conveyor under the hammermill. Mr Nieuwkerk deliberately simultaneously stopped all of the production line's conveyors during their operation that day. He opened up the hammer mill to observe the paste underneath. In this manner, he observed the paste build up. His opinion, which I accept, was that this was caused because the speed of the screw conveyors was too slow. He had noted a like, but more serious problem the previous year, prior to the initial gear box replacement. His opinion, the correctness of which I again accept, was then and remains that this problem required a further upgrade of the gearboxes. I find, based on his evidence, that the installation of such gearboxes is well within Mr Nieuwkerk's expertise. With the assistance of a labourer it would take him no more than a few hours. Dr Paterson opined and I find that the cost of effecting the necessary replacements would have been no more than \$10,000 (and perhaps as little as \$5,000).

(b) The hopper belt stopped moving. The hopper belt was not an item of equipment supplied to Olivaylle by Flottweg under the Contract. Mr Nieuwkerk's evidence, which I accept, was that the problem with the belt conveyor taking olives out of the olive hopper (another item not supplied by Flottweg) was that it could not handle the weight of the olives in the hopper if the hopper were any more than about half full. The consequential inability to fill the hopper with olives meant that the plant could not be fed at a sustained rate of 5 tonnes per hour for more than an hour or two at a time. There was an inability to store a large quantity of olives in the hopper. There was, further, but one harvester in use at the olive grove in 2005 and 2006. Coupled with the then maturity of the olive trees in the grove, this meant to Mr Nieuwkerk's observation, that it was only possible to harvest one or two tonnes per hour. As at July 2006 the problem with the olive hopper had not been resolved. In his oral evidence, Mr De Moya confirmed a difficulty with the hopper belt.

184 Each of these matters was noted in the report of the test prepared by Mr Nieuwkerk on 7 June 2006 which he sent by email to Mr De Moya and to Dr Paterson. In that report, Mr Nieuwkerk opines, and I do not doubt the accuracy of the opinion:

The plant handles the 5 ton per hour very well up to the outlet of the hammermill. Conveyor gearboxes need to be changed between their and the Malaxeurs (at least one is wrongly marked).

The decanter ran well at 5 ton per hour. [sic]

185 I find that, subject to the replacement of the hammermill conveyor gear boxes referred to in this report, the line was able to operate at the speed specified in the Contract.

186 In so doing, I do not ignore the effect that malaxing time can have on the speed at which an olive oil production line can operate. For most of the 2005 and 2006 seasons, the Olivaylle production line operated at abnormally low malaxing temperatures. This necessarily affected the length of malaxing time. Mr Nieuwkerk mentioned and I accept that in these circumstances malaxing took some 90 minutes.

187 As I have mentioned, in his report in respect of the test conducted on 25 May 2006, Mr Nieuwkerk made reference to the adoption of a malaxing time of 52 minutes and to a malaxeur capacity of 2.2 tonnes. I find, based on Mr Nieuwkerk's evidence, that once operators become familiar with the operation of the production line, there will not be any difficulty in filling the malaxeurs with 2.4 tonnes of olive paste. That this is possible was evidenced by Olivaylle's daily data sheet for 10 May 2006, which shows that malaxeur 1 was filled with 2.4 tonnes of olive paste. Each of the four malaxeurs has the same capacity. If operating within normal malaxation temperature ranges, filling the malaxeurs with 2.4 tonnes of paste would increase malaxation time to 57.6 minutes, but this would not have the effect of rendering the line incapable of operating at 5 tonnes per hour.

188 An allegation was also made in Olivaylle's case that a separate cause of an inability of the line to operate at a speed of 5 tonnes per hour was want of decanter capacity. There is nothing in this. The source of that allegation was Mr De Moya. Though I accept that this is his sincere belief, the subject is not one upon which his civil engineering experience qualifies him to express an opinion of any evidentiary worth. The other evidence on the subject comprises Flottweg's business records for the type of decanter sold, which give a specification of 100 to 150 tonnes per day, ie 4.17 to 6.25 tonnes per hour the reliability of which is supported by the Greek Certificate provided by the Greek Institute to which I have already referred. There is no relevant engineering evidence in respect of the decanter sold which would contradict this.

189 Relations between the parties broke down over the balance of that month and July. Though Olivaylle was aware of its desire so to do, Flottweg was not permitted by Olivaylle to perform any further work at the plant. The result of that was that Flottweg was not afforded the opportunity to replace at its own expense the gear boxes as it proposed. That was, I find,

the only step required to bring the production line into conformity with the contractual specifications. As at that time, the line was able to meet the oil recovery term and the oxygen levels term. It was also able to operate at the rate of 5 tonnes per hour but, because of the conveyor gear box difficulty, not able so to do on a sustained basis.

190 Flottweg's proposal again to change the gear boxes was, for Mr De Moya, a source of evident and continuing vexation in the course of his oral evidence. I noted that, when referring in this context to "the third time" Mr De Moya, emphasised that vexation by holding up three fingers. Mr De Moya had a concern, the sincerity of which I do not doubt, about the effect that this might have on the temperature of the olive paste and resultant oil quality. There was though no expert evidence which suggested that the gear box replacement proposed was not feasible because it would detrimentally affect the production of olive oil.

191 The Contract contained a warranty which "entitled and obliged" Flottweg at its option to repair or to replace defective parts in the event that they were not "in accordance with the contractual agreements in terms of its design and quality of materials". The duration of this right was expressed by reference to the lesser of three specified alternatives:

- 16 months from the date of commissioning; or
- 2 full local olive oil seasons during which the equipment is operated; or
- 24 months from the date of readiness of the equipment for dispatch.

192 The "date of commissioning" was not specified in the Contract. Commissioning was though necessarily contemplated by the parties to occur after the delivery and installation of the production line. Further, the Contract made provision for the attendance of Flottweg technicians for the purpose of "Installation, training, start up and training supervision". The contractual allowance for this was for a two week attendance. The date of commissioning was therefore not expected to occur until at the very least some two weeks after the commencement of installation of the production line following delivery. The production line equipment was delivered in mid-April 2005. In the result, according to Mr Nieuwkerk, it took "several weeks" to commission the plant. He had responsibility on site for this. I accept his evidence as to the duration of the task. He made a report to Dr Paterson on 16 May 2005 as to

having “now tested the capacities throughout the line”. I infer from this and the way he has described the subject in his initial affidavit that he regarded the reaching of the stage where the line had been installed and tested as the conclusion of “commissioning”.

193 In the Contract the word “commissioning” is used in a sense analogous to the meaning which the word can have when used in relation to a ship. In that context, the word can mean ready for use at sea (definition, OED, meaning 5c). In the context of the Contract I take it to mean ready for use. The 2 week period provided for seems to have been extended by mutual agreement in light of events until mid-May 2005. On another view, given the meaning which I consider the word bears, it would be possible to contend that, even as at June 2006, “commissioning” was not complete because, in light of the gear box difficulty noted, it was not ready for use in accordance with the contractual specification. That would mean that the warranty period had not, as at June 2006, even commenced to run. I prefer the former view of the meaning, ie installed and ready for initial use

194 If, on what I consider the better view, the “date of commissioning” is to be regarded as the start of May 2005 or mid-May 2005, some 4 months of the 16 month period running from this time had yet to run when Flottweg made its offer to replace the gear boxes at its expense. The remaining defect noted had thus occurred within the warranty period. On the other view I have noted, the warranty period had not even then commenced to run.

195 I have no doubt that the replacement proposal made by Flottweg was a genuine one, ie that Flottweg was ready, willing and able to make good its offer. Dr Paterson gave evidence to this effect which I accept. My observation of Dr Paterson was that he was genuinely embarrassed on the subject of the gear boxes. Flottweg had looked to Palacin for the supply of these items as part of the conveyor system. Palacin was a supplier well known to Flottweg. It was Flottweg’s exclusive agent for the olive oil industry in Spain and Portugal and its agent in Tunisia and Morocco. Olivaylle was, I find, well aware in June 2006 that Flottweg wished to exercise its right under the Contract to effect repairs to or replacement of the gear boxes at its own expense.

196 In the letter dated 21 February 2006 sent to Flottweg, Olivaylle had stated that it “hereby grants Flottweg until 30 June 2006 to bring the plant into compliance. This

constitutes Olivaylle's 'reasonable period of grace' in accordance with the contract". It was further stated in that letter:

If at the end of this 'period of grace', the defects persist and have not been corrected and/or no other arrangements have been made in writing between Olivaylle and Flottweg, Olivaylle shall withdraw from the contract in accordance with its rights under the contract documents and Australian law.

197 Flottweg's responses the following month disputed that Olivaylle had occasion for the giving of such a notice. What did come though to be agreed was an extension of the time for Olivaylle's making of the final instalment of the purchase price until 30 June 2006.

198 Flottweg has submitted that the giving by Olivaylle of notice of intention to withdraw and its fixing of a period of grace was premature having regard to the limited opportunities that Flottweg had in the 2005 season to make the necessary adjustments to the production line and to assess its operating capacity. Olivaylle's riposte was that two seasons and 15 months was enough time for a competent supplier to bring the plant into conformity.

199 I have already identified above difficulties experienced at the plant in the 2005 season. Not all of these difficulties were attributable to Flottweg. I accept that these difficulties in conjunction with the then available nitrogen supply and the adoption in general of abnormally low malaxing temperatures affected Flottweg's ability to assess the performance of the line in relation to oil recovery and the effectiveness of displacement of atmospheric oxygen by nitrogen. This acknowledged, it did prove possible to identify a problem with the conveyors.

200 Olivaylle's letter of 21 February 2006 and its submissions assumed that it was able both to require the undertaking of repairs and to specify a period of grace after which it could withdraw.

201 The reference in the Contract to withdrawal from the contract is specified as an alternative to a "reduction in the purchase price" and conditioned on the expiry of a "reasonable period of grace". The part of the Contract in which this appears also makes provision for Flottweg's entitlement and obligation to repair or replace to which I have already referred. All of these provisions appear under the general heading "Warranty". It was the latter entitlement and obligation that Flottweg was seeking to discharge in June 2006.

202 It is trite that the reference to withdrawal must not be read in isolation but in the contractual context in which it appears. Further, an endeavour must be made in so doing to give sensible meaning to all of the language that the parties have employed and to reconcile insofar as possible apparently inconsistent provisions.

203 Provisions for a “reasonable period of grace” and a “reduction in price” are civil law rather than common law concepts. Given that such terms found their way into the Contract which was drawn by a company headquartered in Germany, I doubt their presence is a coincidence. Such civil law concepts are also found in the Vienna Convention: see Article 50 in relation to the buyer’s ability to reduce the price and Article 47 (fixing by a buyer of an additional period for a seller to perform his obligations). That convention also makes provision for a buyer to require the seller to repair goods so as to bring them into conformity with their contract (Article 46(3)). Further, Article 48 gives the seller an ability to remedy in these terms:

Article 48

- (1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

204 The learned authors of *Benjamin’s Sale of Goods* (7th ed, A Guest (ed), Sweet & Maxwell, 2002) at para 12-077 observe of this Article: “This is a notoriously controversial provision as its interaction with the buyer’s right to ‘declare the contract avoided’ for ‘fundamental breach’ under that Convention is not clear.”

205 That the Vienna Convention has, as I have concluded, been permissibly excluded by the parties from application does not mean that how such terms are understood in the civil law cannot offer guidance. To the contrary, it seems to me inherently likely that this is how it was intended that the Contract be construed.

206 Those civil law concepts are helpfully discussed in an article by Nicholas B, “The Vienna Convention on International Sales Law” (1989) 105 *Law Quarterly Review* 201 by way of background to features of the Vienna Convention. From this discussion it emerges (at p 225) that the ability of a party to fix an additional time for performance, ie the allowance of

a reasonable period of grace, is often referred to in civil law as the *Nachfrist* (from its partial similarity to a German institution of that name). Mr Nicholas remarks of it that:

During the period named the party fixing the period cannot resort to any remedy for breach of contract. Apart from this the direct legal effect is confined to cases of failure by the seller to deliver or by the buyer to take delivery or to pay the price. In these three cases if the failure remains unremedied on the expiry of the *Nachfrist*, the other party is entitled to avoid the contract regardless of whether the breach is fundamental or not. In other words the *Nachfrist* relieves the party from the risk that the original breach might be held not to have been fundamental (or rather substitutes for that risk the smaller risk that the length of the *Nachfrist* may be held to be unreasonable).

207 As to reduction of price, this, Mr Nicholas notes (*ibid*), is familiar to civil lawyers and “derives from the *action quanti minoris* of Roman law”. The civil law alternative right of rescission also owes its origin to Roman law: *actio redhibitoria*: *Chitty on Contracts* (30th ed, H Beale (ed), Sweet & Maxwell, 2008) at para 43-125.

208 Delving further, one finds that the civil law concepts of “reasonable period of grace”, reduction of price as an alternative to rescission of a contract and provision for repairs are to be found in the European Union’s Directive 99/44, Sale of Goods and Associated Guarantees. In the United Kingdom, the latter translated on and from 31 March 2003 into a newly inserted Pt 5A of the *Sale of Goods Act 1979* (UK). Such amendments to sale of goods provisions have not found their way to Australia. It is not necessary to explore the EU Directive or the United Kingdom’s translation of it into sale of goods legislation in any detail. There it is the buyer who may require the seller to repair (if there is scope for the same) and choosing so to do is an alternative to seeking reduction of price or rescission.

209 The observation made in *Benjamin’s Sale of Goods* in respect of the interaction difficulties Article 48 of the Vienna Convention presents apply equally, in my opinion, to the interaction between the “entitlement and obligation” to repair or replace conferred on Flottweg by the Contract and Olivaylle’s right to a reduction in price or to withdrawal after the fixing of a reasonable period of grace. The way the reference to reduction in price or withdrawal from the Contract is cast is to specify a qualification on the ability to exercise such a right, but the language employed carries with it the necessary implication that such a right is conferred on Olivaylle subject to that qualification.

210 The way in which I reconcile that right with Flottweg's entitlement and obligation to repair or replace "within a reasonable period" is that, should Flottweg not so do within a reasonable period, Olivaylle may allow it a further "reasonable period of grace", specifying which of the alternatives of reduction of price or withdrawal from the Contract it will take at the end of that period. If the defect remains after the end of that further period, Olivaylle would then be entitled to withdraw, irrespective of whether the breach was fundamental. While that seems to me to flow as a matter of ordinary English, the word "grace" being used in its alternative sense of benignant (definition, OED, supra), it also accords with the civil law notion of *Nachfrist*, ie the allowance of an additional time for performance.

211 To allow such additional time for Flottweg to make the repair or replacement is an alternative to the other right which Olivaylle would have in the event that repair or replacement were not effected within a reasonable period by Flottweg, which is to make the repairs or modifications itself. If it chose to do that, it would be affirming the Contract and confining itself to a right to recover the cost of those repairs or modifications as damages together with any incidental consequential loss. Further, the amount of those damages would be subject to the cap for which the Contract provides. That may well make the alternative of allowing a period of grace for the effecting of repairs or replacement attractive if the cost thereof is likely to exceed the cap.

212 On this analysis, Olivaylle had no right in February 2006 to nominate as the concluding date of a period of grace 30 June 2006. A problem with the conveyors was detected in the 2005 season. Flottweg sought to do what the contract required of it, to effect repairs or replacements. To do so in a way which would allow the efficacy of such actions to be tested required the line to be operating to produce olive oil. This could not occur until the 2006 harvesting and processing season. The "reasonable period" within which the repairs or replacements could occur was by the end of the 2006 season for processing of the olive harvest. The period nominated by Olivaylle was nothing more than the end of the "reasonable period" to which Flottweg was contractually entitled in any event. This Olivaylle could not do. A "reasonable period of grace" was, in the circumstances, a period which, at the very earliest, would have commenced in June 2006 and concluded in April 2007, ie before harvesting and processing for the 2007 season was to commence. That additional allowance of time would have been benignant; an act of "grace".

213 The circumstances that came to pass in this case highlight a contingency that was foreseeable even when the conveyor difficulty became manifest in 2005, ie to identify whether the plant was capable of operating at a sustained rate of 5 tonnes per hour required sufficient olives for a sustained production run and no interruptions occasioned by other causes. The tests on 1 and 2 May suggested that it was possible to run at 5 tonnes per hour. It was not until the run on 25 May 2006 and the deliberate actions that Mr Nieuwkerk took during that production run that day that the need for further repairs or replacement of gears became manifest. That, in my opinion, serves to underscore why it was that the duration of the 2006 season was a reasonable period within which for Flottweg to effect repairs or replacements in the exercise of the contractual right and obligation it had. It needed no “period of grace” permissibly to undertake such work in that period. This was a production line in which interconnected items of machinery had to operate continuously and sequentially under load. It was always pregnant with the possibility of fine tuning adjustments needing to be made under load before the efficacy of a given repair or replacement of the gear boxes could be known and remedial action taken. Further, it was likewise pregnant with the possibility that causes beyond Flottweg’s control might intrude on that load testing.

214 Once it came to Olivaylle’s attention in June 2006 that some further and, it seems to me, relatively minor repairs or replacements were needed in respect of the gears, it purported to withdraw then and there, without allowing any “reasonable period of grace”. This again it could not do under the Contract. That is not to hold that Mr De Moya was dishonest in causing Olivaylle to send the letter to Flottweg in February 2006, only that he was mistaken.

215 Thus, albeit for some additional reasons associated with what I perceive as the civil law provenance of the terms concerned, I agree with the submission made on behalf of Flottweg that it was premature for Olivaylle in February 2006 to give notice of its intention to withdraw from the Contract.

216 It follows that Olivaylle was not contractually entitled to withdraw from the Contract and to the return by Flottweg of its purchase price. I do accept that a refund of such of the purchase price as paid (or the excusing of any obligation to make a further payment in respect thereof) is a corollary of a right to “withdraw”. In effect, what Olivaylle did by requiring the undertaking of repairs or replacements was to affirm that Contract. Further, it has,

unreasonably I find, prevented Flottweg from undertaking at its own expense the remaining, relatively minor, gear box works. In Mr Nieuwkerk there was a man well familiar with the plant and the only remaining, relatively minor problem so far as fulfilment of contractual specifications were concerned. In Flottweg Olivaylle had a contracting party that was committed to the solving of that problem. It is quite obvious to me from the email and other correspondence that Flottweg, too, was exasperated by June 2006; exasperated with Palacin. There was every reason to expect that Flottweg would have used all of its influence with that company (and I recall their association was not confined by any means to this contract) to cause whatever replacement parts were needed to be dispatched to Australia swiftly. The means reasonably of putting the plant in final conformity were present.

217 What also follows from this also is that when Flottweg then came to draw upon the bank guarantee for the final instalment of the purchase price it was doing no more than claiming a right to payment that Olivaylle's unreasonable refusal of Flottweg's desired exercise of its contractual right to address a remaining, relatively minor obstacle to sustained achievement of the processing speed prevented Olivaylle from denying.

Trade Practices Act Cause of Action?

218 Victoria has enacted its own example of the uniform fair trading legislation but neither party suggested this added anything to the claim made under the TPA. I therefore do not give it separate consideration.

219 I have already concluded that Mr De Moya and hence Olivaylle was interested only in statements contractually made by Flottweg as to the performance of the production line. I find that that there were no operative representations concerning the line other than those embodied in the Contract.

220 That conclusion does not exclude the possibility of a claim by Olivaylle for relief under the TPA. The following observations made by Lockhart and Gummow JJ in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470 at 505-506 are apposite:

- (8) The result of this examination of the provisions of the legislation before and after the 1977 Act is that para. 4 (2) (a), in dealing with "conduct" operates generally, in its terms, so that the T.P. Act after the 1977 Act, was to be read

as "one connected and combined statement of the will of Parliament . . .": *Sweeney v Fitzhardinge*; (1906) 4 CLR 716 at 735. So understood, para. 4 (2) (a) provides significant support for the conclusion reached in this case by the primary Judge, and for the general proposition that the making of a statement as to a presently existing state of affairs, if false, may be the engaging in misleading or deceptive conduct, where the statement is embodied as a provision of a contract. In many cases, there will have been pre-contractual conduct which itself contravenes s. 52. The present case is a striking one because it was presented on a narrower basis, and concerned the giving of the warranties in the contract itself.

- (9) Where the conduct relied upon involves not a statement as to a presently existing state of affairs, but a representation with respect to a future matter, which is contained purely in a contractual promise, then a case for contravention of s. 52 will involve consideration of the extra steps spelled out in s. 51A of the T.P. Act. Some of the issues that would arise in such a case are discussed by Ormiston J in *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217 at 233-241, where reference is made to the relevant authorities in this Court. But this is not a case concerning representations as to future conduct.

221 This case does concern a representation with respect to a future matter. In that regard and as Lockhart and Gummow JJ counsel in the passage quoted assistance is to be gained by regard to the judgement of Ormiston J in *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217 at 239-241 His Honour offered the following analysis with which I respectfully agree:

It would seem on the authorities that, at the least, a contractual promise would amount to an implied representation that the promisor then had an intention to carry out that promise. If it can be shown that he had no such intention he would be guilty of misleading or deceptive conduct. Likewise it would seem that such a representation connotes a present ability to fulfil that promise which, if shown to be untrue at the time of making, would likewise characterise the implied representation as misleading or deceptive.

It is not easy to fit s51A and s10A into the scheme of each Act if the broader view should prevail. One of the principal difficulties is subs(3) in each case which says that subs(1) shall be deemed not to limit by implication the meaning of any reference in the Division to, inter alia, "conduct that is misleading or is likely . . . to mislead". One can understand that the section should not be treated as qualifying by implication the types of conduct which can be characterised as misleading or deceptive. It is another to say that the section does not show in what way a defendant can establish that a representation as to the future which is "taken to be misleading" does not amount to a contravention of s52 or s11, as the case may be; for subs(2), by negative implication, says that, if a person adduces evidence that he had "reasonable grounds for making the representation" as to future conduct, then the representation shall no longer be taken to be misleading. If those who maintain that implied promise plus breach are sufficient to constitute misleading conduct are correct, then the question whether the promisor had reasonable grounds for making the representation would be irrelevant. It would be sufficient, on that hypothesis, to show that the promisee was "led into error" by reason of the promise subsequently broken, regardless of the promisor's having

reasonable grounds for making the representation. Thus, despite the apparently restrictive words of subs(3), the basis for holding that a promise amounts to misleading conduct must be that it carries with it an implication that the promisor had no reasonable grounds for making the representation, i.e. the promise. If he overcomes the section's presumption against him, by proof to the contrary, then it follows that his representation and thus his conduct was not misleading, for present purposes. Otherwise each of the inserted sections would be pointless in so far as it purports to qualify, or expand, s52 and s11.

In my opinion, therefore, accepting that s51A and s10A each assumes that a promise may give rise to an implied representation that the promisor will perform an act in the future, namely the promised act, then the promisee is not, in proceedings under s52 or s11, bound to show that the promisor had no intention or no ability to perform the promise at the time of its making. The promisor will be deemed not to have reasonable grounds for making the representation or promise, unless he satisfies the court by evidence to the contrary that he had reasonable grounds for making that representation. He may achieve this, in part, by showing that he had a genuine intention to perform his promise and that he had the ability at the time to perform it, but in the end he must show objectively that he had reasonable grounds for making the representation. For present purposes I am not prepared to accept that the plaintiff can make out its case by showing merely promise and breach. In my opinion, that evidence, on its own, is insufficient to show that the promisee was "led into error" unless the plaintiff can rely on s10A or s51A. If there is no element of actual or deemed misrepresentation then the promisee can have been led into no error, nor can it be said to have been misled, by reason of some subsequent breach which causes it harm or loss. If the facts connote no error or misrepresentation, nothing thereby led it to take a course which was erroneous.

It follows from what has been said that I am not persuaded that one should treat every contractual promise as giving rise to an implied representation of the kind referred to in s10A (and s51A). However, I am persuaded that if there be an unconditional promise which forms part of the contractual obligations, then it is proper to treat the giving of that promise, at least in the ordinary case, as the making of a representation as to a future matter, being either the doing of an act or the "refusing" (sic) to do an act, being in each case the subject of the promise. Perhaps conditional promises may also be treated as the making of a representation as to future conduct, but in each case the qualified terms of the promise would usually lead to the conclusion that the maker had reasonable grounds therefore, unless it could be shown that under no circumstances would the promisor have fulfilled his promise. It is, however, not necessary to determine this latter point.

222 Has Flottweg shown that it had reasonable grounds for making each of the "representations", ie the promise as to oil recovery, the promise as to the achievement of a minimum level of atmospheric oxygen and the promise as to the processing speed of the line? I find that, objectively, it did, for the following reasons.

223 I should observe at once that I am satisfied on the whole of the evidence that Flottweg had a genuine intention to fulfil the Contract in all respects, including the supply of equipment that would meet each of the specifications in the Contract.

224 It is a fact that, in Australia, Olivaylle and also Flottweg were pioneering the nitrogen blanketing of an olive oil production line. It does not follow from this that Flottweg had no reasonable basis for the minimum oxygen level specified in the Contract. The nitrogen blanketing of industrial equipment was hardly a novel subject. Nor, in relation to this was it a subject addressed by laymen either in-house in Flottweg or by Mr Nieuwkerk. I find the following facts:

- (a) There was within Flottweg corporate knowledge and experience in relation to the sealing and flushing of its decanters arising from some 40 years of providing such equipment;
- (b) As to the other parts of the line to which the oxygen levels term applied, Dr Paterson and Mr Lorenz, who respectively had high tertiary engineering and trade qualifications and relevant experience gave consideration to modifications that should be made to the equipment concerned so as to achieve nitrogen blanketing or, as the case may be sealing in accordance with the specification made in the Contract..
- (c) Dr Paterson and Mr Lorenz each also relied upon Mr Nieuwkerk's expertise and experience in relation to nitrogen blanketing of industrial systems, and his assurances that 1% or lower oxygen levels were achievable. That reliance was neither misplaced nor uncritical. Mr Nieuwkerk had the requisite qualifications and experience to offer such assurances. This was known to Dr Paterson and Mr Lorenz. Each of these gentlemen in turn had the requisite knowledge and experience to assess the feasibility and worth of those assurances and did. Mr Nieuwkerk's assurance was that the oxygen levels could be reduced and maintained at low levels as long as the amount of nitrogen being put into the system was sufficient to create a positive pressure compared to the outside atmosphere and that nitrogen was of sufficient purity. That qualification was translated in to the contractual specification.

225 Flottweg did not just pluck a figure out of the air when specifying that oil recovery percentage. It had in its possession and relied upon the Greek Certificate from the Greek Institute referring to the testing of the Z53-4/464 (in decanter mode). On the evidence, Flottweg was entitled to and did give considerable weight in its business affairs to the certification results notified by that institute. That showed an average yield of 86.9%. In

fixing the figure it also drew upon its combined in-house experience that such a recovery rate was achievable, which at least included that of Dr Paterson, Mr Lagenbrinck, Mr Ecker and Mr Lorenz, in relation to decanters and olive oil processing. That combined in-house experience was to no different effect to the Greek Institute certified results. I note further that, as an absolute, the oil recovery figure specified in the Contract was within the range (80% to (90%) that, having regard to Mr Pantelos' evidence, might be expected in Australia, ie it was not inherently unreasonable. It was known at the time that malaxing at low temperatures would diminish yield but Flottweg made no representation that the percentage oil recovery specified would be achievable under all conditions.

226 The Greek Institute had also tested and certified the average processing speed of the Z53-4/464 (in decanter mode) as 5.148tph and average yield is 86.96%. Further, on the evidence, that decanter is commonly used in other industries at a much higher feed rate (around 50 tph).. For reasons that Mr Nieuwkerk came to explain in evidence, the malaxeurs presented no obstacle to the achievement of the specified processing speed, providing malaxation did not occur at abnormally low temperatures. As to the conveyor system, at the time when the contract was made there was nothing to suggest to Flottweg that Palacin was anything other than well experienced in the supply of suitable such systems. Once again, the processing speed term, as with all of the others, was vetted by two persons with relevant qualifications and experience, Dr Paterson and Mr Lorenz.

227 It follows from the foregoing that Olivaylle has not made out any claim under the TPA. That means that it has failed to make out any cause of action at all either at common law or under a statutory cause of action.

228 It is both necessary and appropriate nonetheless to reach some conclusions of fact and law in relation to the damages and other relief sought.

Relief Sought

229 Olivaylle claimed that, on withdrawal from the Contract, it was entitled to the following:

- (a) repayment of the total amount paid to Flottweg for the line namely €678,606.00 (or the Australian dollar equivalent if that better reflected its loss. I accept that it is possible to enter judgement in a foreign currency sum in this regard.)
- (b) a consequential loss claim in contract for wasted expenditure on the line in the amount of \$454,833.00; and
- (c) loss of profits based on an enforced delay in its planting, production and thus export sales, in the amount, after revision of the initial calculation, of \$10,867,040.00.

230 I also understood Olivaylle to claim that relief to like effect was available to it under the TPA.

231 The right of “withdrawal” in the Contract seems to me to be of a quite different character to what in Meagher RP, Gummow WMC and Lehane JRF, *Equity Doctrines & Remedies* (4th ed Butterworths, 1992) at [24-005], describe as the “first sense” of five senses in which the term “rescission” is used in law. The learned authors there state, by reference to observations made by Gibbs CJ in *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 625-626 that, so used, it describes “the situation where a party to a contract, upon a breach by the other party of a condition, elects to treat the contract as no longer binding upon him”. In that situation, “both parties are discharged from further performance of the contract. But rights already acquired are not divested or discharged and causes of action which have accrued from the breach continue unaffected”: *Equity Doctrines & Remedies*, 4th ed, *ibid*.

232 That in the Contract “withdrawal” is offered as an alternative to reduction in price persuades me that restoration of the original position is intended rather than a release from further performance. The intent is to offer a choice between returning the goods and getting one’s money back or keeping the goods but with the benefit of a reduced price. Though that conclusion follows as a matter ordinary English read in context, it also seems to me to be in accord with civil law notions of what is meant by such alternatives. “Withdrawal” would thus enable orders for the return of the goods supplied and for the refund of the amount paid under the Contract. It is truly a quite exceptional right. That it is available only after the allowance of a “reasonable period of grace”, which can apply in the case of the repair or replacement obligation, persuades me that the right continues to be available even if the result is that used

and thereby devalued goods are returned. That substantial restitution of the goods sold was not possible would otherwise disentitle a party to a contract to an entitlement to “rescission” but not, as I conceive it, to exercise the right of “withdrawal” conferred by the Contract.

233 This production line has been used certainly for 4 years (and perhaps now also a 5th). It is hardly new any longer. It has been used to derive income. It is not possible to effect perfect restitution after this length of time. I accept that this does not automatically rule out the making of an order for rescission: *JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378. Delay and depreciation of the goods sold are but factors to take into account in the exercise of a discretion. To make an order now for rescission and return of the goods would require the making of compensatory orders in favour of Flottweg to take account of what I infer must be an inevitable deterioration in the value of the goods after this length of time and to make allowance for the benefit of the use Olivaylle has enjoyed. I have no evidence that would allow me justly to assess the diminution in value of the machines in the production line, only to form a conclusion that they must have depreciated. Further, the goods are not as Flottweg sold them or even last modified them. There is evidence before me that, at Olivaylle’s request, Mr Carey has made modifications to the line since July 2006.

234 As to delay, Olivaylle was requested as long ago as January 2007 by Flottweg to return the goods. I am not persuaded that it was left with no alternative to keep them, at least beyond the 2007 season. It made no response to this. It was in July 2006 that Olivaylle purported to withdraw from the Contract. On Mr De Moya’s evidence, it seems that Flottweg was but one of a number of potential suppliers of a production line. On the evidence, it took less than a year once the order was placed for Flottweg to deliver, install and commission the production line. Olivaylle seems to have done nothing to that end.

235 Even though I further accept that the power conferred to order rescission conferred by virtue of s 87 of the TPA is wider than under the general law (*JAD International Pty Ltd v International Trucks Australia Ltd*, supra), it seems to me that, even at the end of the 2007 season, the considerations to which I have adverted would not have made that remedy just as a matter of discretion.

236 That, of course, assumes that Olivaylle should not be regarded as having earlier elected to affirm the Contract. In February 2006 it believed, based on its experience of the

2005 season, that the production line was non-compliant in each of its processing speed and its ability to achieve 1% or less v/v of atmospheric oxygen. Yet it chose then not to bring the Contract to an end but rather to seek to rely upon the peculiar right of “withdrawal” after allowance of a reasonable period of grace that it conferred. Thereafter, it chose to use the production line. In my opinion, that amounted to an affirmation of the Contract: *Long v Lloyd* [1958] 2 All ER 402. Olivaylle’s decision to install, commission and use an on-site bottling plant after what it believed was Flottweg’s non-compliance with contractual specifications is also consistent with its having decided to affirm the Contract and retain the production line.

237 As to the claims based on the Contract, there is a limitation of liability clause present. That clause would not, in my opinion, affect the operation of the contractual provision for “withdrawal”.

238 The limitation of liability clause would though limit the amount of any further sum which could be awarded to Olivaylle under the Contract to 5% of the total price, ie to €33,930.00. The language of the clause is such that it would limit each of Olivaylle’s consequential loss claim and its loss of profits claim to no more than this amount in aggregate. For reasons which will shortly emerge, these claims might aptly be described as fantastic.

239 The limitation of liability clause could have no effect on the amount able to be awarded to Olivaylle under the TPA. I accept Olivaylle’s submission that, were I to find a cause of action proved under the TPA, the powers conferred by s 87 of the TPA would extend to the negating of the effect the limitation of liability clause has on the amount of damages recoverable for breach of contract. As I have found no such cause of action it is unnecessary further to consider that point.

240 If, contrary to my opinion, Olivaylle has proved a breach of the Contract or a contravention of s 52 of the TPA it must further prove a causal connection between that breach or that contravention and the loss or damage claimed. This, in my opinion, it has not done.

241 This subject is best approached by reference to what Olivaylle has been able to do with the line and the properties with the properties that Olivaylle asserts it has.

242 The line is able to produce extra virgin olive oil. Dr Mailer said as much. It is able so to do at least in circumstances where there is a low level of atmospheric oxygen, not less than 1% v/v on Olivaylle's case but, as I would find if I were disposed to accept Olivaylle's evidence, within 1% to 2% of that in all likelihood. It is not necessary to achieve the contractually specified minimum in order to describe olive oil even as "gold medal" extra virgin olive oil. Nor is it necessary for there to be any nitrogen blanketing at all in olive oil production in order to achieve that quality description. That there may be some benefit by production in a low atmospheric oxygen environment in assisting in the achievement of oil of that quality is known but it is not in any way essential. There is no Australian or international standard to which production of olive oil in circumstances where the attainment of an atmospheric oxygen level of 1% or less v/v is essential. Nor, apart from quality standards, is there any separate commercial advantage attached to that descriptor in Olivaylle's conjectured American market.

243 As to Olivaylle's conjectured American market, I had what I regard to be the considerable advantage of receiving evidence from Ms Nancy Ash. The oral content of her evidence was received by video link. Making due allowance for the degree of remoteness introduced by that medium, I found her to be an engaging, candid, objectively detached, thoughtful witness. She readily made concessions or acknowledgements when appropriate in cross-examination, even when so doing involved at least a degree of controversy (the withdrawal of recognition in 2006 by the International Olive Oil Council of the accreditation of the accreditation of the testing panel of the California Olive Oil Council). All in all, she was a most impressive witness of significant relevant expertise. I have no hesitation in accepting and acting on her evidence. It is convenient here to set out the findings that I make based on her evidence, even though these extend beyond just the question of whatever advantages might adhere to being able to market olive oil in America as being produced on and from the stage of malaxation in circumstances where the atmospheric oxygen was 1% v/v or less.

244 Ms Ash has over two decades experience working in the specialty foods industry in the United States. In that time she has assisted either clients or employers with their sales and marketing efforts. In 1993 she began working with Manicaretti Italian Food Imports marketing high end extra virgin olive oils among other Italian artisanal food products. Since

then she has been trained as an olive oil taster and taste panel supervisor in accordance with the International Olive Oil Council guidelines. In 2006 she purchased a business known as “Strictly Olive Oil”, an olive oil consulting and education business which has been operating since 1985. She is based in California. The current clients of her business include the California Olive Oil Council (a peak industry body) and various Californian olive oil producers including California Olive Grove, the largest olive oil producer in the United States.

245 It is no coincidence that she is based in California. Both her evidence and that of Dr Mailer are that almost all of the olive oil produced in the United States emanates from California.

246 Ms Ash was asked to make a number of assumptions for the purposes of furnishing the report she adopted in her evidence. She was asked to assume that:

- (a) Olivaylle’s olive oil satisfies all International Olive Oil Council standards for the extra virgin olive oil classification;
- (b) Olivaylle’s olive oil was produced with systems intended to minimise oxidation, under a nitrogen blanket that lowered the level of oxygen in the gas phases of the equipment to between 1% v/v and normal atmospheric levels at various times and at various times and in phases of the process;
- (c) Olivaylle was to sell its olive oil in 500 ml bottles.

247 Ms Ash was briefed with costs and sales projections as detailed in her report and as derived from a report of Mr Jorgensen (an accountant who came to give evidence in Olivaylle’s case). She adopted for the purposes of her report an exchange rate between the Australian and United States dollars current as at 24 November 2007 (A\$1 = US\$0.88 and US\$1 = A\$1,14).

248 Based on Ms Ash’s evidence, I find:

- (a) There are extra virgin olive oils sold in specialty stores throughout the U.S. at the retail price of USD\$26.40.

- (b) The stated retail price of AUD\$30 for Olivaylle's 500 ml extra virgin olive oil is unreasonable because this retail price is too low to realize a profit except when selling directly to the consumer via website or catalogue sales. If the retail price is increased to allow for a profit selling into hybrid supermarkets with a distributor and broker, it would then be priced too high for those retailers and their consumers.
- (c) The most important factor in a consumer's decision to purchase (or not) extra virgin olive oil is its price. The U.S. consumer is accustomed to 500ml of extra virgin olive oil being sold in traditional supermarkets for US\$10-15 per bottle, and because of this level of pricing, consumers question why other brands of extra virgin olive oil in other stores sell for higher prices. For any increase in retail price over USD\$15, the product will lose a significant number of customers.
- (d) There are many factors that contribute to the success of a new product in the U.S., and some of these, such as general economic conditions and international exchange rates, are not in the control of the producer/importer. No one can accurately predict the success of any new product.
- (e) Assuming that Olivaylle was successful in launching its 500ml extra virgin olive oil in the U.S., the sales volume (stated in Mr Jorgenson's report) is not reasonable because it assumes that Olivaylle will capture an unreasonably large percentage of total extra virgin olive oil sales in the U.S.
- (f) In order to attain the stated volume of unit sales, Olivaylle's 500ml bottles would need to be sold in the traditional supermarket segment. However Olivaylle's stated retail price of AUD\$30 is too high for this market segment.
- (g) The stated retail price of AUD\$30 is too high for the traditional supermarket segment, yet not high enough to realise a profit when selling to specialty food stores at the wholesale price, or through a distributor to any retailer.
- (h) Although the stated price of AUD\$30 is profitable as based on Olivaylle's assumptions as to cost of production when selling directly to consumers, the stated volume of units cannot be attained through direct website and catalogue sales alone.

Internet sales account for some portion of producers' total sales. A realistic quantity that could be sold through internet sales is less than 1,000 units per year.

249 As to whether marketing Olivaylle's oil processing method as occurring in an "oxygen-free" (or even low oxygen) environment would add to its perceived value in the U.S. market, I make the following further findings of fact, based on Ms Ash's evidence:

- (a) All marketers aim to position their products as "unique and innovative". Many marketers of extra virgin olive oil use descriptors, such as superior, premium, reserve, special selection, and limited to distinguish their product from others, however descriptors are not regulated and anyone can say anything, except for health claims, to position his product in the U.S. market.
- (b) In general the U.S. consumer does not understand the differences between grades of olive oil (promace, pure, virgin, extra virgin), and does not understand enough about processing olive oil to judge whether the level of oxygen to which it is exposed affects the quality of the oil. Although consumers might find the nitrogen blanketing technology to be an interesting story, not many people would perceive it as adding value to the product and want to spend more on an oil that was processed using this technology.
- (c) When U.S. consumers make purchasing decisions, first they consider product price, and then they consider the product's flavour. A producer's claim of superiority is far less important than either of these factors.

250 I further find, again based on Ms Ash's evidence, that Olivaylle's use in its labels of the descriptors "Olive Nectar" and "Non Plus Ultra" would have no real meaning to a US consumer and little or no impact in consumer purchasing decisions. I accept that these descriptors appeal to Mr De Moya but that appeal does not translate into market appeal.

251 Ms Ash's evidence in respect of internet based sales of olive oil was that such sales were but a small proportion of a producer's sales, a minor adjunct. This might be contrasted with the sales volumes projected by Olivaylle.

252 Based on her evidence, I find that whether launched in November 2005 or later and whether solely by internet or in some hybrid way, Olivaylle's proposed marketing of its olive oil in the United States would have failed, yielding no profit whatsoever and more likely than not the incurring of substantial losses. Olivaylle lost no lucrative American market, as Mr De Moya asserted in his evidence.

253 Further, Olivaylle could not, even assuming in its favour that it had proved a breach of the oxygen level term, lawfully have marketed its olive oil as produced in an "oxygen free" environment. So to do would have been misleading or deceptive. Even as contracted for, not all phases of the line were subject to the oxygen level term and those that were could have had up to 1% v/v of atmospheric oxygen. It is still able to market its product as produced in an "oxygen controlled" environment, for whatever commercial advantage that conferred. On the evidence, that is the labelling term it has adopted since 2007.

254 Mr De Moya asserted in his evidence that problems with the production line and in particular its inability to achieve the contractually specified oxygen level were the reason why Olivaylle abandoned its plan in late 2005 or early 2006 to launch onto the American market. Such a plan had been formulated by Mr De Moya with the assistance of a son-in-law, a Mr Richard Warren, who held a senior sales position with the clothier Polo Ralph Lauren. He was not called to give evidence in Olivaylle's case. He was said by Mr De Moya to be an expert in matters of sales and marketing and to have had an extensive involvement in the formulation of the marketing plan that came to be abandoned.

255 The original plan involved the incorporation of a distribution company, "Say Gourmet" and the entry by Olivaylle into an exclusive sales and marketing agreement with that company. It was planned to establish a new quality level within the U.S. market for Olivaylle's olive oil under the name "non plus ultra". The projected sale price was set initially at \$15.00 and then at \$10.00.

256 This original plan was abandoned at a meeting of members of the De Moya family in Miami either in late 2005 or early 2006. I find that this abandonment was attributable to an appreciation that the projected sale price per bottle could not have yielded a profit because of distribution costs. Mr De Moya came to admit as much in cross examination. It was not attributable to any perceived production line difficulties.

257 A later “internet launch” strategy in respect of the olive oil was also abandoned as a result of a decision taken by members of Mr De Moya’s family. The reason for this was the disinclination by the family to incur projected launch costs of US\$1 million to US\$1.5 million. In so doing, the family over-ruled Mr De Moya. Having regard to the findings which I have made based on Ms Ash’s evidence, that family decision was prudent. I do not accept that the decision was attributable to an inability to guarantee production in an oxygen-free environment.

258 Neither the original “Say Gourmet” plan nor the later “internet” plan was made known to Flottweg prior to the contract.

259 The decisions to abandon U.S. product launches also demonstrate to me that, while Olivaylle has had the benefit of indulgent funding via the family controlled Atalaya Corporation, that funding cannot be presumed to be available just on Mr De Moya’s request. I infer that, though Mr De Moya is greatly respected within his family, there are limits as to the extent to which that will translate into financial indulgence.

260 As to other allegedly loss causative issues related to contractual specifications, such shortfall as there was in the processing speed of the line in the 2005 and 2006 seasons led to no delay in the processing of Olivaylle’s olives. The evidence is quite to the contrary. Mr Nieuwkerk’s evidence, which I accept, is that all olives were able to be processed within appropriate time frames. This was so even in circumstances where, any inability to process at a sustained rate of 5 tonnes per hour apart:

- (a) Olivaylle chose to malax at abnormal temperatures thereby necessarily slowing the processing speed in any event.
- (b) There were problems with the hopper and weigh belt to which I have adverted.
- (c) Olivaylle’s harvester broke down, thereby interrupting the supply of olives.

261 I find that Olivaylle has lost no profits from its olive grove in either 2005 or 2006 as a result of any non-compliance with any of the contractual specifications. I also find that Olivaylle did not in the 2005 or 2006 seasons incur any extra processing costs attributable to

any shortfall in the processing speed of the line. Even on Olivaylle's case, the line was operating at nowhere near full capacity in either of those seasons.

262 As to oil recovery, even were I minded to accept that Olivaylle has proved non-compliance with the 85% contractual specification (and I am not), the shortfall would seem to me to be little more than 1% or 2%. In its submissions, Flottweg was able to demonstrate by example that, at the assumed selling price of A\$30.00 per 500ml bottle and assuming 100 tonnes of olives per harvest, a 1% increase in yield would generate but \$12,000 before bottling, marketing and transportation expenses were deducted. Yet further, the evidence is overwhelming that Olivaylle's aim is to malax not just at "cold press" temperatures but at even lower temperatures. At such temperatures a yield of 85% is not possible. In those circumstances, whether or not at normal malaxing temperatures Olivaylle's production line is able to achieve an 85% yield or even just 1% or 2% short of that is of hypothetical interest only.

263 In theory, were the production line non-compliant with the contractual specifications but it had decided nonetheless to retain it and to sue for damages for breach of contract, Olivaylle would be entitled, as a head of damages, to an amount equal to the difference between the value of the production line for which the contract provided and the value of the production line in fact supplied. It is necessary to say "in theory" because there is no evidence of what that difference in value might be. As I have noted when highlighting difficulties of causation in Olivaylle's claims in contract and under the TPA, the shortfalls in the contractual specifications seem at best in favour of Olivaylle to have been marginal, ie on its case the line nearly met the specifications. That is not a satisfactory basis upon which to embark upon even a robust assessment by inference. Rather, it highlights a failure to discharge a persuasive onus in relation to proof of loss. If such a marginal difference did sound in a capital loss, that was a matter for evidence.

264 The same may be said in relation to any claim for capital loss under the TPA. This would require a comparison between the price paid and the actual value of the production line. The one is known; the other is a matter only of conjecture.

265 I do not accept that Olivaylle, as claimed, wasted \$454,833 of expenditure prior to 30 June 2006. Olivaylle was never going to operate its olive oil production line in the open. It

was always going to construct the production facility to house its olive oil production line from whichever company it chose to purchase the same. It was always going to incur ancillary costs in relation to that production facility such as connections to utilities. What, if any, of expenditure for work performed by Bavaryan Staincraft, TCE and Mr Nieuwkerk should be treated as thrown away is, on the evidence, a matter of conjecture, not evidence. Mr Nieuwkerk and perhaps also Mr Carey might have been able to offer precision on this subject but none was sought from them. It was for Olivaylle to do this, for it has the onus not only of proving the elements of the causes of action it asserts but also the loss and damage it claims.

266 Olivaylle's claimed loss of \$10,867,040.00 required an acceptance not just of the reasoning adopted by the accountant it called, Mr Jorgensen, but also of the factual foundation for his report. The findings which I have made in relation to the absence of any lost market in the United States for Olivaylle's olive oil themselves remove that foundation.

267 Mr Jorgensen voiced no opinion on the reasonableness of the factual assumptions on which he made his calculations. These assumptions were largely based on Mr De Moya's original projections, not on actual events or their impact. Those original projections were those of someone who was both as an olive grower and marketer a layman.

268 There are a number of other facts which make the basis upon which Mr Jorgensen has come to express his opinion as to loss unreliable. In summary they are:

- (a) There is an assumed continuance of indulgent financial support of Olivaylle by the Atalaya Corporation. That company appears to be but a conduit for the De Moya Group. The latter is not under the control of Mr De Moya but his wider family. The abandonment of both the "Say Gourmet" and internet based marketing plans shows that there are limits to the extent to which the wider family will indulge Mr De Moya, his chairmanship of the De Moya Group notwithstanding. Quite what those limits might be is uncertain. I was also left in some doubt as to whether the same drive would attend Olivaylle's operations in the event of Mr De Moya's demise. That is not a palatable prospect to contemplate for there is much to admire about his intellect and achievements. However and with all due respect, he is not a young man and his passing is not a remote contingency over the duration of Mr Jorgensen's projections. It was for Olivaylle to prove an unlimited continuance of funding. It led no evidence of

the worth of either the De Moya Group or the Atalaya Corporation. Nor did it lead any evidence from a member of the younger generation as to ongoing commitment. I find that Olivaylle will not be able to rely on funding from this source for the period of Mr Jorgensen's calculations.

- (b) I do not accept that there is any foundation for Mr Jorgensen's making calculations based on a business plan which assumes for the years 2005 to 2007 inclusive production of 408,202 litres of olive oil. The evidence before me is that for that period 50,000 litres has been produced. An accountant called in evidence by Flottweg, Mr Samuel, was able to demonstrate (and I accept) that, of the difference between the business plan figures and the evidence, 9,000 litres was referable to Mr Jorgensen's attributing the yield to 72% rather than 85%. Quite what the explanation might be for the remaining difference of 349,202 litres remains a mystery.
- (c) Mr Jorgensen has not taken any account in his calculations of a failure in the Nevadillo trees in the grove to produce any olives until 2008. Yet 45% of the grove is comprised of olive trees of this variety. The trees of this variety had a genetic difficulty. Olivaylle was not unique in being unaware of this when laying out its grove. The result of the genetic difficulty was that the trees did not self-pollinate. Initially, they failed to produce olives at all. It was not until, over the course of 2005 and 2006, every fifth row of trees of this variety was removed and pollinator trees of different varieties were planted that the remaining Nevadillo trees started to bear any fruit at all. How much varies according to the proximity of the remaining Nevadillo trees to the newly planted pollinator trees (in 2008 the estimate varied from nil to 15 kg per tree). Even so, as Mr Ravetti, an expert in olive tree horticulture explained, I find the genetic features of the Nevadillo trees are such that they will continue to produce fewer flowers from which olive fruit will set than other varieties of olive trees. As Mr De Moya conceded in a voice which I noted and well recall was heavy with irony, "I have no experience in Nevadillos producing. I have a lot of experience in Nevadillos not producing." It was a significant moment during the trial. For all that, its impact has not been taken up by Mr Jorgensen. Neither has he taken account of the impact of Olivaylle's plan, voiced in evidence by Mr De Moya, to uproot and replace all Nevadillo trees if the yields do not reach a satisfactory level.

- (d) The actual production of olives at the grove has been less than that which Mr De Moya anticipated based on his study of grove yields internationally, as the following tabulation shows.

| Year | Projected Tonnage | Actual Tonnage |
|------|-------------------|--|
| 2005 | 160 | 125 (but perhaps as little as 41, the latter better in keeping with then extent of the Nevadillo tree problem) |
| 2006 | 300 | 144 |
| 2007 | 500 | 59 |

- (e) The vicissitudes of nature have to date severely affected the grove. Hail and high winds affected the 2006 crop. Hot winds which blew in October and November 2006 blew most of the flowers off the trees in the grove, thereby reducing the 2007 crop of olives. There is evidence that high winds are not an isolated event, even if hot winds are not regular. On any view, there is a contingency of adverse crop yield impact from naturally occurring events. Mr Ravetti adverts to this and its predictable frequency in his report.
- (f) As to the crop for 2008, this was at trial a matter for estimation, actual harvest figures not then being available. There was in this regard a correspondence of expert evidence. Each of Messrs Ravetti and Berlanda put the likely crop at 700 tonnes. Mr Ravetti gave an estimate of 272 tonnes for the 2009 crop (assuming no vicissitudes of nature). He offered a plausible explanation for this pessimism. New growth is essential to the amount of crop one can expect in the following year at a grove. He noted little or no growth on the Frantoio or Corregiola variety trees when he inspected the grove in 2008. Mr Ravetti struck me as a man who well knew his subject and who was trying as best he could dispassionately to give the Court the benefit of that knowledge. He also struck me as the keener observer of the grove than Mr Berlanda. I prefer Mr Ravetti's evidence generally where it conflicts with that of Mr Berlanda. The statements made by Mr Ravetti in his report concerning the problems nationally experienced with Nevadillo trees and why exactly coincided with Olivaylle's experience and provide another reason why I prefer his evidence. I accept his estimate in respect of the 2009 crop. I also reject the criticism made of Mr Ravetti's evidence based on the timing of its introduction. That was a necessary reflection of the time at which Olivaylle had opened up subjects concerning the grove and its management in

Mr Berlanda's evidence. Olivaylle had, in my opinion, a reasonable opportunity in the course of the trial to address Mr Ravetti's evidence.

- (g) Vicissitudes of nature aside, the soils at the grove do not hold water well and have almost no naturally occurring nutrients. Olivaylle, prudently, has engaged an expert, a Mr Guerrero, to furnish it with advice in relation to irrigation and fertilisers. It has in place a system of drippers and lines to apply fertiliser. Nonetheless, recent soil and leaf analysis reports highlight that nutrient deficiencies remain. Further, the system mentioned has been affected by bacterial mud blocking the drippers and by roots penetrating irrigation lines. This has led to inconsistent tree growth at the grove and adversely impacted on its productivity. Mr Ravetti's evidence, which I accept, is that for the each of the 2004/2005 and 2005/2006 years the grove received less than half of the water that a fully irrigated grove planted in 1999 should receive.

269 These factors persuade me that cash flow projections upon which Mr Jorgensen acted in making his calculations are quite unrealistically optimistic. Mr Jorgensen conceded in evidence that his choice of 40% as an appropriate discount rate was based on an assumption that the cash flows with which he was provided were conservative. He stated that, had he known they were not conservative, he would have selected a higher discount rate.

270 There are other flaws in the assumptions upon which Mr Jorgensen was briefed to express his opinion. He assumed a delay of 5 years in the implementation of Olivaylle's plans. There was not a scintilla of evidence which would support such a lengthy postponement. On the findings I have made, the only remaining repair or replacement task that remained would have occasioned no delay whatsoever in the commencement of processing for the 2007 season, and this Olivaylle unreasonably refused to allow Flottweg to effect, notwithstanding the latter's contractual right.

271 Mr Jorgensen was asked to (and did) assume production costs of \$2.50 per bottle. This was much lower than the evidence of historical costs which were between \$16.00 and \$22.00 per bottle. As Mr Samuel explained, adopting the latter, which seems much more reasonable to me, would eliminate all of the forecast profits.

272 As to production costs, Mr De Moya accepted that those anticipated by Olivaylle were four to five those of some other producers in the market. He also acknowledged that its intended method of production was, “according to all people that have been doing this for years, too expensive for the market.” He stated, “Well that may be true, but we don’t believe it to the point where we have been willing to spend our own money to prove it”. I found that answer revealing. Mr Jorgensen’s calculations are based on Mr De Moya’s self belief, not facts or reasonable assumptions based on known facts and relevant experience. They are in short worthless.

273 Such is the inadequacy of the factual foundation for the calculations in Mr Jorgensen’s reports that it is unnecessary to refer to all other bases upon which Mr Samuel came to criticise them. He noted, for example, that there were inconsistent assumptions made by Mr Jorgensen as to the percentage of fruit producing trees. He also noted that no allowance had been made for ongoing repairs and maintenance requirements or for capital equipment in the residual value. These are legitimate criticisms. Further, I can see no basis for Mr Jorgensen’s having selected 1 January 2008 as a calculation point. That date has nothing to do with anything which is in any way material in this proceeding. Were it to matter, and on the findings as to liability and the absence of any lost American market that I have made it does not, such matters would persuade me to act on Mr Samuel’s critique and opinions rather than those of Mr Jorgensen. I accept that, fundamentally flawed though Mr Jorgensen’s opinions as to the amount of loss are, my rejection of them would not disentitle Olivaylle to an assessment of damages. Were I to find that there had been a loss of market then, difficult though the exercise might be, I should be obliged to do the best I could to assess damages, even if that involved a degree of guess work.

274 Were I to embark on any such assessment then I should be obliged to take into account in Flottweg’s favour the profits that Olivaylle has derived from its continued use of the production line. Mr Jorgensen stated that \$615,000 had been made from sales of oil produced in 2005 and 2006. I accept that. I do not have exact evidence of what has been made in 2007 and 2008. Even so, what would stand in Flottweg’s favour is not just that which was made but that which ought reasonably to have been made.

275 Olivaylle at one stage sought an award of exemplary damages. I did not understand that claim to be pressed. Even if it were, such damages are not available either for breach of contract or under the TPA. Further, there is nothing in Flottweg's conduct which would in any way warrant the making of an award of such damages if they were able lawfully to be claimed.

Concluding Remarks

276 Reflecting on and reconsidering for the purposes of preparing this judgement the evidence served to confirm for me an impression which I increasingly formed as that evidence unfolded in the course of a lengthy trial. Flottweg seems to me to have become the focus for Mr De Moya's disappointment with a business plan that has not enjoyed the success for which he hoped and strove. That focus does not, as I have found, bear objective scrutiny of the facts. That Mr Jorgensen was instructed to base his calculations on figures in a business plan which, as I find, defied the course of events exemplifies the degree of Mr De Moya's disappointment, not a basis for quantifying Olivaylle's damages. It has suffered no compensable loss at Flottweg's hands. I do not attribute dishonesty to Mr De Moya in the pressing of such a claim – the concessions against interest he made and volunteered in cross-examination were too readily and sincerely given for that (e.g. in relation to the failure of the Nevadillos) – only disappointed pride.

277 It only comes to this. I dismiss the application.

278 I shall hear the parties as to any particular costs orders which are sought.

I certify that the preceding two hundred and seventy-eight (278) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 20 May 2009

Counsel for the Applicant: Mr Whittington QC with Mr Teague

Solicitor for the Applicant: Wallmans Lawyers

Counsel for the Respondent: Mr Hoffmann QC with Mr Doyle

Solicitor for the Respondent: Baker & McKenzie

Dates of Hearing: 3 December 2007 – 14 December 2007
17 March 2008 – 4 April 2008
21 April 2008 – 23 April 2008
12-13 May 2008

Date of Judgment: 20 May 2009