[2010] WASC 141

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	ATTORNEY-GENERAL OF BOTSWANA -v- AUSSIE DIAMOND PRODUCTS PTY LTD [No 3] [2010] WASC 141
CORAM	**:**	MURPHY J
HEARD	**:**	12-16 OCTOBER, 23 DECEMBER 2009 & ON THE PAPERS
DELIVERED	**:**	23 JUNE 2010
FILE NO/S	**:**	CIV 1139 of 2008
BETWEEN	**:**	ATTORNEY-GENERAL OF BOTSWANA Plaintiff AND AUSSIE DIAMOND PRODUCTS PTY LTD Defendant

Catchwords:

Contract - General principles - Construction and interpretation - Nature of terms

Contract - Remedies for breach of condition - Recovery of advance payment - Total failure of consideration

Private international law - Choice of law - Contract - Proper law of contract - C.i.f contract for the sale of goods

Sale of goods - C.i.f contracts - General principles

Sale of goods - Remedies for breach of condition - Right of rejection - When buyer deemed to have accepted goods - Section 35 *Sale of Goods Act 1895* (WA)

Legislation:

Sale of Goods (Vienna Convention) Act 1986 (WA), s 5, s 6
Sale of Goods Act 1895 (WA), s 5(1), s 5(3), s 14(i), s 14(ii), s 14(iv), s 20, s 27, s 34, s 35, s 54, s 55, s 60(1)

Result:

Action dismissed

Category: B

Representation:

Counsel:

Plaintiff	:	Mr M L Bennett & Mr M P Bruce
Defendant	:	Mr T Cox

Solicitors:

Plaintiff	:	Lavan Legal
Defendant	:	Crawford Legal

Case(s) referred to in judgment(s):

Akai Pty Ltd v The People's Insurance Co Ltd [1996] HCA 39; (1996) 188 CLR 418
Ankar Pty Ltd v National Westminster Finance (Australia) Ltd [1987] HCA 15; (1987) 162 CLR 549
Arcos Ltd v EA Ronaasen & Son [1933] AC 470
Attorney-General of Botswana v Aussie Diamond Products Pty Ltd [No 2] [2009] WASC 301
Australian Broadcasting Commission v Australasian Performing Right Association Limited [1973] HCA 36; (1973) 129 CLR 99
Automasters Australia Pty Ltd v Bruness Pty Ltd [2004] WASCA 229
Baltic Shipping Co v Dillon (The Ship Mikhail Lermontov) [1993] HCA 4; (1993) 176 CLR 344
Barber v Inland Truck Sales Ltd (1970) 11 DLR (3d) 469

Bonython v The Commonwealth of Australia [1948] HCA 2; (1950) 81 CLR 486
Burroughs Business Machines Ltd v Feed-Rite Mills (1962) Ltd (1973) 42 DLR (3d) 303
Burroughs Business Machines Ltd v Feed-Rite Mills (1962) Ltd (1976) 64 DLR (3d) 767
Carr v JA Berriman Pty Ltd [1953] HCA 31; (1953) 89 CLR 327
Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord) [1976] QB 44
Cerealmangimi SpA v Toepfer (The Eurometal) [1981] 3 All ER 533
Champtaloup v Thomas (1976) 2 NSWLR 264
Comptoir d'Achat et de Vente du Boerenbond Belge S/A v Luis de Ridder Limitada (The Julia) [1949] AC 293
Damberg v Damberg (2001) 52 NSWLR 492
Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32
Finch Motors Ltd v Quin (No 2) (1980) 2 NZLR 519
Fisher, Reeves & Co Ltd v Armour & Co Ltd [1920] 3 KB 614
Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd [1987] HCA 30; (1987) 163 CLR 236
GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd [2003] FCA 50; (2003) 128 FCR 1
Geroff v CAPD Enterprises Pty Ltd [2003] QCA 187
Hancock Prospecting Pty Ltd v BHP Minerals Pty Ltd [2003] WASCA 259
Hart v MacDonald [1910] HCA 13; (1910) 10 CLR 417
Hyundai Heavy Industries Company Ltd v Papadopoulos [1980] 1 WLR 1129
Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW) [1993] HCA 27; (1993) 182 CLR 26
JS Robertson (Aust) Pty Ltd v Martin [1956] HCA 2; (1956) 94 CLR 30
Khoury v Government Insurance Office (NSW) [1984] HCA 55; (1984) 165 CLR 622
Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd [2007] HCA 61; (2007) 233 CLR 115
Kwei Tek Chao v British Traders & Shippers Ltd [1954] 2 QB 459
Lumbers v W Cook Builders Pty Ltd (in liq) [2008] HCA 27; (2008) 232 CLR 635
Maggbury Pty Ltd v Hafele Australia Pty Ltd [2001] HCA 70; (2001) 210 CLR 181
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705
Manifatture Tessile Laniesa Wooltex v J B Ashley Ltd (1979) 2 Lloyd's Rep 28
Margaronis Navigation Agency Ltd v Henry W Peabody & Co of London Ltd [1965] 2 QB 430

McCann v Switzerland Insurance Australia Ltd [2000] HCA 65; (2000) 203 CLR 579
McDonald v Dennys Lascelles Ltd [1933] HCA 25; (1933) 48 CLR 457
Mcdougall v Aeromarine of Emsworth Ltd (1958) 1 WLR 1126
Mendelsohn-Zeller Inc v T&C Providores Pty Ltd [1981] 1 NSWLR 366
Morrison v Clarkston Bros (1898) 25R 427
Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga) [1990] 1 Lloyd's Rep 391
Neilson v Overseas Projects Corporation of Victoria Ltd [2005] HCA 54; (2005) 223 CLR 331
Pacific Carriers Pty Ltd v BNP Paribas [2004] HCA 35; (2004) 218 CLR 451
Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation [1970] HCA 36; (1970) 121 CLR 154
Panchaud Freres SA v Establissements General Grain Co (1970) 1 Lloyd's Rep 53
Playcorp Pty Ltd v Taiyo Kogyo Ltd [2003] VSC 108
Power Curber International Ltd v National Bank of Kuwait [1981] 1 WLR 1233
Public Utilities Commission of City of Waterloo v Burroughs Business Machines Ltd (1974) 52 DLR (3d) 481
R G McLean Ltd v Canadian Vickers Ltd (1970) 15 DLR (3d) 15
Roxborough v Rothmans of Pall Mall Australia Ltd [2001] HCA 68; (2001) 208 CLR 516
Sargent v ASL Developments Ltd [1974] HCA 40; (1974) 131 CLR 634
Schmoll Fils & Co Inc v Scriven Bros & Co (1924) 19 Lloyd's Rep 118
Shevill v Builders Licensing Board [1982] HCA 47; (1982) 149 CLR 620
Stocznia Gdanska SA v Latvian Shipping Company [1998] 1 WLR 574
Taylor v Combined Buyers Ltd [1924] NZLR 627
The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9) [2008] 225 FLR 1
The Commonwealth v Verwayen [1990] HCA 39; (1990) 170 CLR 394
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165
Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd (1955) 1 WLR 761
Town of Mosman Park v Tait [2005] WASCA 124; (2005) 141 LGERA 171
Tropical Traders Ltd v Goonan [1964] HCA 20; (1964) 111 CLR 41
Wallis, Son & Wells v Pratt & Haynes [1910] 2 KB 1003
Wallis, Son & Wells v Pratt & Haynes [1911] AC 394
Wanganui Motors (1963) Ltd v Broadlands Finance Ltd (1988) 2 NZBLC 103,372
Whitecap Leisure Ltd v John H Rundle Ltd (2008) EWCA Civ 429

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MURPHY J:

Introduction

1 This case involves a restitutionary claim for approximately $1 million. The money was paid by the Department of Geological Survey of the Republic of Botswana (the Department) to the defendant under a contract made in 2003, involving the supply and commissioning of a drilling rig. The Department undertakes drilling for mineral exploration and geotechnical and water well drilling in Botswana. The plaintiff is the person authorised under a Botswanan statute to bring these proceedings on behalf of the government of Botswana.

2 The plaintiff puts its claim on two bases. The first is that the consideration under the contract wholly failed, because the defendant failed to commission the drill rig. The second is that, on the proper construction of the contract, the payment was conditional upon performance of all the defendant's obligations, including its promise of commissioning, the non-fulfilment of which entitled the Department to the return of the sum paid.

3 The defendant contends that commissioning of the rig was completed in late February/early March 2006, and says that, in any event, the goods were accepted and the Department cannot recover in restitution.

4 For the reasons which follow, I find that the plaintiff has not made out his case.

The evidence - overview

5 Many of the underlying facts are not in dispute in this matter. The principal differences centred around the events of late February/early March 2006 when, on the defendant's case, the commissioning of the rig was completed.

6 The plaintiff called three witnesses of fact and one expert witness. The three witnesses of fact were Mr Morake Molatlhegi, Mr Moruti Ntloedibe and Mr Moeng Bareki. Each gave evidence-in-chief by witness statement. Affidavits of Mr Molatlhegi that had been sworn on 1 April 2008 and 19 May 2008 (pars 1 - 8) in relation to an earlier summary judgment application were also tendered, the former by the plaintiff and the latter by the defendant. The plaintiff objected to the tender of Mr Molatlhegi's affidavit of 19 May 2008, particularly, as I understand it, on the basis that it could not be admitted as to the proper construction of the contract entered into between the parties. I indicated that I could not

see it as admissible for that purpose, but that I would reserve the overall question of admissibility. I accept the plaintiff's submission that the affidavit would be inadmissible for the purpose of construction. I accept its tender only insofar as it deals with the placing of the orders for the equipment and the payment of the respective sums of $999,728 and $73,060. Paragraphs 1 - 8 of that affidavit are admitted for those purposes only.

7 Mr Molatlhegi has held the position of Superintendent at the Department since 2004. In 2002 he was the Chief Technical Officer of the Department and he was responsible for overseeing the purchase and commissioning of the drill rig. Whilst I consider that, generally speaking, he gave his evidence as truthfully as he can recollect, he appeared to me to prevaricate somewhat in responding to questions in cross-examination, and to be anxious to put forward his view of events, whether or not it was directly responsive to the particular question being asked of him. Part of the reason for this, I think, is that the events concerning the purchase of the drill rig achieved some notoriety in Botswana. The matter had been raised in the news in Botswana and had also been raised in parliament. I formed the impression that Mr Molatlhegi sought, subconsciously, to portray his role in the events in a favourable light. Mr Molatlhegi (like the defendant's witnesses) misstated in his witness statement the timing of the visit to Botswana by Mr Adamson and Mr Hanias of the defendant in late February/early March 2006. The error (like that of Mr Adamson and Mr Hanias) arose, I think, from an attempted reconstruction of the events by reference to certain contemporaneous documents which proved to be incomplete on the subject matter of the visit. I also found Mr Molatlhegi's evidence somewhat confusing regarding certain of the events which occurred between 1 July and 3 December 2007. Having made those observations, he no doubt gave his evidence honestly, to the best of his ability.

8 Mr Ntloedibe is a Principal Technical Officer with the Department. He had previously been a drilling foreman, and had undertaken further studies in Canada. He was responsible for overseeing the Department's drilling programme, and the operation of its drilling equipment and drill crews. Although he tended to be at times somewhat argumentative, I found Mr Ntloedibe to be, generally, a reliable and impressive witness. Mr Ntloedibe had, it seems to me, the most direct and immediate interest, having regard to his position within the Department, in the operation and functioning of the drill rig in question. Of all the witnesses in the case, I regarded his evidence as to what occurred in late February/early March 2006 as, by and large, the most cogent and reliable, although I think the

passage of time has also diminished his accurate recall of all the details. As noted below, there were occasions where I have preferred the evidence of the defendant's witnesses over his evidence.

9 Mr Bareki, in the course of cross-examination, appeared to be somewhat unfamiliar with all the contents of his witness statement. I also found some aspects of his evidence in cross-examination concerning the events after July 2007 somewhat confusing although other aspects seemed to me to be quite reliable. Nevertheless, overall I thought he attempted to give evidence honestly as best he could recall about the events in which he directly participated. He also corroborated a number of aspects of Mr Ntloedibe's evidence in relation to the events of late February/early March 2006. To the extent that there were contradictions between the two, however, I generally preferred Mr Ntloedibe's evidence.

10 The defendant's witnesses of fact were Mr Adamson and Mr Hanias. Mr Adamson had been involved in the supply of Edson drilling equipment since 1996. Mr Hanias had been in the drilling industry for over 35 years. He started in the industry as a drill technician. He is presently a director of the Australasian Drilling Association. He was an impressive witness in his grasp of technical matters and his knowledge of the drilling industry. In this transaction, Mr Adamson was the more 'hands on' of the two, and Mr Hanias, in effect left the day-to-day management of the transaction to Mr Adamson. In my view, both Mr Adamson and Mr Hanias attempted to give their evidence truthfully although Mr Adamson, in particular, seemed to me to be somewhat unsure of all the detail and timing of the events in late February/early March 2006. Both witnesses had, in their original witness statements, misstated the timing of their arrival in, and departure from, Botswana in late February/early March 2006. Both Mr Adamson and Mr Hanias said that they spent approximately three days on site in relation to the commissioning of the rig in late February/early March 2006. Mr Ntloedibe (exhibit 80A, pars 6, 10) had said, as did Mr Molatlhegi, that they were on site for two days. I think they are incorrect in that regard. At trial, there appeared to emerge common ground that Mr Hanias and Mr Adamson arrived in Botswana on 27 February, that the rig left for site on 28 February, and that it became bogged en route to site. It is also common ground, now, that Mr Adamson and Mr Hanias left the site where the drill was operating on Friday 3 March, and departed Botswana on Saturday 4 March. On the timing of the bogging, Mr Ntloedibe said, and I accept, that the rig became bogged at 7.00 pm on 28 February and was freed the next morning, 1 March 2006. I find that the rig arrived on site on 1 March 2006. I accept the evidence of Mr Hanias and Mr Adamson that they spent approximately three days

on site with the rig, and I find that their time on site with the rig was for most of 1 March, and for 2 and 3 March 2006.

11 In a number of respects the evidence of the plaintiff's witnesses and the defendant's witnesses in relation to the events of late February/early March 2006 was not materially different. One important respect in which the evidence of Mr Ntloedibe (and Mr Bareki and Mr Molatlhegi) differed from that of Mr Hanias and Mr Adamson was in relation to the reason for the absence of any diamond core drilling on site during the visit by Mr Hanias and Mr Adamson in late February/early March 2006. I refer to this issue in more detail later in these reasons but at this juncture, I would record that I prefer the evidence of Mr Ntloedibe and Mr Bareki on this point. I think that the evidence of Mr Adamson and Mr Hanias is mistaken in this regard, although not from any deliberate attempt to mislead.

12 Generally speaking, I think the recall of each witness of fact at trial was diminished where contemporaneous documents were not available to stimulate recollection, but I think Mr Molatlhegi's evidence, and Mr Adamson's evidence to a similar but slightly lesser degree, were most affected in that regard.

13 Two expert witnesses were called. The plaintiff called Mr Kevin Ewing as an expert witness. For reasons later explained, I did not find his evidence of any assistance. I preferred, generally, the evidence of the defendant's expert witness, Mr Graham, although ultimately the expert evidence has not been material in the resolution of the case.

Facts

The invitation to tender and the period to September 2003

14 By an invitation to tender dated 28 April 2003, sent to the defendant under cover of a facsimile dated 6 May 2003, the Department called for tenders for the supply of a multi-purpose drill rig, associated equipment, and certain services. The invitation for tender contained detailed specifications as to the required drill rig and associated 'standard equipment', a truck-carrier vehicle, standard equipment associated with the vehicle, and drilling spare parts. The rig was evidently intended to be a mobile drill rig that could be moved from place to place. Specifications were set as to the rating, the size, the speed and other identified features of the various pieces of equipment (Specifications). It also stipulated that tenderers should make provision for training, commissioning, warranties and the supply of manuals, and for tenderers to specify delivery time in

compliance with 'Botswana Supplies Regulations' (the regulations were not in evidence).

15 In relation to training and commissioning, the invitation to tender provided:

> **E) <u>Training</u>** - The supplier will be responsible for training [in Botswana] Technicians (drillers) on how to operate the rig.
>
> **F) <u>Commissioning</u>** - To *be carried out in Botswana by applying all methods of drilling on a site* to be decided by Geological Survey Department. (emphasis added)

The invitation to tender concluded with a provision for tenderers to specify a 'total price' for the 'Drill Rig, Compressor, Carrier-Truck, accessories covering [the other specified items and services] including delivery to Lobatse/Gaborone, Commissioning and Training'.

16 The defendant submitted a quotation, dated 13 May 2003, for the supply of an Edson 6000W multi-purpose drill rig and other equipment. The quotation commenced with the words ' … thank you for giving us the opportunity to submit our quotation for the above tender', and said, in effect, that the Edson 6000W 'in all ways either complies with or exceeds' the Specifications.

17 The defendant's quotation outlined the drilling capabilities, including diamond core drilling and reverse cycle, and the scope and nature of the items to be supplied, including a compressor, a Mercedes Benz truck, and spare parts. Under the heading 'General Specification' it referred to 'Commissioning and Training Program. Delivery to Gaborone, Botswana'.

18 The last page of the defendant's quotation dated 13 May 2003 stated relevantly:

> **<u>Total Quotation:</u>** Our quotation based on the above specification is **One Million and Seventy two Thousand, Seven Hundred and Eighty Eight (A$1,072,788.00) Australian Dollars.**
>
> **<u>Delivery:</u>** The drill rig will be delivered ex works 20 weeks from the placement of your purchase order and completion of the commercial arrangements. The drill rig will then be shipped from Fremantle to Durban, South Africa and then by road to Gaborone, Botswana.

> **Warranty:** *A 12 month warranty period* on workmanship and equipment subject to adherence to the maintenance schedule *will be in place after handover*. The carrier warranty will be Mercedes Benz's normal vehicle warranty.
>
> **Payment Terms:** Our standard payment terms are 20% Deposit on placement of your purchase order. The balance will be by an *Irrevocable Letter of Credit confirmed and negotiated at an Australian Bank at [sight] of conforming shipping documents*.
>
> **Total Price:** The total price of the Drill Rig, Compressor, Carrier Truck, Accessories covering (B1) including delivery to Lobatse\Gaborone, Commissioning and Training **(A$1,072,788.00) One Million and Seventy Two Thousand Seven Hundred and Eighty Eight Australian Dollars.** (Original emphasis in bold, emphasis added in italics)

19 Mr Molatlhegi was impressed by the defendant's quotation as the Department already owned and operated an Edson multi-purpose drill rig, which worked well.

20 On 16 June 2003, Mr Molatlhegi, on behalf of the Department, spoke by telephone to Mr Adamson of the defendant. Neither Mr Molatlhegi nor Mr Adamson gave evidence-in-chief of this conversation but I infer that it occurred from the terms of Mr Adamson's facsimile of 17 June 2003, referred to below. I also infer, from that facsimile, that in that conversation, Mr Molatlhegi asked Mr Adamson to address, in writing, the points which are the subject matter of Mr Adamson's facsimile. In cross-examination, Mr Molatlhegi said, in effect (ts 197), that around this time he had asked Mr Adamson to specify the minimum number of weeks that would be spent in commissioning the rig, and that Mr Molatlhegi had suggested a five-week period of commissioning. I accept this evidence and infer that the facsimile of 17 June 2003 was partly in response to that enquiry by Mr Molatlhegi.

21 The 17 June 2003 facsimile from Mr Adamson to Mr Molatlhegi referred to their telephone conversation the previous night. The facsimile addressed five matters. The first matter involved providing a breakdown of the dollar value of each of the spare parts. The spare parts were detailed and their prices totalled $77,338. The second matter was headed 'Project breakdown', and stated:

Drill Rig	A$593,877.00
Compressor	A$106,803.00
Carrier/Truck	A$265,450.00
Freight	A$18,720.00
Commissioning/ Training	A$10,600.00
SubTotal	A$995,450.00
Spare Parts	A$77,338.00
Total	A$1,072,788.00

The third, fourth and fifth matters were in these terms:

> 3. *Commissioning of the drill rig and operator & maintenance training will take 3 weeks*.
>
> 4. Button bit grinder A$2,000.00
>
> 4.[sic] Project schedule
>
> Design will commence on receipt of your official purchase order. Construction will commence when the letter of credit is confirmed.
>
> Delivery will be 20 weeks ex works from the date of your purchase order *provided that the letter of credit is received within 2 weeks of order confirmation*.
>
> I hope this is the information you are looking for. If you require any further information please do not hesitate to contact me. (emphasis added)

22 On 30 June 2003, in response to a request from Mr Molatlhegi, the defendant forwarded to the Department a copy of its certificate of incorporation.

23 On 20 August 2003, Mr Adamson on behalf of the defendant wrote to the Department and confirmed that the defendant's tender included all sea freight, clearance and document charges from Perth to Botswana.

24 By facsimile dated 22 August 2003, Mr Adamson of the defendant advised Mr Molatlhegi of the Department that the defendant's 'standard terms' included a 20% deposit because 'the total Project [including] the Drill Rig and Carrier are manufactured on demand to the specification as per the ... tender'. Although the facsimile referred to 'standard terms', the defendant did not in these proceedings allege that the relevant contract between the parties incorporated a document called 'standard terms', or tender such a document.

25 On 10 September 2003, the Department requested the establishment of an irrevocable documentary credit with Barclays Bank. The request was for the payment of $999,728, by acceptance of a draft drawn on the confirming bank on sight of specified documents. The documents specified were signed commercial invoices showing the c.i.f. value, negotiable marine bills of lading to order and bank-endorsed, certain transport documents, a marine and war risk insurance policy for 'not less than the CIF invoice value plus 10%', and other documents including an inspection certificate. The beneficiary was to be the defendant. Confirmation charges were to be to the beneficiary's account. The request stated that part shipments were not allowed and that shipment would be no later than 31 January 2004. The credit was to be valid up to the end of February 2004.

26 By cl 2 of the application, the Department agreed, in effect, to pay Barclays Bank in Botswana an amount in sufficient time to enable transfer of the funds to the point at which the draft was to be drawn under the letter of credit, on or before the date when it fell due. By cl 11, the Department authorised the bank to hold the documents called for in the documentary credit and the merchandise to which they related, and the insurance, as security for all liabilities incurred by the bank in connection with the provision of the letter of credit.

27 Mr Molatlhegi said that a documentary credit was issued on 10 September 2003 (exhibit 78, pars 8 - 9). I infer that an irrevocable letter of credit was issued by Barclays Bank in accordance with the Department's application. It is referred to in the confirming credit referred to below.

28 The ANZ Banking Group Ltd in Perth was the confirming bank. By letter dated 15 September 2003, the ANZ bank confirmed to the defendant that Barclays Bank had issued an irrevocable documentary credit for $999,728, set out the terms of the credit, and undertook to honour drafts drawn under the letter of credit. The terms substantially reflected the terms of the application for credit. The confirmation included:

> DRAFT DRAWN UPON CONFIRMING BANK AT SIGHT FOR 100% OF THE CIF.

29 On 16 September 2003, Mr Adamson wrote to Mr Molatlhegi and said that manufacture of the drill had commenced, and asked for the release of the 20% deposit.

30 Mr Adamson wrote to Mr Molatlhegi a second letter on 16 September 2003 and indicated certain difficulties with the letter of credit. He asked that certain amendments be made to it, including changing the latest date of shipment to 31 March 2004 and the expiry date to 31 April 2004, and required payment of the 20% deposit in accordance with the defendant's quotation of 13 May 2003. There was no complaint in relation to the value of the credit, being $999,728.

31 On 17 September 2003, the Department wrote to Barclays Bank seeking amendments to the letter of credit as requested by the defendant, including the payment of a 20% deposit as 'advance payment against an invoice'. Mr Molatlhegi said (exhibit 78, par 10), and in any event I would also infer, that Barclays Bank made the requested changes and amended the credit. I infer that Barclays Bank notified the ANZ bank accordingly, and that the ANZ bank confirmed the amended credit.

32 By letter dated 18 September 2003, the defendant sent the Department an invoice for a 20% deposit in the sum of $214,557.60. This sum represents 20% of $1,072,788.00, being the full amount in the defendant's quotation of 13 May 2003.

Payment of the deposit

33 It is admitted on the pleadings that on or before 9 October 2003, the Department paid the defendant $199,945.60 (ie, 20% of $999,728). Mr Molatlhegi's affidavit of 1 April 2008 (exhibit 78, par 11) indicates that the drawing was made under the letter of credit, on or about 8 October 2003. I also infer that by or at around this time, Mr Molatlhegi and Mr Adamson had agreed that the deposit payable would be 20% of the amount in the letter of credit, and not 20% of the total price referred to in the defendant's quotation of 13 May 2003. In this regard, I note that Mr Molatlhegi in cross-examination (ts 178) said that the Department had initially obtained funding from the government to purchase the rig, but not the spares. He also deposed, in his affidavit of 19 May 2008 (exhibit 117, par 5), that the Department 'made a decision to place an initial order for the rig and only the most essential spare parts. Those items cost a total of $999,728'. I infer that around this time, Mr Molatlhegi had told Mr Adamson that the Department would order the rig and essential spares for $999,728, and that he would order the bulk of the spares, at a price of $73,060, separately, when further funding became available.

The manufacture, despatch from Australia and payment of the balance: October 2003 to August 2004

34 By facsimile dated 23 October 2003, Mr Adamson wrote to Mr Molatlhegi in relation to the supply of an auger in relation to another transaction. In relation to the transaction the subject of these proceedings, he said:

> 2. Manufacture has commenced on the 6000W and the major long leave time components have been ordered. The hydraulic package will let in the next 2 weeks as manufacture proceeds. A more detailed report with component delivery dates will issued [sic] when final delivery of components is confirmed.

35 On 20 November 2003, Mr Adamson wrote again to Mr Molatlhegi. He reported on items which had been the subject of 'Forward Purchasing', including the Mercedes Benz and the compressor, and indicated the dates when they were expected to be available. He also reported on the 'Design and Manufacturing Schedule', and set out the dates by which the manufacture of components of the rig were to be completed, and ready to be packed for shipping. The estimated date for packing for shipping was said to be 15 March 2004.

36 On 25 February 2004, Mr Adamson wrote to Mr Molatlhegi explaining that certain delays had occurred, particularly in relation to the machining of the gears and shafts for the rotary heads, which was being undertaken by a gear-cutting company. The letter concluded:

> Although overall the manufacture of the drill rig is only slightly behind schedule we are concerned that we not [sic] have sufficient time to conduct a full and comprehensive testing schedule.
>
> Therefore we are asking that the Letter of Credit latest shipping date be extended to the end of April with the expiry date extended to the end of May.
>
> We apologise for the delay, but we feel it is in the best interests of the project that we ensure that the drill is properly commissioned prior to shipment.

37 On 2 March 2004, the Department requested Barclays Bank to amend again the letter of credit to change the latest date of shipment to 30 April 2004 and the expiration of the credit to 31 May 2004. I infer that the changes were made, as requested by the Department.

38 By letter dated 9 March 2004, the Department provided the defendant with information concerning the clearing of goods on arrival in Botswana. The facsimile concluded:

> Don't forget to fax us a full invoice of spares for the rig spares so that we can process telegraphic transferring of payment into your account before the end of our financial year here. This is very urgent and crucial.

39 On 13 May 2004, the defendant rendered a further invoice showing a net sum due of $799,782.40, being the amount of $999,728, less the amount of $199,945.60 (being the 20% deposit).

40 I infer that the shipping documents were presented to the ANZ bank. The bill of lading was in evidence. It was a clean, multi-modal bill. It referred to the letter of credit. The plaintiff, in its submissions, contended that 'documents' were not 'shipped' in accordance with the letter of credit, and referred to certain matters put to Mr Adamson, and to his answers in his cross-examination (ts 417 - 424). I did not regard that evidence as an admission that the proper shipping documents were not presented - Mr Adamson said that payment would not have occurred without presentation of the proper documents. Whilst his opinion is not evidence of the fact, and as an opinion I place no weight on it, I infer, based on the commercial nature of the transaction, that nearly $1 million would not have been paid by the ANZ bank except upon presentation of the proper shipping documents.

41 The rig was shipped from Fremantle around 25 May 2004. The rig arrived in Gaborone, via Durban, on 8 July 2004. Insofar as shipment occurred after 30 April 2004, it was beyond the date mentioned in the last amendment to the letter of credit. I infer that the letter of credit was amended again to permit shipment by 31 May 2004, or that the stipulation was waived by the banks involved, with the concurrence of the Department. I so find on the basis put that it is highly unlikely that the ANZ bank would have put itself at risk by paying such a large sum contrary to the terms of the credit without the concurrence of Barclays Bank, and that Barclays Bank would not have concurred without approval by the Department. Mr Molatlhegi also said (exhibit 78, pars 14 - 15) that it was agreed to extend delivery to the end of May 2004.

42 It is admitted on the pleadings that on or before 24 July 2004, the Department paid $799,782.40. Mr Molatlhegi's affidavit of 1 April 2008 (exhibit 78, par 11, 'MM7') indicates that this amount was also drawn under the letter of credit, as amended, on or about 24 June 2004.

The spare parts

43 Spare parts, a rod rack and certain other items were sent by the defendant to the freight forwarder in early/mid-August 2004. They were the subject of an invoice from the defendant dated 12 August 2004. They were to be shipped around 16 August 2004 but there was a delay due to problems associated with the dispatch by the freight forwarder. They were subsequently shipped on or about 30 August 2004. It is admitted on the pleadings that on or before 12 August 2004, the Department paid $73,060. There is no evidence indicating that this amount was paid under the letter of credit which, as I have indicated, was in the sum of $999,728. I infer from Mr Molatlhegi's affidavit of 19 May 2008 that the sum of $73,060 related to the bulk of the spare parts, which were the subject of a separate order by the Department some time in July 2004.

September 2004 to October 2004

44 On 28 September 2004, Mr Adamson wrote to Mr Molatlhegi. He said that the spare parts and accessories were clearing customs in Durban, and that the shipment was expected in Botswana in the following week. He also said:

> 4. I anticipate that I will be in Botswana for 10 to 14 days to assemble components that were removed for shipping, maintenance and operation instruction and drill rig commissioning. A more complete program will be outlined prior to my arrival.
>
> 5. Please advise if workshop facilities, tools and staff will be available to assist me in assembly and commissioning of the drill rig.

45 In early to mid-October 2004, by the exchange of the correspondence referred to below, the parties agreed that commissioning would be undertaken in two stages, with one stage being commissioning at the Department's premises in Gaborone in about late October 2004, and the second stage being test drilling at a site near Lobatse, at some future time to be determined.

46 On 6 October 2004, Mr Adamson wrote to Mr Molatlhegi and said:

> Referring to my facsimile [of 28 September 2004] and our subsequent telephone conversation.
>
> Our commissioning will be in two parts.
>
> The first part will be as indicated in the above facsimile.

> The second will be carried out by an experienced drill technician at a date to be agreed and preferably at a site close to Lobatse. This part of the commissioning will take approximately two weeks.
>
> We look forward to receiving your comments as soon as possible so that the required arrangements can be made.

47 Mr Molatlhegi's reply, dated 7 October 2004, was in the following terms:

> 1. I would like to advice [sic] on the following. In relation to the commissioning of the rig:
>
> 2. We don't have problem with period and time on [your fax].
>
> 3. We suggest that the second period of the OF Commissioning by your Technician be 3 to 4 weeks because it involves drilling and test of DTH [down-the-hole] and Coring Techniques.
>
> 4. We have two sites available for commissioning:
>
> - Site A is in the Kalahari Desert about 463 km West of Lobatse
> - Site B is also in the Kalahari Desert about 275 km west of Lobatse
> - The tarred road is about 95% of both distance
>
> 5. Our Country will be going for elections on the 30th August, therefore we will loose [sic] 3 days off site.
>
> 6. Can you arrange your plans based on the above information, our staff including the Mechanic will be available for help.

48 On 11 October 2004, Mr Adamson wrote:

> I confirm that the first stage of commissioning will be carried out either immediately before or immediately after the three day break in Botswana for your elections at the end of October 2004.

49 On 15 October 2004, Mr Adamson informed Mr Molatlhegi that he intended to arrive in Gaborone on 4 November 2004.

50 The spare parts arrived in Gaborone on 25 October 2004.

51 On 29 October 2004, Mr Adamson informed Mr Molatlhegi that he would be in Gaborone on 4 November 2004 and that in his absence 'arrangements for the second commissioning period' would be made by the defendant's head office.

Mr Adamson's attendance in Botswana 4 - 13 November 2004

52 Mr Adamson was in Botswana in the period 4 - 13 November 2004. The drill rig was in the Department's yard in Lobatse at this time. In this period, Mr Adamson unpacked the rig from its plastic covering and noticed that there had been damage to the radiator and the mast-foot. He considered that the damage had occurred in transit, and he arranged to have the damage repaired. Mr Adamson assembled and started up the rig. There were delays in the drill rig responding to the hydraulic controls which operated the rig. Mr Adamson told Mr Molatlhegi that the delays were to do with the pilot pressure system. Mr Adamson said, and I accept, that the pilot pressure system operated the rotary head and the winches. Mr Adamson told Mr Molatlhegi that when he returned to Australia he would consult with the company that had designed and supplied the hydraulic system.

Correspondence between the parties in the period 15 November 2004 to March 2005

53 On 15 November 2004, following his return to Australia, Mr Adamson forwarded Mr Molatlhegi the specification sheet for the Mercedes Benz truck.

54 On 16 November 2004, Mr Molatlhegi wrote to the defendant in these terms:

> Thank you for assisting us on the vehicle capacity. I think it's better for us to bring the following observation made as far as the new rig commissioning is concerned:
>
> 1. Compressor was not loaded and the air gauge is not supplied.
>
> 2. Drill rig DTH work plate is not supplied we suggest that the plate must be able to accommodate 12" Hammer circumference.
>
> 3. Locking Pins for angle drilling are not available.
>
> 4. Wire-line Haul Winch and Pins missing from the spares.
>
> 5. Ladder for climbing up the mast not provided.
>
> 6. Oil Seal for the pump.
>
> 7. Water Swivel for DTH drilling.
>
> 8. The working lights are not enough we need **two** bright and **one** deem [sic] for derrick, engine area and control panel respectively.

9. The Carrier truck tyres are 365XR20 NOT 1400x R 20.

10. Air dust collector for the rig engine is missing I think you overlooked this.

I think this information will assist your office in preparing for the final and Part II of the commissioning by Technician. I suggest this must be done before the end of year especially the supply of outstanding items which are needed for commissioning to avoid Christmas Shut downs delays in shipment. (original emphasis)

55 On 23 November 2004, Mr Adamson replied by facsimile:

1. There is an air gauge on the panel. When I returned to Perth I checked the air circuit and noted that the gauge fitting on the pipe should be upstream of the isolation valve. From memory I think the fitting is downstream of the gauge. If you can confirm this let me know and I will supply another fitting. If the operators are not happy with the gauge as fitted let me know and I will try to source an alternative.

2. The largest DTH plate [which] Edson currently supplies takes an 8" hammer. We are at the moment redesigning the plate to accommodate 12".

3. These pins were in the spares and will be resupplied.

4. Haul winch cable will also be resupplied.

5. Mast ladders are not a standard item and because of regulation in various areas are supplied to specification. In this case no ladder was specified and when we checked the build list for your existing drill no ladder was mentioned.

6. The oil seal leakage was corrected.

7. The DTH swivels are in the manufacturing program for manufacture as soon as possible. I will advise on delivery and price shortly.

8. We supplied 2 flood lights that cover the mast and engine area's [sic]. We can supply 1 soft light for the control panel.

9. We are still waiting for Mercedes to come back to us. At this stage I think the problem with the larger tyres is the twin steering.

10. I didn't notice the missing collector. Are you referring to the tapered plastic piece under the main filter?

> We are still reviewing the technician issue. With the items that need to be manufactured and shipped to Botswana, prior to the last visit, I believe that it will be unlikely that any visit will happen before the end of the year.

56 On or about 2 March 2005, the Department moved the rig in its yard in Lobatse in order to make way for work being undertaken in the yard by building contractors. When moving the rig, its mast broke. The Department advised the defendant of the occurrence. Mr Adamson, in a facsimile dated 4 March 2005, suggested that it appeared that the hinge mounting plate on top of the pivot mounting had broken away and that the damaged plate would need to be removed and re-welded.

57 Mr Adamson also referred, in his facsimile of 4 March 2005, to the question of the irregular hydraulic control, and said that it was being caused by the low control pressure at the pilot control valves in the control panel. He suggested a gauge be fitted and that the pressure be set to 70 lbs per square inch to improve performance.

58 Mr Adamson at this time (ts 444) considered, and I accept, that the fracture to the mast had rendered the drill unsafe. Accordingly, on site drilling for the purposes of the second stage of commissioning was not possible.

59 On 11 March 2005, Mr Adamson wrote to Mr Molatlhegi again and suggested that certain repairs be carried out to the damaged pivot area. He suggested that the drill not be used until the repairs were carried out and the pilot operation pressure was reset.

60 The down-the-hole swivel equipment referred to in item 7 of Mr Adamson's facsimile of 23 November 2004, which was not part of the Department's order for the rig in question, was the subject of further correspondence by Mr Adamson on 22 March 2005. (The equipment was the subject of a separate order by the Department dated 11 July 2005, for which the defendant invoiced the Department $9,350 on 12 July 2005.)

Mr Adamson's attendance in Botswana 7 - 19 April 2005

61 At around this time, Mr Adamson made arrangements to travel to Botswana, in order to supervise the repair of the broken pivot and to inspect the mast and controls. He arrived on 7 April 2005 and left on 19 April 2005. During this period, he arranged for the fractured mast to be sent to be repaired at a welding and fabrication workshop, and then returned to the Department's yard at Lobatse. Before leaving, Mr Adamson advised Mr Molatlhegi and Mr Ntloedibe that he would arrange for a Botswanan contractor, Minetech, to carry out work on the

pilot pressure system of the drill rig. He indicated that on-site commissioning could not be undertaken at that stage.

The engagement of Minetech and the period July to December 2005

62 In August 2005, the defendant made arrangements for Minetech to install valves with a view to improving the control response of the drill rig's hydraulic system. Minetech had been recommended to the defendant by Parker Hydraulics, the company which had supplied the pilot pressure system for the rig.

63 On 24 August 2005, the Department wrote to the defendant and said:

> Thank you for your fax dated the 21st August 2005. We are concerned with the delay in commission the drill rig and hand it over to us [sic]. The Department would like your Company to submit a plan of how you would attend this matter because its long overdue and we have lost production for almost one year now. The plan must clearly state when do you expect Minetech to finish the work on the rig and when do you plan to start Commissioning the rig.

64 By about October 2005, it also became evident that the two hydraulic cylinders used to lift the mast to its vertical position, known as tilt rams, were damaged. The defendant made arrangements for replacement rams to be shipped from Australia to Lobatse, and installed by Minetech.

65 On 19 October 2005, the Department wrote to the defendant and said:

> The Department of Geological Survey received the new Edson 6000 drill rig on the 8th July 2004. The rig is now one year three months in our yard. It has not yet been commissioned by test drilling on site as per Tender specification. According to the tender No19/2-20/2001 2002 the drill rig commissioning should have lasted for five weeks but it's still not done. We would like to bring the following to your attention:
>
> - The drill rig is one year three months old to date, however it has not been commissioned and handed to Department of Geological Survey.
>
> - Initially we had expected the commissioning to last for Five weeks upon delivery as per tender agreement but to date this has not been done.
>
> - Your engineer was delayed by two months to attend a pre commissioning inspection of the rig.

- After the arrival of your engineer for pre commissioning inspection, some spares were not supplied and it took six months to supply and commissioning was resumed on the 19th April 2005.

- No test drilling has been done so far to confirm other functions of the rig.

- Commissioning has since been pending since end of April 2005 after your engineer has replaced some parts and repair the mast since the rig continued to malfunction. This problem is six months old now.

- There are lots of repairs being carried out on the rig though it is new. This is a serous course [sic] for concern.

The purpose of purchasing the rig was to alleviate Water problems faced by our Country and to carry out Mineral exploration. All these have failed due to delay in commissioning and hand over. You will recall that I have raised a similar complaint (ref to fax dated 24/08/05 which you did not respond to.

The Department of Geological Survey is giving your Company up to Mid November 2005 to complete the commissioning and hand over of the rig, failing which we will demand our money back and request you to come and collect the rig because you did not fulfil the tender specifications of Tender No: 19/2-20/2001 2002.

Looking forward to your reply. Please acknowledge receipt of this letter.

66 On 31 October 2005, the defendant replied:

We do acknowledge that preparing this drill rig for commissioning has taken much longer than usual. We also advise that we are moving as quickly as possible to resolve this matter and make the rig ready to go to the field.

We take your point and share your concern about repairs to the unit not leaving it in an as new state. To this stage all repairs have been on an as new status with any replacement equipment being new. To ensure that this continues we have ordered replacement tilt rams to replace those that have been damaged. We expect these in store this week when they will be shipped by air to Gaborone. Minetech will be asked to install these rams and complete installation of the revised mast tilt hydraulics.

Minetech will also be asked to carry out a full check of all operations of the drill rig to ensure that the unit is ready for the field.

When the drill rig is taken to the field either Minetech or ourselves will provide commissioning supervision for approximately one week as per our normal commissioning schedule.

> The above schedule should ensure that the rig is ready to proceed to the field and commence operational work.
>
> I can assure that we are committed to completing the project.

67 On 16 November 2005, the defendant invoiced the Department for the two new tilt rams. The invoice described the price as 'No charge'.

68 Around December 2005 Minetech replaced the tilt rams. The defendant paid for the replacement work.

Attendance of Mr Hanias and Mr Adamson in Botswana in early 2006

69 By facsimile dated 30 January 2006, Mr Adamson informed Mr Molatlhegi that the down-the-hole equipment would be shipped soon and that he was trying to arrange for himself and Mr Hanias of the defendant to visit Botswana on 13 February 2006.

70 On 14 February 2006, Mr Adamson advised Mr Molatlhegi that he and Mr Hanias would arrive in Gaborone on Monday, 20 February 2006, and leave on Saturday, 25 February 2006. He said that they would be 'completing the drill commissioning'. By facsimile dated 16 February 2006, Mr Adamson advised the Department that their visit would likely be postponed for one week.

71 On Monday 27 February 2006, Mr Adamson and Mr Hanias arrived in Gaborone. The following day, Tuesday 28 February, the rig was driven to a site approximately 90 km from Lobatse, for on-site commissioning. The rig became bogged en route. It was freed the next morning and arrived on site that day, 1 March 2006. At the site, the rig was set up for drilling under the supervision and direction of Mr Adamson and Mr Hanias. In total, Mr Hanias and Mr Adamson spent approximately three days, between Wednesday 1, Thursday 2 and Friday 3 March 2006, on site working with the rig.

72 During the period 1 to 3 March 2006, when Mr Adamson and Mr Hanias were present, down-the-hole drilling was undertaken; diamond core drilling was not undertaken. Mr Hanias said (ts 557) and I accept, that diamond core drilling operations are the same or similar to down-the-hole drilling operations, although diamond core drilling uses a diamond tip drill with a core barrel, the drilling occurs at a lower speed, and certain ancillary equipment is different.

73 Over the course of the three days, four principal problems were identified. There was a compressor failure; the water injection pump failed; the tilt rams recently replaced by Minetech became bowed; and it was apparent that the valves which had been installed by Minetech had not adequately improved the responsiveness of the hydraulic controls.

74 In relation to the compressor, an Atlas Copco representative attended the site during Mr Hanias' and Mr Adamson's visit, and corrected the problem. The representative found that a temperature safety shutdown gauge was set too low. He adjusted the setting, tested the compressor again, and it then operated satisfactorily.

75 In relation to the water injection pump, that item of equipment required repair or replacement, and Mr Hanias thought it would be cheaper and quicker to replace it. In the meantime, test drilling was carried out using another pump: a 'Bean pump'. I accept the evidence of Mr Hanias and Mr Adamson to the effect that this was a minor problem and that it was a simple operation to use the Bean pump in its place (Adamson ts 507 - 511). I accept Mr Hanias' evidence that this would not have hindered ongoing drilling (exhibit 115, par 68).

76 In relation to the tilt rams, the problem was one of 'over-stroking'. Whilst the tilt rams successfully raised the mast to the vertical position, the hydraulic pressure which operated the tilt rams was too high, which meant that the rams kept pushing even though the mast was upright. The result of this extra pressure against the vertical mast was that the tilt rams became bowed.

77 Mr Adamson agreed that this was a matter of concern. Mr Hanias, who did testing of the hydraulic tilt rams on site, agreed that it needed to be fixed. He said (ts 555):

> All right. You tell me what was the discussion on site when Mr Adamson was present?---The discussion was that we had a bowed - bowed rams, and we'd obviously done our inspections and I knew they were overstroking and we had to correct that situation. We had two choices to correct it; we could put stop-tubes in so they didn't overstroke or we could choose to put new cylinders in. We chose, for the long-term benefit of the situation, to put new cylinders in.

78 Mr Hanias and Mr Adamson took measurements of the tilt rams and advised the Department that upon return to Australia, the defendant would arrange for the manufacture of new tilt rams that had a different stroke and rod configuration.

79 In relation to the hydraulic controls, it was apparent that the Minetech work had not fully remedied the problem. Mr Adamson, in cross-examination, said that the hydraulics was a 'complex issue' (ts 514). Mr Adamson considered that it was necessary to make alterations to the load sense lines.

80 On Saturday 4 March 2006, Mr Adamson and Mr Hanias departed for Australia.

81 By this time, the drill rig had completed down-the-hole drilling to a substantial depth - approximately 80 m. Mr Adamson and Mr Hanias said in their witness statements that in the period of their attendance there was no equipment on site to undertake diamond core drilling. They referred to the fact that the Department subsequently purchased a universal swivel, being a component for diamond core drilling. Mr Molatlhegi said, and I accept, that the swivel later purchased was a spare. Moreover, I accept the evidence of Mr Ntloedibe and Mr Bareki that there were the necessary components for diamond core drilling on site. I accept the evidence of Mr Hanias and Mr Adamson that they did not see the diamond core drilling equipment on site, but I think that they have assumed, wrongly, that because they did not see it, it was not there.

82 I also accept Mr Ntloedibe's evidence that at the conclusion of the visit to site, Mr Adamson suggested to Mr Ntloedibe (exhibit 80, par 75) that the Department continue down-the-hole drilling, and then do some diamond core drilling, to see if any further problems emerged in connection with the operation of the rig.

83 Mr Adamson and Mr Hanias said that they provided training in operation and maintenance during their time on site. I accept that there had been some training in the operation and maintenance of the rig, but in the limited time on site, it was not extensive training.

84 After Mr Hanias and Mr Adamson left, Mr Ntloedibe and the other Department employees continued down-the-hole drilling for a further 30 m. Mr Ntloedibe (exhibit 80, pars 76 - 79) said, in effect, and I accept, that no further difficulties with down-the-hole drilling were encountered at this time, and that the down-the-hole drilling 'worked well' (ts 302). Mr Molatlhegi also said in cross-examination that the down-the-hole drilling 'went fine except for these hiccups like the foam injection [water] pump and the compressor not working' (ts 269).

85 Whilst the hydraulic controls needed improvement, and the tilt rams and water pump needed to be replaced, the rig worked well in the performance of down-the-hole drilling operations. The bowed tilt rams did not impede drilling once the mast was in place. Rather, the significance of the bowing was that it created a difficulty in lowering and raising the mast. This was a problem because the mast would need to be lowered every time the rig moved to a new place to do drilling, and then raised again for the drilling operation.

86 After Mr Hanias and Mr Adamson departed, the Department then changed the drill rods and commenced diamond core drilling. There was no evidence from the plaintiff as to how long the Department attempted diamond core drilling, but I infer that it did so for at least a day or so after the departure of Mr Adamson and Mr Hanias from Botswana on 4 March 2006. Mr Ntloedibe and Mr Bareki gave the following evidence, which I accept, as to what occurred on the Department's attempts at diamond core drilling. (See Ntloedibe, especially exhibit 80A, pars 37 - 44.)

87 In the course of attempting diamond core drilling two issues arose. First, the issue of the responsiveness of the hydraulic controls became more stark. The Department technicians could not accurately control the speed of the drill head, due to problems with the pilot pressure system. That is because diamond core drilling requires greater accuracy than down-the-hole drilling. Too much speed will cause the drill bit to become blunt and wear it out too early. Too much pressure will result in the cuttings clogging the annular space. If the annular space becomes clogged, water will not be properly fed to the drill bit, which entails the risk that the bit becomes overheated and solidifies with the rock. This can result in the loss of the equipment in the hole.

88 Secondly, at around this time, the wire winch line which is used in diamond core drilling to haul up the core to the surface, failed to operate. Mr Hanias gave evidence, which I accept (ts 557 - 558), that the 'old fashioned' way of diamond core drilling was to take the rods out of the ground, empty the core barrel and then put the core barrel back into the ground. He said that Boart Longyear had developed a wire line system which allowed the core to be retrieved by taking out the inner sleeve of the core barrel through the rods. He agreed that an inoperative winch line would diminish the capacity to effectively carry out diamond core drilling.

89 Having encountered difficulties in carrying out diamond core drilling, the Department then left the rig in the field, with the mast upright, under the guard of two employees of the Department.

90 There was an issue on the evidence as to how things were left between the Department and the defendant at the conclusion of the site visit by Mr Hanias and Mr Adamson on 4 March 2006, regarding repairs to the rig. Mr Molatlhegi's evidence was to the effect that Mr Hanias and Mr Adamson said that they would return in two weeks to fix the hydraulic circuit and complete the commissioning (exhibit 78, par 57). Mr Ntloedibe said that Mr Adamson and Mr Hanias had said that they would return to Botswana to effect repairs (exhibit 80, par 74). He did not say that Mr Adamson and Mr Hanias had said that they would return within two weeks. Mr Adamson did not refer to the conversation in his witness statement, but he accepted in cross-examination, in substance (ts 518 - 519), that the arrangement was that the defendant would have the drill fixed before it would be put into general use by the Department.

91 Mr Hanias, in his witness statement (exhibit 115, par 81), said that he and Mr Adamson had advised the Department that 'the issues concerning the rams and hydraulics would be rectified' by the defendant. In cross-examination, Mr Hanias said, in effect, that he had told Mr Molatlhegi that it would take two weeks once they returned to Australia to get the parts that would be needed to fix the rig.

92 Mr Hanias also said that he had told Mr Molatlhegi that he 'wanted to do a follow-up trip to Botswana once things had been repaired'. He also said (ts 565) that he believed that the rig had been commissioned by the time of his departure on 4 March 2006. The following exchange in cross-examination occurred:

> Did you honestly hold the belief that the rig, in its state that you left it in, had been successfully commissioned?---Yes, with the problems we had notified and everybody knew about and we were taking steps to rectify.
>
> With your undertaking to fix those problems?---With my undertaking that we would pay the cost of fixing those problems, yes.
>
> And do it on an expedited basis and return?---As quick as physically possible.

93 I do not accept Mr Molatlhegi's evidence to the effect that Mr Adamson and Mr Hanias said that they would return in two weeks. The logistics of securing the requisite parts and organising the work were such that the defendant's officers could not have sensibly concluded, or undertaken to, or informed the Department that, they would be back in two weeks.

94 I find, in light of the evidence of Mr Hanias, Mr Adamson and Mr Ntloedibe to which I have referred, that the arrangement with the Department on 4 March 2006 was that Mr Adamson and Mr Hanias would, on their return to Australia, organise spare parts which they said they expected would take two weeks to source, and then make arrangements for the identified problems to be rectified, at the defendant's cost, as soon as possible. They also said that at least one of them would return to Botswana to check the operation of the drill rig around the time of, or shortly after, the execution of the repair and modification work.

Communications in the period March to October 2006

95 I infer from Mr Adamson's letter to Mr Molatlhegi of 10 March 2006 (see below) that Mr Molatlhegi spoke to Mr Adamson at some time between 6 and 10 March 2006 regarding the difficulties experienced in relation to the use of the hydraulic controls in diamond core drilling.

96 On 10 March 2006, Mr Adamson wrote to Mr Molatlhegi and said that he considered that the problems being experienced with the functions of the drill rig were related to air in the pilot control system and that the air needed to be bled from the system in a similar way that air is bled from a brake system. Mr Adamson also said that he was in discussion with Parker Hydraulics about the air in the pilot system.

97 At this time, the rig was still in the field, 90 km from Lobatse, guarded by two employees of the Department. As events transpired, the rig remained in the field for about one and a quarter years.

98 On 13 March 2006, the defendant ordered two new tilt rams, pursuant to the arrangement referred to in [78] and [94] above.

99 On 23 March 2006, Mr Molatlhegi wrote to the defendant and said:

> The Department of Geological Survey would like to remind you that the following issues were will [sic] have to be addressed in order to have the rig in good and operational condition these were picked up during the drilling to commission the rig on site these are:
>
> 1. Controls respond time
> 2. Wire-line winch not working
> 3. DTH table not suitable for large diameter drilling
> 4. Haul-winch shift slew pins
> 5. Hydraulic Mast raised Cylinders bent
> 6. Hydraulic Clamp quick couplers
> 7. Mast Locking Pins
> 8. Air line flow control valve too far from the operator

9. Lights not fitted.
10. Air delivery, Mud, connections too close to the compressor
11. Drive Shaft for Coring
12. Bean pump leaking at parking
13. Gauges pressures and batteries
14 Compressor speed not automatic or not dependent on air-volume
15. Brake out spanner
16. No spirit level

100 The Department evidently intended, and conveyed by this letter its intention, that the defendant should provide all such equipment and carry out all such works at the defendant's cost.

101 Most of the items listed above were put to Mr Adamson and Mr Hanias in cross-examination (ts 435, 520, 566 - 567). The effect of their combined evidence, which I accept, was as follows. Item 1 related to the issue regarding the responsiveness of the hydraulic controls. Item 2 related to the wire winch used for diamond core drilling. Item 11 appeared to relate to diamond core drilling, although its nature or significance had not been explained by the Department or understood by the defendant. Nor, I would interpolate, was there evidence before me as to the precise nature or significance of item 11. Item 3 was a matter previously raised by the Department with Mr Adamson or Mr Hanias, but had not been in the original specification by the Department. It was, in effect, I infer, a modification to carry out larger diameter drilling. Item 7 related to pins that had been despatched but had been lost in transit. They were not a 'big-value item' and were being replaced. Item 8 was said by Mr Hanias to be an 'interpretation issue', and his attitude was 'if it can be fixed and make people happy, go ahead'. I infer from this that in his opinion, which I accept, it was an item the operational significance of which could be a matter of debate, but he was prepared to have it altered. Item 9 was not a 'big-ticket' item and the defendant intended to add certain lights. Item 10 was an item which Mr Hanias said that he had not understood, and which was not explained in the evidence before me. Item 12 was presumably intended to be a reference to leakage from the 'packing' (not 'parking'), and was probably the result of a leaking seal. Item 13, insofar as it referred to batteries, related to the batteries on the rig. Mr Hanias was not sure of the reference to gauge pressures, and I note that this item was not explained in the evidence of the plaintiff. Item 14 related to the compressor. Items 15 and 16 were tools, and item 16 was not a drill rig part.

102 I infer that item 5, and also probably item 6 on the list, related to the bowed tilt rams. I also infer that item 4, like item 7, was not a 'big value' item and that these were pins which were intended to be replaced.

103 On 28 March 2006, the defendant sent to the Department a statement of outstanding amounts totalling $14,926.40, of which the Department paid approximately $4,000 on or about 24 May 2006.

104 On 23 April 2006, the defendant arranged for the supply of the two replacement tilt rams, to be invoiced to the Department at nominal value, pursuant to the arrangement referred to in [78] and [94] above. The invoice referred to 'warranty replacement', as did the bill of lading dated 10 May 2006. They were despatched on 10 May 2006. By 11 July 2006 the tilt rams had arrived in Durban and were awaiting transport to Botswana.

105 In September/October 2006, the rotary drill head of the Department's other Edson drill broke. Mr Bareki reported this to Mr Molatlhegi. Mr Molatlhegi asked Mr Adamson if the new rig's spare head could be used by the Department as a replacement for the other Edson rig. Mr Bareki was responsible for overseeing the repairs to the other rig. He encountered problems with leaking oil when he tried to fit the spare head, and, in the end, the spare rotary head was not used as a replacement for the head on the other Edson rig. Mr Adamson told Mr Molatlhegi that he would look at the spare rotary head on his next trip.

106 On 27 October 2006, the new water injection pump and accessories were air-freighted by the defendant to the Department in Botswana, pursuant to the arrangement referred to in [75] and [94] above. They were also recorded on the invoice and bill of lading as 'warranty replacement'. Throughout the time between March 2006 and late 2006, Mr Molatlhegi spoke to Mr Adamson about once a month about the progress of the proposed repairs/modifications. On or about 30 October 2006, the new tilt rams and water injector pump were received by the Department in Gaborone.

January to late June 2007

107 By facsimile dated 17 January 2007, Mr Adamson advised Mr Molatlhegi that he was still trying to schedule a time to travel to Botswana.

108 In early 2007, Mr Molatlhegi spoke to Mr Hanias by telephone and asked him to expedite the outstanding work. Mr Hanias asked Mr Molatlhegi to provide a list of local companies that could be engaged to carry out the work. Mr Molatlhegi suggested two companies, one of which was a company called Fluid Systems, in Gaborone. Mr Molatlhegi said in his statement that, in this conversation, Mr Hanias said he would return in May. Mr Hanias said in cross-examination that he told Mr Molatlhegi that someone from the defendant would return to Botswana, but that he did not give a date. I prefer Mr Hanias' evidence on this, as it is unlikely that Mr Hanias would specify a date until he had at least made tentative arrangements with a local company to carry out the work.

109 Shortly after this time, Mr Adamson suggested to the Department that the mast be lowered, and the rig driven to Gaborone for the work to be carried out. Mr Molatlhegi, however, would not lower the mast or move the rig for fear that, in doing so, it might be further damaged. The mast was capable of being lowered, and the rig capable of being moved, despite the bowed tilt rams, as evidenced by the events of June 2007 (see [114] below).

110 On 30 March 2007, Mr Franken of Fluid Systems wrote by email to Mr Hanias and offered, in effect, to undertake any work required by the defendant in relation to the rig for the Department. Fluid Systems had done service and repair work for the Department over a number of years.

111 On 7 June 2007, Mr Adamson responded, on behalf of the defendant, to Mr Franken's email of 30 March 2007. He said that the rig needed 'modification/repair' and asked if it could be done under the defendant's supervision at Fluid Systems' premises in the week commencing 25 June 2007. He said that the work would involve fitting the two new tilt rams, a directional control valve, and some general repairs to a gear box, and that some welding would be required. Mr Franken replied on 11 June 2007 and said that the job could be done on 25 June 2007.

112 On 12 June 2007, Mr Adamson wrote to Mr Franken of Fluid Systems and said that the rig was in the field near Kanya with damaged tilt rams. He enquired whether Fluid Systems had field service technicians who could 'attend the site and replace the rams so that the mast could be lowered and the rig moved to Gaborone' for the other work to be done. Mr Franken replied on the same day, stating that a service vehicle could be sent to change the rams.

113 On 19 June 2007, Mr Adamson wrote to Mr Franken and said that he would arrive in Lobatse on 25 June 2007, and asked whether a service vehicle could meet him the following morning (26 June 2007) with a view to travelling to the site, changing the tilt rams, lowering the mast, and bringing the drill rig to Fluid Systems' yard in Gaborone. He said that once the drill rig was at Fluid Systems' workshop, he expected that the work could be carried out over the next few days. Mr Franken replied the same day, saying that one of their fitters would meet him at Lobatse on the morning of 26 June 2007. Later that day, Mr Adamson wrote to Mr Franken again and advised him that Mr Molatlhegi was their contact at the Department and that the work would be to the defendant's account.

114 Mr Adamson arrived in Botswana on 24 June 2007. He went to the site on or about 26 June 2007 with an employee of Fluid Systems. He decided not to change the tilt rams on site, as the area was too dusty and he thought the hydraulics might become contaminated. The mast was lowered and the rig was driven to Fluid Systems' workshop in Gaborone.

115 On arrival at Fluid Systems' workshop in Gaborone, the tilt rams were replaced, and a directional control valve in relation to the hydraulics, was installed. Fluid Systems sent an invoice to the defendant dated 25 June 2007 as an initial payment for this and certain other work, which the defendant paid. After replacement of the tilt rams, Mr Adamson said, and I accept, that the mast appeared to work satisfactorily.

116 Mr Molatlhegi, Mr Bareki and Mr Adamson met with Mr Mezieres of Fluid Systems on 30 June 2007. In the course of that meeting, a list of 12 items was made for the repair or modification of the rig. Mr Bareki said that the list was generated from things which he told Mr Adamson required repair. Mr Adamson said that he and Mr Mezieres compiled the list. I find that it was probably generated from the suggestions of all those present.

117 The list was handwritten by Mr Adamson, a copy was given to Mr Molatlhegi and Mr Mezieres, and Mr Adamson retained a copy. It was in these terms:

1. Strip and repair wireline winch drive.

2. Fit detent kit to new direction control valve.

3. Fit dash 6 hose in place of dash 4 on load sense line bleed and test.

4. Ask Percy to start and test run compressor.

5. Adjust rollers on head frame.

6. Fit panel to underside of control panel.

7. Fit power beyond sleave and reconnect oil cooler hose.

8. Refit side panel to control panel. Bolts in truck cab.

9. Fit new batteries to drill engine, compressor engine and truck.

10. Fit new water pump. Fill oil chamber with gear oil.

11. Move drill engine air cleaner to left hand side near engine.

12. Remove lower plate on rotary head and fit pick up pipe

118 I accept Mr Adamson's evidence regarding the nature of the items 1, 2, 3, 4, 5, 7, 10 and 12 on the list (ts 524 - 528). I accept Mr Bareki's evidence concerning items 6 and 8 (exhibit 81, pars 65, 67). Item 1 of the list related to the wire haul winch used in diamond core drilling. Items 2 and 3 related to the issue of the responsiveness of the hydraulic controls. The new directional control valve, with a detent kit, facilitated fine feed. A dash 6 hose has a greater bore size than a dash 4 hose and would increase oil flow to the rapid feed wireline and rotation circuits, thereby increasing responsive speed. Item 4 concerned the checking of the compressor. Although the compressor had been remedied by Atlas Copco on site, Mr Adamson thought it should be checked again as it had not been used since February/March 2006. Item 5 related to rollers that needed adjustment, particularly to enable finer control required for diamond core drilling. Mr Bareki said, and I accept, that he had noticed in March 2006 that some adjustment was required. Item 6 was an item which Mr Bareki wanted to be fitted. He said that the other Edson drill owned by the Department had such a control panel. Item 7 also related to the hydraulic controls, and was to be fitted to the new directional control valve, although the slow-fast speed operation was working without it. Item 8 involved refitting a side panel which had been removed when the rig first arrived at Fluid Systems' premises from site. Item 9 related to batteries which, I infer, had gone flat through disuse. Item 10 related to the fitting of the water injection pump. Item 12 was intended to allow better lubrication to the bearings when the mast was positioned at a certain angle.

119 Item 11 involved a change in location in the air filter. Both experts in this case have agreed that the original location of the air filter (valve) 'would not have prevented commissioning': see [166] below.

120 By the end of 30 June 2007, in relation to the four problems identified at on-site commissioning on 1 - 3 March 2006, and in the day or so after 3 March 2006:

(a) the compressor had been fixed on site and was working satisfactorily;

(b) the tilt rams had been replaced and were working satisfactorily;

(c) the replacement water pump had arrived and was to be installed, at the defendant's cost, by Fluid Systems;

(d) a directional control valve had already been installed and paid for by the defendant, and the other items in connexion with the responsiveness of the hydraulic controls had been identified and arranged to be attended to by Fluid Systems at the defendant's cost; and

(e) the winch line was arranged to be fixed at the defendant's cost.

121 On or about 2 July 2007, Mr Adamson left Gaborone for Australia. Before leaving, he confirmed to Mr Molatlhegi that the work would be paid for by the defendant. He also agreed to have the carrier truck serviced at the defendant's cost.

122 Mr Molatlhegi said (exhibit 75, pars 77, 80), and I accept, that he spoke to Mr Adamson before he left Botswana on or around 2 July 2007. The precise nature of the conversation is somewhat difficult to gauge from the way the evidence was given by Mr Molatlhegi. The effect of it, I find, is that Mr Adamson said that after repairs and modifications had been effected, he would return to Botswana to check the rig.

123 The work that was undertaken is recorded in Mr Franken's email to the defendant on 7 December 2007 (referred to below). I find that the work referred to in the list of 30 June 2007, apart from testing the compressor, had been undertaken by about October 2007.

124 On 19 July 2007, Mr Mezieres of Fluid Systems emailed Mr Adamson and requested the defendant to send to Fluid Systems the specifications on the pumps and hydraulic valve banks. On 20 July 2007, Mr Adamson supplied certain technical information to Mr Mezieres.

125 On 24 July 2007, Mr Franken of Fluid Systems wrote to Mr Adamson and said that they had stripped the cable winch, and found that the shaft that couples the motor drive to the planetary drive was not coupling internally. He requested drawings of the winch assembly. Mr Adamson supplied the drawings on 25 July 2007. On 28 July 2007, Mr Adamson informed Mr Franken that he would be overseas for a few weeks, and nominated another officer of the defendant as the person whom Mr Franken should contact to advise on the progress of the job and to whom any questions should be directed.

126 According to Mr Molatlhegi, he and Mr Bareki were both anxious to have the work effected as quickly as possible (ts 220, 223). I accept this. Both gentlemen attended with Mr Adamson at Fluid Systems' premises on 30 June 2007 when the list was drawn up, both contributed to the creation of the list, and both had a keen interest in having the work undertaken. Mr Bareki said in his witness statement (exhibit 81, par 74), and I accept, that, following July 2007, he had been to Fluid Systems' premises to check on the progress of the repairs to the rig. Although certain aspects of his evidence were somewhat confusing, I accept his evidence in cross-examination (ts 339) when asked whether he reported back to Mr Molatlhegi: 'Everything - everything - that I discussed with Mr Frenken [sic] I was going back to my boss'. Insofar as Mr Molatlhegi suggested the contrary, I do not accept his evidence. I find that Mr Bareki kept Mr Molatlhegi informed of the progress of the repairs, as known to Mr Bareki from his visits to the Fluid Systems workshop.

127 Mr Bareki also visited Fluid Systems to discuss other jobs in the second half of 2007. He made inquiries from time to time on the progress of the repairs to the rig. The first time was in August 2007. Eric, an employee of Fluid Systems, told Mr Bareki in August 2007 (ts 339) that the wire line winch was being repaired and that it would take a long time. Mr Bareki said, and I accept, that Fluid Systems were very busy at this time.

128 The evidence of Mr Molatlhegi and Mr Hanias, which I accept, was to the effect that in September 2007, Mr Molatlhegi telephoned Mr Hanias (ts 569) and asked about the status of the rig. Mr Hanias said, in effect, that he would review the matter and that someone would get back to Mr Molatlhegi.

129 Mr Molatlhegi said, and I accept, that in October 2007 he again asked Mr Hanias about the rig. Mr Hanias told him that he thought it had been repaired (ts 224). That information is likely to have come from Mr Franken, which suggests that Mr Franken had been in touch with Mr Hanias or Mr Adamson by about October 2007 regarding the status of the repairs, and informed them that the work had been done.

130 Mr Bareki said, in effect, that Mr Franken would complain to him when he visited Fluid Systems, and that Mr Franken would also telephone Mr Bareki to complain, that Fluid Systems had not been paid by the defendant for the work on the rig. I find that these conversations, which I infer occurred around the time the work had been done, started in about October 2007. Mr Bareki said, and I accept, that he asked Mr Franken to contact the defendant directly (ts 339) and gave him fax and telephone numbers for both Mr Hanias and Mr Adamson. Whilst I infer that Mr Franken already had, at least, Mr Adamson's contact details if not Mr Hanias' details, these conversations are likely, in my view, to have prompted Mr Franken to contact Mr Hanias in around October 2007, or at least to have played a part in that decision.

131 After Mr Hanias told Mr Molatlhegi that he thought the rig had been repaired, Mr Molatlhegi telephoned Mr Franken in November 2007 and asked about the repairs. Mr Molatlhegi said that Mr Franken told him, in effect, that certain work had been carried out and had not been paid for, and that there were other extensive repairs still to be done, which would take a month, and which he would not start until the other repairs had been paid for. Mr Molatlhegi said that he was told that after the additional work had been undertaken, it would be necessary to test the rig, as modified and repaired.

132 I accept Mr Molatlhegi's evidence insofar as it is to the effect that he spoke to Mr Franken in November 2007; that Mr Franken said that certain works had been carried out for which he had not been paid; that Mr Franken said he would not do further work until after he had been paid; and that once the additional work was completed, he considered it would be necessary to test the rig. Insofar as Mr Molatlhegi's evidence suggests that Mr Franken stated, in November 2007, that extensive repairs remained to be done, and that they would take a month, I am unable to accept that evidence.

133 It is likely that Mr Molatlhegi was told by Mr Franken in November 2007, in substance, what he told the defendant by email on 7 December 2007 about the state of the work. It is also likely that Mr Molatlhegi heard from Mr Bareki, in around November 2007, that the work had been substantially done and that Mr Franken was chasing payment. I find that Mr Molatlhegi knew in about November 2007 that, in substance, the work in the 30 June 2007 list had been undertaken.

134 On 3 December 2007, Mr Bruce of Lavan Legal, solicitors on behalf of the plaintiff, wrote to the defendant. The letter said, inter alia:

> I act for the Department of Geological Survey (Department).
>
> I am informed by my client that by letter dated 13 May 2003 you responded to an invitation to tender issued by the Department. In that tender, you made an offer to the Department to provide them with a multipurpose drill rig and accessories and to commission the drill rig for the sum of AU$1,072,788.
>
> …
>
> By your failure and refusal to commission the drill rig, and despite the numerous requests from my client for you to complete commissioning without delay, you have repudiated the contract. My client demands within 14 days that you refund the money paid to you by the Department of Geological Survey, together with interest thereon from 9 October 2003 at 6% per annum. Whilst my client has not taken possession of the drill rig my client understands that it is available for your collection at Fluid Systems (Pty) Ltd.

135 On 7 December 2007, Mr Franken of Fluid Systems wrote to Mr Adamson. He referred to the earlier replacement of the tilt rams and then said:

> WORK DETAIL AS FOLLOWS. FOR SECOND JOB DONE. (NOT YET PAID FOR)
>
> 1. TESTED WIRE LINE WINCH FOUND NOT WORKING.
>
> 2. REMOVED THE WINCH WITH A CRANE.
>
> 3. STRIPPED THE ENTIRE WINCH, FOUND THAT THE MALE COUPLING SHAFT WAS FIRSTLY TO [sic] SHORT, AND WAS THEREFORE NOT ENGAGING PROPERLY, AND SECONDLY THE COUPLING SHAFT WAS RUSTED IN THE DISENGAGED POSITION, HENCE NOT ENGAGING PROPERLY. ALL THE WINCH COMPONENTS HAD TO BE STRIPPED AND CLEANED OF RUST ESPECIALLY THE CLUTCH PACK WAS RUSTED IN SOLID. WE THEN WORKED ON THE COUPLING SHAFT, WE

HAD TO MEASURE UP THE ENGAGEMENT PARAMETERS OF THE SHAFT AND MANUFACTURE A SPACER ADAPTOR AND PARTIALLY ASEMBLE [sic] AND TEST. HAD TO STRIP AND REMACHINE AND THEN FULLY RE ASSEMBLE AND TEST AND FOUND OK. UNIT THEN FITTED ON MACHINE. ALSO RE WELDED ONE WINCH BRACKET. ALSO REPLACED WINCH SEAL.

4. FITTED DETENT KIT ON D.C.V [direct control valve].

5. REMOVED DASH 4 HOSE ON LOAD SENSING VALVE, AND FITTED A DASH 6 HOSE, BLED AND TESTED.

6. THE ROLLERS ON THE ROTARY HEAD WERE OUT OF ADJUSTMENT, ADJUSTED ALL FOUR ROLLERS AND TESTED OVER FULL TRAVEL.

7. FITTED LOWER CONTROL PANEL PLATE, AS DUST WAS COMING IN TO THE HYDRAULIC PANEL FROM THE BOTTOM.

8. WE WERE NOT ABLE TO SOURCE CORRECT POWER BEYOND SLEEVE FOR D.C.V. FROM PART NO GIVE BY AUSROC, MEASURED UP AND MADE SLEEVE AND TESTED.

9. REFITTED AL [sic] SIDE PANELS.

10. FITTED ALL SIX BATTERIES.

11. REPLACED THE WATER PUMP.

12. WE NOTICED THAT THE ENGINE AIR FILTER WAS FITTED RIGHT ABOVE THE DRILL HEAD, THEREBY CATCHING THE LARGEST VOLUME OF DUST. REMOVED AND MADE A NEW MOUNTING POINT A FULL 3 METRES FURTHER BACK AS WELL AS EXTENDED THE AIR PIPE.

13. FITTED STEEL PIPE ON PUMP INSIDE ROTARY HEAD ON EXISTING BOX, AS WELL AS ON THE SECOND ROTARY HEAD.

PRICE:	LABOUR:	P15500
	SPARES:	P11450
	CONSUMABLES:	P650
TOTAL		P27600

WORK STILL TO BE DONE.

1. TEST ENTIRE SYSTEM, UNDER NO LOAD THEN TEST UNDER DRILLING APPLICATION.
2. TEST COMPRESSOR.

> 3. SMALL VARIOUS ITEMS TO STILL CARRY OUT.
>
> PRICE: P4450.
>
> GRAND TOTAL DUE: P32050
>
> THEREFORE COULD YOU PLEASE PROCESS PAYMENT FOR THE FULL P32050 PLUS VAT = P35255 = A$6543.32
>
> THIS SHOULD COVER THE ENTIRE JOB, WE CAN HOWEVER NOT GUARANTEE ANY OTHER PROBLEMS THAT MAY COME UP, ONCE WE RUN THE RIG PROPERLY, AS THE ENGINEER WHO DESIGNED AND BUILT THIS RIG, DID NOT PROPERLY DESIGN AND BUILD THIS RIG.

136 By this letter, Mr Franken, in effect, confirmed that the bulk of the work referred to in the list of 30 June 2007 had been carried out. Items 1 - 3 of the letter related to item 1 of the list of 30 June 2007; item 4 of the letter related to item 2 of the list; item 5 of the letter related to item 3 of the list; item 6 of the letter related to item 5 of the list; item 7 of the letter related to item 6 of the list; item 8 of the letter related to item 7 of the list; item 9 of the letter related to item 8 of the list; item 10 of the letter related to item 9 of the list; item 11 of the letter related to item 10 of the list; item 12 of the letter related to item 11 of the list; and item 13 of the letter related to item 12 of the list. Although the compressor remained to be tested (item 4 of the list), the work in relation to the hydraulic controls had been undertaken, the new water pump had been fitted, and the wire haul winch had been fixed. The cost of the work undertaken up to that time and the testing and small items still to be done was not great - just over $6,500 including VAT. As noted earlier, the two tilt rams had been replaced, and a directional control valve for the hydraulics fitted, on or about 26 June 2007. Whilst Mr Franken criticised the design and build of the rig, there was no pleading by the plaintiff alleging defects in design of the rig or failures of workmanship.

137 Mr Hanias said in cross-examination (ts 570), and I accept, that Fluid Systems' email of 7 December 2007 was sent following a request from Mr Hanias to Mr Adamson, that Mr Adamson contact Fluid Systems to obtain a breakdown of Fluid Systems' charges and an invoice. I infer that Mr Adamson made the request of Fluid Systems in about late October/November 2007. Mr Hanias said, in effect, that although Mr Franken provided the itemisation requested, by the email of 7 December 2007, Mr Franken did not send an invoice as requested.

138 Mr Hanias said, and I accept, that some time after 7 December 2007, Mr Hanias told Mr Molatlhegi that the rig was ready to be used back in the field (ts 569). At this stage, Mr Hanias knew that the works had not been paid for, but he had also not received the invoice which had been requested. Mr Hanias explained (ts 570):

> We have never received an invoice. I have never had a phone call from Mr Frenken [sic] since then to tell me why, and I don't pay bills without invoices or proper breakdowns. We've been burnt overseas plenty of times before when we used contractors who just charge what they feel like it, [sic] and I think it needs to be justified.

139 On 9 January 2008, Mr Franken of Fluid Systems wrote again to Mr Adamson of the defendant, in effect requesting a response to his letter of 7 December 2007.

140 On 6 February 2008, Lavan Legal, on behalf of the plaintiff, wrote to the defendant again requesting a return of the contract sum.

141 On 15 February 2008, the plaintiff filed the writ in these proceedings, and pleaded, inter alia, an alleged repudiation of the contract.

142 On 5 March 2008, Mr Franken of Fluid Systems wrote to the defendant. He noted that he had not received payment and said that, as the rig was still in his yard, he would charge the defendant a storage fee.

143 On 10 April 2008, the defendant paid Fluid Systems the sum of $5,015, representing the sum referred to by Mr Franken in his email of 7 December 2007 as the 'second job', ie, the repair work carried out in accordance with the list dated 30 June 2007 (excluding the 'work to still be done'). Prior to this, Mr Hanias had met with Mr Bruce of Lavan Legal to attempt to resolve the dispute (ts 572). I infer that, despite the lack of an invoice, Mr Hanias arranged payment in an attempt to deflect further escalation of the dispute.

144 I find that although payment to Fluid Systems had not been made by 7 December 2007, the obligation to pay had by then arisen and it was subsequently discharged by the defendant, notwithstanding the absence of an invoice.

The pleadings

145 I should observe, at the outset, that for much of the history of this litigation, neither party had pleaded any case about what was said to constitute the contract between the parties, and the scope and nature of all

the material terms of any contract between the parties, including the nature of the commissioning obligation. The pleading of the contract and its terms started to emerge about a month before trial - the history is set out in ***Attorney-General of Botswana v Aussie Diamond Products Pty Ltd [No 2]*** [2009] WASC 301 [3] - [7]. Following the commencement of the trial, the parties produced further amendments to their pleadings, and the current statement of claim and defence represent the parties' respectively pleaded cases at the end of the evidence and closing oral submissions. It is those to which I refer below.

The plaintiff's pleaded case

146 The plaintiff alleges, in substance, that by the terms of the contract:

(a) the drill rig and equipment was to be suitable for multi-purpose mineral exploration and water well drilling;

(b) the drill rig and the equipment were to be delivered at the defendant's cost as to sea freight, land freight, insurance clearance and document charges to the Department at Gaborone, Botswana, within 20 weeks ex the defendant's works of placement of a purchase order by the Department;

(c) on delivery of the drill rig and equipment, alternatively within a reasonable time thereafter, the defendant was to commission the drill rig at a site in Botswana nominated by the Department;

(d) commissioning was to be undertaken by the defendant setting up and operating the drill rig and all of its operating parts over a period of not less than three weeks in such a manner as to demonstrate a reasonable and continuing functional capacity to conduct drilling for mineral exploration, geotechnical and water well purposes, by both down-the-hole and diamond core drilling;

(e) upon completion of commissioning, the defendant was to provide operational and maintenance training to the Department's staff;

(f) upon satisfactory completion of commissioning and training there was to be a handover by the defendant to the Department of the drill rig and equipment;

(g) property in the drill rig and equipment passed upon handover;

(h) insurable risk in the drill rig and equipment passed upon handover;

(i) a 12-month warranty period on workmanship and equipment subject to adherence to the maintenance schedule after handover;

(j) delivery to Lobatse/Gabarone, commissioning and training for a total price of A$1,072,788, payment to be made: by a 20% deposit on placement of purchase order (exhibit 12); of the balance of the total price, by irrevocable letter of credit confirmed and negotiated at an Australian bank at sight of conforming shipping documents (exhibit 76).

147 Further, or alternatively, the plaintiff alleged that on its proper construction, the contract was an entire contract, such that the total price was paid by the Department to the defendant in advance of handover, conditional and contingent upon the performance by the defendant of all of its obligations, including commissioning, training and handover of the drill rig and equipment.

148 Alternatively, the plaintiff alleged that on the proper construction of the contract, having regard to the obligation of commissioning and handover, if, which is denied, property passed on payment, then property passed conditionally upon and subject to successful commissioning and handover.

149 The plaintiff pleads that the Department paid sums totalling $1,072,788 to the defendant pursuant to the contract and that the rig and certain equipment were delivered on about 8 July 2004 and other equipment was delivered on about 25 October 2004.

150 As to breach and termination, the plaintiff pleads that:

> 7 On or around 26 February 2006 the defendant commenced its commissioning of the Drill Rig at a site near Lobatse, Botswana.
>
> 8 The defendant did not complete commissioning in that at no time did the defendant conduct normal drilling operations in the manner pleaded in [sub-par (d) of [146] above].
>
> 9 In June 2007 the defendant collected the Drill Rig from the site and delivered it to ... Fluid Systems, where it has remained since that time.
>
> 10 By reason of the defendant failing to commission the Drill Rig, there was a total failure of consideration for the Payments.
>
> 11 By its failure to commission the Drill Rig, the defendant committed a fundamental breach of, alternatively repudiated, the Contract.

> 12 By a letter from the plaintiff's solicitors to the defendant dated 3 December 2007, alternatively by a further letter dated 6 February 2008, the plaintiff elected to terminate the Contract, and upon the defendant's receipt of the letter dated 3 December 2007, alternatively the letter dated 6 February 2008, the Contract came to an end.
>
> 13 The sum of $1,072,788.00 is therefore repayable by the defendant to the plaintiff.

151 The plaintiff did not plead a case alleging specified defects of design, and/or workmanship, or that the rig was thereby rendered unfit for purpose, or was unmerchantable or not suitable within the meaning of the term pleaded in subpar (a) of [146] above.

The defendant's pleaded case

152 In relation to the contract, the defendant pleaded, in effect, that it agreed:

(a) to design, purchase components for, manufacture and construct the Edson 6000W drill rig in accordance with the Department's specifications;

(b) to commence design upon confirmation of a purchase order;

(c) to commence manufacturing upon confirmation of the letter of credit;

(d) to purchase the Atlas Copco compressor, Mercedes truck and other equipment;

(e) to supply the rig, compressor, truck and the other equipment and associated manuals ('the goods') to the Department;

(f) to deliver the goods to the Department, and the Department agreed to accept delivery of the goods, 'ex works'; ie, when the goods left the defendant's premises, or when the goods passed the ship's rail at Fremantle;

(g) to effect delivery within 20 weeks of acceptance of a purchase order subject to receipt of the letter of credit;

(h) that the property in the goods would pass 'ex works', alternatively once the goods passed the ship's rail;

(i) the Department would pay a 20% deposit at the time of the purchase order and the balance on sight of conforming shipping documents;

(j) to ship the goods to Durban and then transport them to Gaborone after effecting delivery, and to pay all applicable marine insurance, shipping and freight costs;

(k) to outline and demonstrate the components, controls and operations of, and explain the maintenance procedures for, the Edson 6000W rig to one or more Departmental employees and to instruct employees about the controls, operations and maintenance procedures (Commissioning and Training); and

(l) to undertake repairs to the goods within the scope of the warranty for 12 months after delivery.

153 The defendant also pleaded that in consideration for the performance of the above terms, the Department agreed to pay $1,072,788, broken down as set out in the defendant's letter to the Department of 17 June 2003.

154 The defendant also pleaded that:

> [T]he process of Commissioning & Training involves the outlining and demonstration of the components, controls and operations of, and an explanation of the maintenance procedures for, the Edson 6000W to one or more Departmental employees and the instruction of that or those employees about the controls, operations and maintenance procedures.

155 The defendant denied the terms of the contract, and breaches of contract, alleged by the plaintiff. It also pleaded that even if there were a contract as alleged by the plaintiff, which was breached, the Department, nevertheless, accepted the goods, or is deemed to have accepted the goods, and the Department is limited to a claim in damages by virtue of s 11(3) of the Act.

156 The defendant, by its pleading (pars 6.2, 6.4 and 6.5 of the further amended defence) and particulars, contends that the Department accepted the goods by:

(a) Mr Molatlhegi, following an inspection, signing a delivery note on 8 July 2004 and by his letter dated 19 October 2005;

(b) by its conduct in the 'acceptance of the delivery of the items [supplied] ... in and around 8 July 2004 and 19 October 2005';

(c) its payment of customs duty on 27 October 2004 and in taking delivery of the spare parts around 27 October 2004;

(d) retaining the drill rig, carrier, compressor and other equipment and specifications without intimation to the defendant that those items had been rejected by the Department.

157 The defendant also pleaded that the rig was commissioned and that training was provided in that the defendant, inter alia, provided instructions for, outlined and demonstrated the components, controls, operation and maintenance procedures for the rig to the Department's employees, and undertook on site test drilling using the rig. It alleged that commissioning was completed by 13 March 2006, and that the rig was on site and able to be used for drilling by the Department as at and from that date.

158 The defendant also pleaded (par 6.10 and particulars) that the rig and equipment have in fact been used for drilling by the Department by:

(a) performing down-the-hole drilling on 29 February 2006;

(b) using the truck in February/March 2006;

(c) using the drill for in excess of 70 hours' drilling operation;

(d) using the compressor for in excess of 18 hours; and

(e) using the spare rotary head in September/October 2006.

159 The defendant also alleged (par 6.11 and particulars) that the Department exercised its rights under warranty, and that the defendant, at its own expense, undertook warranty obligations by effecting repairs and maintenance and the supply of replacement parts. It is alleged that the Department made demands for warranty work to be undertaken:

(a) by letters dated 16 November 2004, 2 March 2005, 24 August 2005, 19 October 2005 and 23 March 2006;

(b) by telephone communication between Mr Molatlhegi and Mr Adamson in March 2005; and

(c) at a meeting on 30 June 2007 with Mr Adamson at the premises of Fluid Systems.

160 It is also alleged that the defendant undertook the following works, and that they were undertaken under warranty:

(a) repairs to the radiator and mast in November 2004;

(b) the welding of the mast and the replacement of pilot pressure components in April 2005;

(c) the carrying out of the works by Minetech in July 2005 to January 2006;

(d) in May 2007 to December 2007, replacement of the tilt rams and the water injection pump and accessories; and

(e) by causing the works referred to in the list of 30 June 2007 to be carried out by Fluid Systems.

161 The defendant also alleged (par 7.4 of the defence), inter alia, that under the general law the matters referred to above disentitled the Department to any relief.

162 There were also extensive written submissions, including after the end of the trial, and some in response to queries raised by the court, in which the complexion of the parties' cases was developed in various ways. In considering the pleadings and submissions, I have endeavoured to understand the essential elements of the points made. However, I would add that, properly characterised, it appears to me that many points seemed to overlap or involve different legal characterisations of the same facts, or had within them aspects of matters which were connected with other points and other issues. Furthermore, the parties raised their respective points in a sequence and order which was somewhat unconducive to a consideration of where, precisely, all the points intersected as issues for resolution. I have not attempted in these reasons to trace the parties' respective order and sequence of points raised in the pleadings and submissions.

163 I would also note here that I have read all of the submissions and cases referred to by counsel and have attempted to deal with all of the material points as I understand them. To the extent that these reasons do not expressly mention every authority adverted to by counsel, whilst having considered them all, any omission signifies that I have not in the

end found the matter to be particularly helpful in the resolution of the dispute.

The expert evidence

The plaintiff's expert

164 Mr Ewing, the expert called on behalf of the plaintiff, had been involved in the manufacture of drilling equipment or its operation for more than 40 years, including in its design and maintenance, and in training and commissioning programmes. He is not an engineer and does not have an engineering qualification. His report was tendered after certain objections to it had been conceded or ruled upon.

165 Mr Ewing, in his report dated 16 March 2009 (exhibit 82), said, in effect, that he had inspected and tested the functioning of the drill rig in December 2009 (although he presumably meant December 2008) for the purposes of these proceedings. He saw no difficulties in the operation of the mast, the compressor or the winch line. He made a number of other observations in which he criticised aspects of the efficiency, safety and practicality of various aspects of the drill rig. His conclusions were:

> • On the day that I inspected the drill and did my tests it was apparent the drill could not be used for 'all methods of drilling' as requested by the Department.
>
> • For efficient safe drilling operation it is very important that the hydraulic functions respond promptly to the operation of the controls. This was not happening on the day that I was testing the drill.

166 Two of his criticisms, in relation to the rod rack and air valve location, were subsequently addressed in a joint expert report following a pre-trial conferral of the experts. The joint report stated:

> 1. The rod rack not being fitted would not have prevented commissioning.
> 2. The air valve location while not ideal, would not have prevented commissioning.

167 As an expert report, Mr Ewing's report had, in my view, a number of problems, partly no doubt as a result of him being instructed at a time when neither party had articulated a case about the nature and scope of the commissioning obligation; ie, the central issue of the case.

168 First, his report was not directed to the way that the parties had joined issue in their pleadings. His report was prepared at a time when neither party had pleaded what was said to be the scope and nature of the commissioning obligation. He did not address in his report the activities and events leading up to, and the operation of, the rig on-site in March 2006, at which time, on the defendant's case, the rig had been commissioned. He did not address and provide his opinion by reference to the content and scope of the commissioning obligation as pleaded by the plaintiff, or the content and scope of the commissioning obligation as pleaded by the defendant.

169 Secondly, Mr Ewing says that he was instructed with respect to three questions. The first question was whether the rig had been commissioned. As to this question, as I have said, his report was not directed to the competing meanings of commissioning and the matters alleged by the parties to constitute commissioning on their respective cases. The second question he said he was asked was whether the 'structural and technical problems experienced' were such that the rig could not be commissioned. He did not, however, articulate what facts he assumed or understood to be conveyed by the words 'structural and technical problems experienced'. It is essential in my view that an expert identify the facts relied upon for the basis of the opinion: ***Town of Mosman Park v Tait*** [2005] WASCA 124; (2005) 141 LGERA 171 [63]; ***Automasters Australia Pty Ltd v Bruness Pty Ltd*** [2004] WASCA 229 [28] - [29]; ***Makita (Australia) Pty Ltd v Sprowles*** (2001) 52 NSWLR 705, 731 - 732. The third question he said he was asked was whether the rig was fit for purpose. The instruction to report on this matter appeared in an email from the plaintiff's solicitors dated 27 November 2008 (exhibit 84). The email said, relevantly:

> In addition to investigating the question of the commissioning of the drill rig, please also investigate the question whether, having regard to the design, capability and performance of the rig it was fit for purpose. In that respect please note the tender requirements as to the use to which the rig was intended to be put by the Department.

170 This was not a pleaded issue, although again it is important to note that the report had been commissioned and prepared at a time when neither party had pleaded any comprehensible case about the nature of the relevant contract or its terms. In any event, notwithstanding the instruction, the report made no attempt to explain the overall design of the rig, or its particular design parameters or capabilities, or the significance of the Specifications, or its historical performance.

171 Thirdly, Mr Ewing said that he had reviewed, for the purpose of his report, certain affidavits and other documents which were not tendered in evidence in these proceedings. His report failed to make plain what he took into account and how it affected his conclusions.

172 Fourthly, it was not clear on the face of it how the general discussion in his report, and the two conclusions, related to the three questions he was asked to address. The report should have proceeded by taking each question separately (assuming for the moment that each question addressed a relevant issue), identifying the facts relied upon, and disclosing what use he had made of the documents he had read, setting out his reasoning and presenting a conclusion demonstrated by his reasoning. None of this occurred. The way that he expressed his conclusions might seem to indicate that he was expressing an opinion on fitness for purpose as at December 2008.

173 However, the plaintiff's counsel did not tender the report on that basis (ts 356 - 357). He said:

> We will make submissions, and your Honour may anticipate them, that if the machine isn't functionally operating when tested by the expert after the commencement of proceedings, then we would say that has a significance as to whether or not it meets either standard of commissioning.

(I would interpolate here that the plaintiff did not in closing, as best I understood it, make submissions of the kind adumbrated with respect to Mr Ewing's evidence.) Counsel for the plaintiff also said (ts 366), consistently with the plaintiff's pleaded case:

> I am not going to be making submissions about fitness for purpose because … it's not part of the case.

174 Thus, Mr Ewing's report was not tendered as addressing the third question he was asked. Further, his report did not seem to me to answer the second question he was asked. It was tendered, as I understand it, with reference to the first question he was asked, on the basis outlined by counsel for the plaintiff in [173] above, namely that if the rig was not 'functionally operating' in December 2008, it could be inferred that it had not been commissioned on either the plaintiff's, or the defendant's, contention as to the nature and scope of the commissioning obligation.

175 Mr Ewing, in his report, disclosed that he had been a director, for a short time, and subsequently an employee of, a company known as Airside Maintenance Services in which Mr Adamson (of the defendant) and his father had been directors. He said in his report that he resigned as

a director over issues regarding the solvency of Airside Maintenance Services and later resigned as an employee, and that a dispute ensued over a period of time concerning holiday pay, superannuation and expenses. He said that the latter were unpaid and that he had obtained a judgment against Airside Maintenance Services but was unable to recover the money. By way, in effect, of amplification, Mr Ewing agreed in cross-examination that he had left the employ of Airside Maintenance Services 'under a cloud', that there had been somewhat of a falling out, and that there had been a number of disputes with Airside Maintenance Services which had not been resolved.

176 In cross-examination (ts 367), Mr Ewing said that he had been looking to buy the company for which he had been working in the early 1990s, which Mr Adamson, through Airside Maintenance Services, had later successfully acquired. That commercial rivalry had not been disclosed in his report.

177 Mr Ewing said in his report that he had started his own drilling company in 1999. The question was raised in his cross-examination as to whether the company with which he is currently involved, in which he said he had a 50% 'partnership' interest, was a competitor of the defendant. He answered in the negative and said that the two operated in different markets, with the defendant supplying larger machines than the company with which he is involved. Nevertheless, it is clear that Mr Ewing's company and the defendant are both in the business of supplying drill rigs. His response that they were nevertheless not competitors because of a compartmentalisation of the market was not given, in my view, with much conviction.

178 He left me with the impression that he was a person who may have had an axe to grind with regard to Mr Adamson of the defendant, although I do not suggest that there was any actual bias on his part in the giving of his evidence.

179 Overall, having regard to the above, and having observed and heard the expert witnesses, I preferred the evidence of the defendant's expert to Mr Ewing's evidence, although, as noted below, I have not accepted all of the defendant's expert's evidence.

The defendant's expert

180 Mr Graham was the defendant's expert. He, too, had no engineering qualifications. His experience was in the manufacture, marketing, supply and commissioning of drill rigs for 34 years. He had been a member of

the board of Boart Longyear (the company which developed the wire line system for diamond core drilling) between 1996 - 2007. Prior to that, he was the General Manager, Drilling Services, for Boart Longyear in the Asia Pacific Region.

181 Mr Graham inspected the rig and observed its functions whilst it was put into operation by one of Fluid Systems' technicians for three to four hours in early July 2009.

182 Mr Graham provided a report, dated 7 August 2009, in which he provided comments by way of response to elements of Mr Ewing's report, and answered certain additional questions put to him. Sections 1 - 9 of his report dealt with his responses to Mr Ewing's evidence, in light of his inspection and observations on the functioning of the rig. Sections 10 - 15 dealt with the additional questions. In section 10 he was asked to assume that the rig had been used to drill to a depth of 110 m (which was subsequently established by evidence), and whether that indicated that the rig could drill properly and had been commissioned. In section 11 he was asked to report on his observations of the mast, which he found to be in a 'good serviceable condition'. Section 12 of his report was struck out for want of admissibility. In section 13 he was asked if delays and problems with delivery and commissioning were fairly typical of problems encountered in 'remote locations in the world'. This question was, I thought, too obscure to be of any assistance.

183 Like Mr Ewing, Mr Graham reviewed certain affidavits and other documents which were not tendered in evidence in these proceedings, which in my view diminished any weight that might otherwise have been attached to section 13 of his report. In section 14 he was asked to provide observations on the present general condition of the rig and its spare parts. In section 15 he was asked to report on the number of hours for which the rig had been used for drilling, and to provide his opinion on whether a conclusion could be drawn about whether the rig had been commissioned and was able to drill properly, having regard to its hours of operation.

184 This report also preceded the parties' pleadings concerning the nature and scope of the commissioning obligation, and accordingly Mr Graham too did not address the matters and events up to March 2006 which, on the plaintiff's case, revealed that commissioning had not been carried out and which, on the defendant's case, revealed that commissioning had been completed.

185 Mr Graham concluded that the rig 'is capable of performing all modes of drilling' although his investigations 'highlighted a number of shortcomings' which, he said, 'I can only presume have arisen due to either the drill crews' level of expertise, or a general lack of work procedures'. He later stated that there was 'conclusive evidence to me that the drill crew that were operating the drill rig are inexperienced'.

186 Mr Graham was criticised in cross-examination for expressing the opinion that the problems had presumably arisen by reason of the drill crews' level of expertise or lack of work procedures. In particular, he was asked whether he had taken into account the various problems with the tilt rams, hydraulic controls and the water pump, and if not, why not.

187 The criticism seemed to me to be valid to some extent. Certainly, his reference to 'conclusive evidence' was an overstatement. I was not satisfied that he had sufficient information to justify his criticism of the Department and I do not accept his evidence in that regard. In imputing operator deficiencies to the Department, Mr Graham failed to take into account, in my view, the history of the rig and the matters that required attention and correction in 2004/2005, and the works undertaken in mid to late 2007. However, the failure is, I think, largely explicable because he saw his prime task as responding to Mr Ewing's evidence, and Mr Ewing had not, at least apparently, taken these matters into account when expressing his opinion. It also reflects, in my view, what seems to me to be the rather haphazard way in which the experts' views were sought and emerged in their reports in this case.

188 Despite the matters referred to above, overall, I was impressed with Mr Graham as a witness, and his apparent competence in the way that he dealt with the subject matter under cross-examination.

189 I accept that when he examined the rig in July 2009, he found that the rig was capable of performing all modes of drilling. (I did not understand counsel for the plaintiff to put the contrary to him in cross-examination.) I also accept his responsive evidence to Mr Ewing set out in sections 1 - 9 of his report. Section 10 of his report suffers from a lack of definition of 'commissioning', and I place no weight on it. Section 11, I accept. I have already mentioned the difficulty with section 13, and I place no weight on it. I accept his evidence in section 14. I accept his evidence in section 15 that the machine had recorded usage of 78.6 hours, but otherwise section 15 suffers from a lack of appreciation of the history of the rig, and an understanding of the parties' respective contentions as to commissioning.

Conclusions on expert evidence

190 Whilst I have recorded my findings on the expert evidence for completeness, in the end the expert evidence does not, in my view, ultimately affect the outcome of the case. Even if I had accepted Mr Ewing's evidence, for the purpose foreshadowed by counsel for the plaintiff (see [173] above), it would not advance the plaintiff's pleaded case because I find in any event (see [291] below) that the defendant, on the proper construction of the contract, breached the contract for failing to undertake diamond core drilling as part of the commissioning of the rig. Further, I find that, irrespective of Mr Graham's evidence, the plaintiff's case as pleaded fails.

191 The defendant's counsel submitted that the evidence of Mr Graham established that the Department has received a substantial benefit under the contract, and hence, for that reason, the plaintiff's claim in restitution must fail. The point seems to me to be erroneous. It is only if the property in the goods revested unconditionally in the defendant that the Department ceased to be liable for the price: ***Whitecap Leisure Ltd v John H Rundle Ltd*** (2008) EWCA Civ 429 [49] - [50]; see also [225], [241] and [259] below. If the rig had not been properly rejected on 3 December 2007, and the property in it had remained vested in the Department, the plaintiff's action in restitution must fail, irrespective of the rig's drilling capability, satisfactory or otherwise, in July 2009. Conversely, if the rig had been properly rejected and the property in it had revested in the defendant, the rig's drilling capability in July 2009 would be equally irrelevant as a defence to the plaintiff's claim in restitution.

The contractual documents

192 Both parties submitted that, to the extent that it was written, the documents constituting the contract included:

- the defendant's quotation dated 13 May 2003;
- the defendant's letter to the Department dated 17 June 2003;
- the defendant's letter to the Department dated 20 August 2003;
- the ANZ bank's confirmation dated 15 September 2003 of the letter of credit issued by Barclays Bank; and
- the defendant's first letter to the Department on 16 September 2003.

193 In addition, the plaintiff submitted that the contractual documents included the Department's invitation to tender dated 28 April 2003.

194 The defendant denied that the invitation to tender dated 28 April 2003 was a contractual document and it submitted that there were four further documents which constituted the contract, viz:

- the defendant's letter to the Department dated 22 August 2003;
- the defendant's second letter to the Department on 16 September 2003;
- the defendant's invoice dated 18 September 2003; and
- the Department's letter to Barclays Bank dated 17 September 2003.

195 My findings are as follows. It was common ground in closing submissions, and I accept, that the Department's invitation to tender dated 28 April 2003 was an invitation to treat (ts 629). The defendant's quotation of 13 May 2003 constituted an offer. Accordingly, it contained the terms on which the defendant was then offering to supply the rig and other equipment in response to the Department's invitation to tender dated 28 April 2003.

196 In relation to the defendant's letter dated 17 June 2003, the first matter identified was, in my view, promissory, in that it set out the spare parts offered to be supplied under the contract and the prices for such parts. In that regard, it clarified the offer. The purpose of the second matter identified by the defendant in its letter dated 17 June 2003 was, in my view, principally to provide information to enable the Department to consider the value of the offer and to assess whether it wished to accept the defendant's quotation. In my view, it did not amend the offer by conveying severable and divisible promises to supply the rig, the compressor, the carrier truck and to arrange freight in exchange for severable and divisible consideration in the amounts assigned to those items. The consideration to be paid by the Department for the supply of the rig and the other items to the Department in Botswana was and remained one indivisible sum out of the total purchase price. The rig, the compressor and the carrier truck were all items which would combine to produce a mobile, multi-purpose drilling rig. They were not, severally or collectively, intended to be sold without the defendant arranging for their freight to Botswana, and the provision of freight could not sensibly be understood without reference to the goods to be freighted. Nevertheless, insofar as the second matter identifies a separate cost component for

commissioning and training, it is possible both to identify that part of the final price which is attributable to that cost component, and to conclude that an alteration in circumstances, for example, involving the defendant being unable or unwilling for whatever reason to travel to Botswana to undertake the commissioning and training, would result in a failure of a severable part of the consideration: ***Roxborough v Rothmans of Pall Mall Australia Ltd*** [2001] HCA 68; (2001) 208 CLR 516 [17].

197 The third matter identified in the letter of 17 June 2003 was, in my view, promissory in character, in that it was in response to Mr Molatlhegi's query about the period in which the defendant would undertake commissioning and training, and Mr Molatlhegi's proposal that the period be five weeks. To that extent, it involved a variation to the offer. The fourth matter referred to, being the 'Button bit grinder', also involved a variation to the offer; it offered a new item at the specified cost.

198 In relation to the fifth matter in the letter of 17 June 2003 (which is inadvertently described as a second, fourth matter), designated 'Project schedule', I would make the following observations. First, those words precede, and are to be read as providing background information and context to the sentence beginning 'delivery' (the meaning of which I refer to later). Secondly, the references to design and construction do not, in my view, signify that any part of the price to be paid by the Department was to be earned by the defendant simply undertaking design and construction of the rig. In my view, the relevant promissory term in this context is that the defendant would deliver a rig to meet the Department's Specifications, not that the defendant would earn any part of the purchase price by designing and building the rig. In this regard, the contract was, in my view, not materially different from the contract in ***Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*** [1943] AC 32 - see especially the observations by Lord Russell of Killoween (56).

199 Thirdly, the next sentence is promissory in nature insofar as it provides for the time for delivery. It provides, in effect, that once a purchase order is placed by the Department, then, subject to the establishment of the letter of credit within two weeks thereafter, the goods will leave the defendant's premises and be ready for shipment within 20 weeks from the date of the purchase order.

200 The defendant contended that the reference to 'Delivery ... ex works' meant that delivery was to be effected 'ex works' - in other words, it was a contract for sale 'ex works'. In my view, the interposition of the words

'will be 20 weeks' indicates that when the sentence is read as a whole, and in the context of the agreement to freight the goods to Botswana, the sentence is addressing timing issues concerning delivery, rather than the place of the delivery obligation. A contract 'ex works' has been described by Mo JS, *International Commercial Law* (4th ed, 2009) [1.16] as follows:

> 'Ex Works', also known as EXW, means that goods are delivered at the seller's premises, such as a factory, warehouse or place of business. The term normally has no relevance to the means of transport, and is commonly used for the carriage of goods by land or multimodal carriage. ... Under the term, the seller is neither responsible for loading goods onto a transportation vehicle or vessel, nor for obtaining export clearance, except for the obligation to assist the buyer to clear customs. The seller is not responsible for the costs and risks involved in taking the goods from the seller's premises. ... Although risk in the goods passes to the buyer at the seller's premises when delivery takes place, the seller is required to give notice of delivery to the buyer to enable the buyer to make arrangements for such things as shipment, insurance and customs procedures.

In my view, this was not an 'ex-works' contract.

201 The defendant's letter dated 20 August 2003 is promissory in nature. In my view, it either confirms, or clarifies, the defendant's offer dated 13 May 2003 in relation to the defendant's obligation to ship and obtain export clearance for the goods from Perth to Botswana.

202 The defendant's letter of 22 August 2003 provides background information as to why the defendant seeks a 20% deposit, but, in my view, is not promissory per se.

203 Both parties contend that the ANZ bank's confirmation of credit dated 15 September 2003 is a document of contractual effect. I have inferred that the credit was subsequently amended. In my view, the confirmed letter of credit, as amended, does record contractual terms. It records the terms upon which the Department was to pay, and the defendant was to be paid, the sum of $999,728 towards the contract price and the conditions upon which payment would be made. As indicated earlier, I have inferred that it was agreed that the sum of $73,060 would be paid separately for certain spare parts. The placement of the order for the rig and the establishment of the letter of credit, as amended, constituted, by about September/early October 2003, an acceptance of the Department's offer dated 13 May 2003 as varied or clarified as discussed above.

The proper law of the contract and the *Sale of Goods Act 1895* (WA)

204 The plaintiff pleaded, in its reply (but not in the statement of claim), that Botswanan law was the proper law of the contract. The plaintiff contended, in effect, that a forum statute, the *Sale of Goods Act 1895* (WA) (the Act), had no application to the contract. I note here that the Act is copied from the *Sale of Goods Act 1893* of the United Kingdom which itself is a codification of the common law: ***Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation*** [1970] HCA 36; (1970) 121 CLR 154, 165.

205 The plaintiff did not plead or prove the content of Botswanan law, or establish how it applied to the transaction. Indeed, in its submissions, it did not rely on Botswanan law at all. It relied on common law principles applicable in Australia by reference to English, Australian and Canadian authorities, including cases dealing with the English and Canadian sale of goods legislation.

206 The defendant contended that the law of Western Australia is the proper law of the contract, and that the Act applies either for that reason, or because the plaintiff has not displaced the presumption that the law of Botswana is the same as the law of the forum.

207 In my view, the law of Western Australia is the system of law with which the contract is most directly connected, and hence is the proper law of the contract: see ***Bonython v The Commonwealth of Australia*** [1948] HCA 2; (1950) 81 CLR 486, 498; ***Akai Pty Ltd v The People's Insurance Co Ltd*** [1996] HCA 39; (1996) 188 CLR 418, 434. The following features are relevant. The offer, in the quotation dated 13 May 2003, and all subsequent contractual communications, were in English. The consideration provided by the Department was in Australian dollars. It was to be paid by a confirming bank in Australia upon the presentation of documents. The goods were to be supplied from Australia and c.i.f. obligations were to be undertaken by the defendant in Australia. Although commissioning was to occur in Botswana, that fact alone does not outweigh the other considerations to which I have referred, which point to the law of the contract being the law of Western Australia.

208 Whilst the question of the proper law is, in each case, dependent on the particular nature and terms of the contract and its surrounding circumstances, the conclusion which I have reached here derives some support, I think, from ***Mendelsohn-Zeller Inc v T&C Providores Pty Ltd*** [1981] 1 NSWLR 366 and ***Power Curber International Ltd v National***

Bank of Kuwait [1981] 1 WLR 1233 and the factors considered relevant in those cases.

209 If I am wrong about the proper law of the contract, I would still apply forum law, including any applicable forum statute relating to the law mercantile, such as the Act, in the absence of evidence that Botswanan law differs from forum law: ***Damberg v Damberg*** (2001) 52 NSWLR 492 [119], [144]; ***Neilson v Overseas Projects Corporation of Victoria Ltd*** [2005] HCA 54; (2005) 223 CLR 331; ***Playcorp Pty Ltd v Taiyo Kogyo Ltd*** [2003] VSC 108 [244].

210 I would add here that Australia, but not Botswana, is a party to the United Nations Convention on Contracts for the International Sale of Goods, adopted by the United Nations Conference on Contracts for International Sale of Goods on 11 April 1980, Vienna - as to which, see generally Mo JS, *International Commercial Law*, ch 2. The provisions of the Convention apply (insofar as they are relevant) in each of the States and Territories of Australia by legislation which provides that the terms of the Convention shall apply over any provision of local law to the extent of any inconsistency. In Western Australia see s 5 and s 6 of the *Sale of Goods (Vienna Convention) Act 1986* (WA). Neither party in this case has suggested that there are provisions of the Convention which require consideration, or that the provisions of the Convention would operate inconsistently with the application of the Act in the circumstances of this case, and the general law of Western Australia. Having regard to the way the case was run it is unnecessary to refer to the Convention further: see also ***Playcorp v Taiyo Kogyo*** [235] - [245] in this regard.

211 The next question is whether the Act applies to the circumstances of this case. The defendant contends that it does.

212 A contract for the sale of goods may be distinguished from a contract for work done and materials supplied: see generally, Sutton KCT, *Sales and Consumer Law* (1995) (4th ed) (Sutton) [2.36]. As noted in Sutton [2.39] - [2.42], different tests have been postulated for distinguishing between a contract for the sale of goods and a contract for work to be done. I refer to the terms of the contract in this case, properly construed, in [262] - [263] below. On any test, this contract involves, in my view, a contract for the sale of goods. In my view, the contract here is not in the nature of a building contract. It is unlike the shipbuilding contracts in ***Hyundai Heavy Industries Company Ltd v Papadopoulos*** [1980] 1 WLR 1129 (see especially Viscount Dilhorne (1134 - 1135), Lord Edmund-Davies (1138 - 1139) and Lord Fraser (1148 - 1149)), or

Stocznia Gdanska SA v Latvian Shipping Company [1998] 1 WLR 574, 588 (Lord Goff). I would respectfully adopt and apply to this case, in relation to the supply of the rig, the language of Walsh J in ***Pacific Film Laboratories v Federal Commissioner of Taxation*** (174):

> [T]he substance of the agreement … was that it was an agreement for the manufacture by the [supplier] of goods and for the delivery of them to the customer, to whom the property in them would pass at or before the time of delivery and who would pay to the [supplier] a price for the goods. It was, therefore, an agreement for the sale of goods.

See also the observations of Barwick CJ (160 - 161) and Windeyer J (165).

213 Historically, contracts for work such as building contracts have raised issues involving the law of entire obligations which have not arisen in relation to contracts for the sale of goods. As Wallace ID, *Hudson's Building & Engineering Contracts* (11th ed, vol 1) has observed [4.006] - [4.008], [4.014]:

> The essence of a building contract is a promise by the contractor to carry out work and supply materials in consideration of a promise by the building owner to pay for it. In most contracts for major works the contractor is given an express right to payment by instalments on account of the contract price as the works proceed, and so to that extent no question of an entire contract arises. But the rules as to entire contracts will still apply to the last instalment, or to any general balance due, or to any individual instalment if the work is abandoned or brought to an end before the instalment is completely earned. Furthermore, in many smaller contracts the question whether the contractor is bound to complete the works in their entirety before becoming entitled to any payment on account is of vital practical importance.
>
> Where entire performance is a condition precedent to payment, the builder, in order to recover his price, must either prove entire performance or else an acceptance of the works by the building owner amounting to a waiver of the condition. However, while in contracts for the sale of goods the buyer must either accept or reject the goods and a failure to reject within a reasonable time will be regarded as an acceptance, and if he accepts them he must pay the price subject to any cross-claim for damages for breach of contract, a building owner who merely allows works erected on his land to remain there does not impliedly accept them. Thus where the contract is entire, the owner may get the benefit of valuable works not entirely completed by the builder without having to pay for them, unless the circumstances are such as to justify a quasi-contractual remedy. So a builder who has not fully completed the work, through no fault of the owner, cannot overcome his difficulty by ignoring the contract and sue on a *quantum meruit* for the work he has done. …

> Unlike contracts for the sale of goods, therefore, the consequence of a rigid application of the rule could work considerable hardship and anomalies in the case of contracts for services ... a builder might apparently have completed a project, but, if some omissions or defects were then discovered, the owner could then avoid payment of a perhaps substantial contract sum or balance otherwise overdue. …
>
> …
>
> The anomalies resulting from entire contract interpretations did not give rise to serious difficulty in the case of contracts for sale of goods, or for mixed work and materials contracts, since, on easily sustainable theories of acceptance, failure by the purchaser to reject goods bought or made for him following their delivery would render him liable for the price, subject to set-off for any breach of warranty by the seller. ... Construction contracts, however, with their special characteristic of fixing and incorporation of work into the land of the owner, could not provide a satisfactory theory of acceptance to be derived from the mere fact of the incorporation of defective or incomplete building work into an owner's land, and so might create a special and real injustice where a contractor had bona fide completed a project but subsequent defects, quite possibly minor, were raised as a defence to the whole price by an owner unwilling to pay even a part of it. It was consequently in the field of construction contracts that the courts, much earlier than the case of ***Dakin v Lee*** in 1916 ... which is usually credited with its inception, evolved the doctrine of substantial performance.

See also ***Lumbers v W Cook Builders Pty Ltd (in liq)*** [2008] HCA 27; (2008) 232 CLR 635 [51] - [53] in relation to the concept of 'free acceptance' by an owner of building works on the owner's land.

214 Whatever may be the scope of the doctrine of substantial performance in relation to contracts for work or services (see, eg, Stoljar, '*Substantial Performance in Building & Work Contracts*' (1956) 3 UWALR 293), in a contract for the sale of goods the *de minimis* rule may apply to prevent rejection of the goods by the buyer: Guest AG, *Benjamin's Sale of Goods* (7th ed) (Benjamin) [8-050]. The *de minimis* rule is a rule applicable to all transactions in which a breach is alleged and under which the court 'will not regard or give effect to what are undoubtedly, in the view of the court, trivialities, matters of little moment, or of a trifling or negligible nature': ***Margaronis Navigation Agency Ltd v Henry W Peabody & Co of London Ltd*** [1965] 2 QB 430, 444. The question of whether a breach falls within the *de minimis* rule depends on a consideration of the nature and extent of the breach and the nature and scope of the term breached, having regard to the presumed intention of the parties based on the proper construction of the contract. In ***Arcos Ltd v EA Ronaasen & Son*** [1933] AC 470, 479 - 480, Lord Atkin said:

> It was contended that in all commercial contracts the question was whether there was a 'substantial' compliance with the contract: there always must be some margin: and it is for the tribunal of fact to determine whether the margin is exceeded or not. I cannot agree. If the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. ... If the seller wants a margin he must and in my experience does stipulate for it. ...
>
> No doubt there may be microscopic deviations which business men and therefore lawyers will ignore. ... It will be found that most of the cases that admit any deviation from the contract are cases where there has been an excess or deficiency in quantity which the Court has considered negligible. But apart from this consideration the right view is that the conditions of the contract must be strictly performed.

The background legal considerations relevant to the proper construction of the contract

215 The contract, in my view, falls to be considered having regard to the following background considerations.

216 First, as noted above, insofar as it involved the supply of a drilling rig, a vehicle and associated parts and equipment, it was a contract for the sale of goods rather than a contract for work done and materials supplied.

217 Secondly, in relation to the rig, it was a contract for the sale of goods to be acquired after the making of the contract for sale. It was thus a contract to sell future goods: s 5(1) and (3), and s 60(1) of the Act. In that regard, it also involved the sale of goods by description: Benjamin [11-008]; Sutton [8.13].

218 Thirdly, subject to the express terms of the contract (s 54 of the Act), conditions implied by law may arise. A contract for the sale of goods by description will contain an implied condition as to merchantable quality: s 14(ii) of the Act. Also, where the buyer makes known the purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply, there is implied a condition that the goods are reasonably fit for their purpose: s 14(i) of the Act. An express term does not negative an implied condition or warranty under the Act unless it is inconsistent with the statutorily implied terms: 14(iv) of the Act.

219 Fourthly, it is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract: s 27 of the Act. 'Delivery' means the voluntary transfer of possession from one person to another: s 60(1) of the Act. It includes constructive delivery: ***Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd*** [1987] HCA 30; (1987) 163 CLR 236. The seller's duty with regard to delivery must be construed in light of the contract, the subject matter and the circumstances of the case: Sutton [19.3]. In the case of a c.i.f. contract, it involves handing over the documents representing the goods in exchange for the price: ***Comptoir d'Achat et de Vente du Boerenbond Belge S/A v Luis de Ridder Limitada (The Julia)*** [1949] AC 293, 309. The 'symbolic' delivery effected by tender of the documents is to be contrasted with the occasion when the goods are physically handed over to the buyer at the destination: Benjamin [19-072]; ***Schmoll Fils & Co Inc v Scriven Bros & Co*** (1924) 19 Lloyd's Rep 118, 119.

220 Fifthly, the provision of a documentary credit is a common arrangement for payment in an international sale of goods transaction. The arrangement is described in Sutton [26.22] as follows:

> **26.22 Payment by letter of credit common.** The most common method of financing international commerce today is by letter of credit. A contract for the sale of goods between two parties in different countries will usually be found to have a stipulation that payment of the price is to be by this method. ...
>
> In its essence, a letter of credit is a promise by a bank acting on behalf of the buyer of the goods, that it will honour the drafts drawn by the seller for the price of the goods, provided the stipulations appearing on the face of the instrument are met, such as the handing over of the documents of title and other specified documents. In effect the bank undertakes to buy the shipping documents, and its probity and solvency are substituted for that of the buyer.

221 In this case, the parties agreed that the intermediary bank in Australia, the ANZ bank, would be a confirming bank, and not just an advisory bank, and thus be legally obliged to pay under the irrevocable letter of credit upon the production of the relevant shipping documents: see Sutton [26.25].

222 Sixthly, a c.i.f. contract is an 'agreement to sell goods at an inclusive price covering the cost of the goods, insurance and freight': Benjamin [19-001]. Although the contract in this case was also for the

commissioning of goods, insofar as it involved the sale of goods, it was a c.i.f. contract.

223 The fact that the Department agreed to pay by the establishment of a letter of credit, with payment to be made by an Australian confirming bank pursuant to the production of shipping documents, indicates that the parties contemplated performance of the sale by the defendant by the delivery of documents representing the goods, rather than actual physical delivery of the goods. The parties agreed that the documents at the sight of which payment would be made to the defendant, as seller, would include the documents required under a c.i.f. contract for sale, viz, a bill of lading, an insurance policy and an invoice: see Sutton [26.11] and Benjamin [19-024]. Also, the ANZ bank's confirmation of the letter of credit issued by Barclays Bank contained reference to the 'CIF' value of the sale of the goods.

224 Seventhly, where property in the goods passes to a buyer, there is transferred an absolute legal interest in the goods sold: Benjamin [5-003]. Also, risk passes, prima facie, with the transfer of property: s 20 of the Act; Benjamin [5-007]. In a c.i.f. contract, once the goods are ascertained, and if no right of disposal is reserved, property will ordinarily pass on the transfer of the shipping documents, although the risk may pass on or as from shipment: Benjamin [19-098] - [19-110]. Passing of property is a relevant issue if the seller becomes insolvent. If the property has passed to the buyer and the seller becomes insolvent, the pre-paying buyer will be able to claim the goods to the exclusion of the other creditors of the seller: Benjamin [5-005]. In this case, in my view, if for example the defendant had become insolvent after tender of the shipping documents and receipt of the price, its liquidator could not have asserted that the defendant retained property in the goods against Barclays Bank (in the event that Barclays had not been put in funds) or the Department.

225 Eighthly, under a c.i.f. sale, the buyer has no opportunity to examine the goods prior to delivery, and the passing of property in the goods. A c.i.f. contract is one where the parties have 'otherwise agreed' that the seller is not bound, upon tendering delivery, to afford the buyer an opportunity to examine them: s 34(2) of the Act; Benjamin [12-042]. Nevertheless, the buyer still retains the contractual right to reject the goods once they are received. Pending the exercise of this right, the buyer has the property in the goods subject to the condition that they shall revest in the seller if upon examination they are not in accordance with the contract: ***JS Robertson (Aust) Pty Ltd v Martin*** [1956] HCA 2; (1956) 94 CLR 30, 59; ***Kwei Tek Chao v British Traders & Shippers Ltd*** [1954]

2 QB 459, 487 - 488. In the latter case, Devlin J (as his Lordship then was) said:

> I think that the true view is that what the buyer obtains, when the title under the documents is given to him, is the property in the goods, *subject to the condition* that they revest if upon examination he finds them to be not in accordance with the contract. That means that he gets only conditional property in the goods, the condition being a condition subsequent. …
>
> If the property passes conditionally the only ownership left in the seller is the reversionary interest in the property in the event of the condition subsequent operating to restore it to him. It is that reversionary interest with which the buyer must not, save with the penalty of accepting the goods, commit an inconsistent act. …
>
> The seller's reversionary interest entitles him, immediately upon the operation of the condition subsequent, that is, as soon as opportunity for examination has been given, to have the goods physically returned to him in the place where the examination has taken place … (emphasis added).

226 Ninthly, the buyer's contractual right to reject the goods includes for breaches of implied conditions of merchantable quality and fitness for purpose or other express conditions. Breaches of such conditions may allow the innocent party to treat the contract as having been repudiated by the other party, and to terminate the contract: s 11(2) of the Act; Benjamin [12-022]. Alternatively, where a seller breaches a condition, the buyer may 'waive the condition' entirely and completely excuse the breach, or, as would more usually be the case, treat the breach as a breach of warranty and sue for damages: s 11(1) of the Act; Benjamin [12-034].

227 If a term is a condition, ie an essential term, any breach of it will enable the innocent party to terminate the performance of the contract and sue for damages: ***Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*** [2007] HCA 61; (2007) 233 CLR 115 [48]. This is subject to the *de minimis* rule: ***Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)*** [1976] QB 44, 69.

228 However, if a promisor breaches a warranty, however serious the breach, the innocent party may not quit its future obligations, and its only remedy is in damages. The ordinary remedy for breach of contract is an award of damages: ***Koompahtoo Local Aboriginal Land Council v Sanpine*** [46]. Courts are not too ready to construe a term as a condition and, at least where other considerations are finely balanced, will hold that a term is of such a kind that breach of it does not give a right to terminate performance. The preference is for a construction that will encourage

performance rather than the avoidance of contractual obligations: ***Ankar Pty Ltd v National Westminster Finance (Australia) Ltd*** [1987] HCA 15; (1987) 162 CLR 549, 556 - 557.

229 Although the Act only refers to conditions and warranties, the law respecting intermediate terms also applies to contracts for the sale of goods: ***Cehave NV v Bremer Handelsgesellschaft mbH*** (59 - 60, 69, 71 - 72, 84). An intermediate term, if breached, will sound in damages but if the breach is sufficiently serious, it also gives the innocent party a right to terminate the performance of the contract: ***Koompahtoo Local Aboriginal Land Council v Sanpine*** [49] - [54].

230 Tenthly, in addition to the operation under the general law of concepts such as election and estoppel, there are restrictions in the Act on the right of a buyer to reject goods. For example, where a contract is not severable (eg, where the contract does not contemplate supply and acceptance of the goods by instalments) and the buyer has accepted the goods, or part of them, the buyer may not treat a breach of condition as grounds for rejection or for terminating the contract for repudiation. Instead, the buyer may only treat the breach as a breach of warranty, and sue for damages, unless the contract otherwise provides: see s 11(3) of the Act; Sutton [20.2]. See also Benjamin [8-064] - [8-076] concerning contracts for delivery by instalments.

231 Eleventhly, s 34(1) of the Act provides, in effect, that where goods are delivered to the buyer which have not previously been examined by the buyer, the buyer is not deemed to have accepted the goods unless and until it has had a reasonable opportunity to examine them for the purpose of ascertaining whether they are in conformity with the contract.

232 In ***Taylor v Combined Buyers Ltd*** [1924] NZLR 627, Salmond J said (651):

> What amounts to reasonable examination, and to reasonable delay for the purpose of examination, is a question of fact which depends on the nature of the article sold and the nature of the defects alleged. There are cases in which these defects are discoverable at once or on a mere cursory inspection. There are other cases in which the defects are so far latent that some form of investigation, or even user, and some consequent delay, may be essential for their discovery. But if such user or such delay exceeds what is reasonably necessary for this purpose it amounts to an acceptance which destroys the right of rejection and relegates the purchaser to his right to damages as for a breach of warranty.

233 In ***Finch Motors Ltd v Quin (No 2)*** (1980) 2 NZLR 519, 526 the court held, in effect, that the buyer was entitled to examine the merchantable quality of the goods when operating under load. In another New Zealand case, involving the sale of large machinery (a tractor), the buyer was entitled to reject the goods after some delay in using the machinery to test its merchantable quality: ***Wanganui Motors (1963) Ltd v Broadlands Finance Ltd*** (1988) 2 NZBLC 103,372.

234 In this case, there was a commissioning and training obligation which, in my view, does inform the concept of a 'reasonable time' for the purposes of the Act, in relation to the period up to 3 March 2006.

235 Twelfthly, by s 35 of the Act, the buyer is deemed to have accepted the goods when it intimates to the seller that it has accepted them, or it does an act inconsistent with the ownership of the seller after the goods have been delivered, or it retains the goods, without intimating to the seller that it has rejected them after the lapse of a reasonable time.

236 A reasonable time is a question of fact: s 55 of the Act. What constitutes a reasonable time depends on all the circumstances bearing in mind the reasonable interests of both the seller and the buyer: ***Manifatture Tessile Laniesa Wooltex v J B Ashley Ltd*** (1979) 2 Lloyd's Rep 28, 32; ***Whitecap Leisure v John H Rundle*** [44].

237 Thirteenthly, where defects revealing unfitness for purpose or unmerchantability become apparent after examination, the buyer's delay in exercising its right to reject the goods, coupled with the buyer calling on the seller to carry out work on the goods, may, properly characterised, be regarded as an acceptance of the goods: ***Morrison v Clarkston Bros*** (1898) 25R 427, 437; ***R G McLean Ltd v Canadian Vickers Ltd*** (1970) 15 DLR (3d) 15, 19 - 20. Lord McLaren's observations in ***Morrison v Clarkston Bros*** (437) are pertinent:

> The sending for assistance to the [seller] is consistent with the theory that the [buyer has] accepted the [goods] and held the [seller] bound to rectify latent imperfections, but is altogether inconsistent with the supposition that the contract of sale was unexecuted, and with the existence of a right of rejection on the part of the buyer.

238 On the other hand, where defects revealing unfitness for purpose or unmerchantability become apparent after examination, and the buyer is induced by the seller's representations to retain and not to reject the goods, on the basis that they are being, or will in due course be made satisfactory, the buyer's retention for that purpose may not in certain circumstances be

regarded as an acceptance of the goods: ***Barber v Inland Truck Sales Ltd*** (1970) 11 DLR (3d) 469, 475; ***Burroughs Business Machines Ltd v Feed-Rite Mills (1962) Ltd*** (1973) 42 DLR (3d) 303, 307, affirmed ***Burroughs Business Machines Ltd v Feed-Rite Mills (1962) Ltd*** (1976) 64 DLR (3d) 767. In ***Public Utilities Commission of City of Waterloo v Burroughs Business Machines Ltd*** (1974) 52 DLR (3d) 481, 490. Although the above cases do not expressly articulate it, the underlying principle is likely, in my view, to be an estoppel. The seller is estopped, in consequence of representations (express or implied) to the effect that it would not treat the buyer's failure to reject the goods whilst repairs were being effected as acceptance, from contending that the buyer has accepted the goods, whilst the buyer, instead of rejecting the goods, acquiesces in the seller effecting repairs. The period in which the estoppel operated would, at least generally, not be included in the assessment of a reasonable time. The full scope of the estoppel and its application would depend upon the circumstances and precise nature of the arrangements in question. A correlative estoppel would generally arise by which the buyer would not exercise its right to reject whilst the seller was carrying out repairs. The estoppels might operate, at least in some circumstances, subject to the qualification that the buyer could terminate the suspension of its rights by giving reasonable notice of any departure from the assumed state of affairs: cf ***The Commonwealth v Verwayen*** [1990] HCA 39; (1990) 170 CLR 394, 442; ***Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd*** (1955) 1 WLR 761. The right of the buyer to do so would depend eg, on the nature and extent of the defects and the nature and scope of the repair work undertaken prior to the giving of the notice.

239 Such an estoppel would likely not arise if the buyer itself insisted upon modifications and improvements going beyond what was necessary to make the goods fit for purpose or merchantable. Calling on the seller to effect such alterations or improvements would, at least generally, be inconsistent with the preservation of a right to reject based on unfitness for purpose or unmerchantability.

240 Fourteenthly, where a buyer has a right of rejection on one basis, and represents or creates an assumption that it no longer intends to reject the goods on that basis, the buyer may, by operation of estoppel or election, lose its right to reject the goods subsequently on that same basis: ***Cerealmangimi SpA v Toepfer (The Eurometal)*** [1981] 3 All ER 533, 538 - 539; ***Panchaud Freres SA v Establissements General Grain Co*** (1970) 1 Lloyd's Rep 53.

241 Fifteenthly, where a buyer is entitled to reject goods for breach of condition, and treats the contract as having been repudiated by the seller, the buyer may sue in restitution to recover the price paid for the goods on the basis of a total failure of consideration: Benjamin [12-067]; ***Kwei Tek Chao v British Traders & Shippers*** (475). Section 53 of the Act preserves the right of a party to recover money paid when the consideration has wholly failed.

242 Finally, the following general principles are relevant to construction:

(a) The court's primary task in construction is to discover the intention of the parties from the words used by the parties in the contract, read as a whole: ***Australian Broadcasting Commission v Australasian Performing Right Association Limited*** [1973] HCA 36; (1973) 129 CLR 99, 109.

(b) The common intention of the parties to a contract is to be ascertained by reference 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 contract is to be determined by what a reasonable person would have understood them to mean: ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165, 179 [40]. This normally requires a consideration of not only the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction, including the market in which the parties were operating: ***Toll (FGCT) v Alphapharm*** (179) [40]; ***Pacific Carriers Pty Ltd v BNP Paribas*** [2004] HCA 35; (2004) 218 CLR 451, 461 - 462 [22]; ***Maggbury Pty Ltd v Hafele Australia Pty Ltd*** [2001] HCA 70; (2001) 210 CLR 181, 188 [11]; ***McCann v Switzerland Insurance Australia Ltd*** [2000] HCA 65; (2000) 203 CLR 579 [22].

(c) Contracts dealing with matters of business are to be construed in a reasonable and business manner: ***Hart v MacDonald*** [1910] HCA 13; (1910) 10 CLR 417, 431. Commercial contracts should be construed so as to make commercial sense of them - a conclusion that reflects business common sense is to be preferred to one that flouts it: ***Geroff v CAPD Enterprises Pty Ltd*** [2003] QCA 187 [36] - [40]. Thus, the contract should be construed practically to give effect to its commercial purpose: ***Hancock Prospecting Pty Ltd v BHP Minerals Pty Ltd*** [2003] WASCA 259 [72].

Termination

243 Before considering the terms of the contract, it is convenient to mention the issue of termination. The plaintiff contended that the Department terminated the contract by its solicitors' letter dated 3 December 2007. The defendant contended that the letter, by its terms, was incapable of being construed as evincing an intention to terminate.

244 Unequivocal words or conduct evincing an election to terminate the performance of a contract are required, although there is no requirement that the promisee used the word 'terminate': see Carter JW, *Breach of Contract* (2nd ed, 1991) (Carter) [1015] - [1016]. Repudiation of a contract is a serious matter, and is not to be lightly found or inferred: ***Shevill v Builders Licensing Board*** [1982] HCA 47; (1982) 149 CLR 620, 633.

245 The term 'repudiation' is used in different senses. First, it may refer to the renunciation of the contract, in the sense that the repudiating party's conduct evinces an unwillingness or inability to render substantial performance of the contract. The test is whether the conduct of that party is such as to convey to a reasonable person, in the situation of the other party, renunciation of the contract as a whole or of a fundamental obligation under it. Secondly, the term 'repudiation' may refer to any breach of contract which justifies the termination by the other party: ***Koompahtoo Local Aboriginal Land Council v Sanpine*** [44].

246 Termination for repudiation in either sense operates prospectively so that each party is released from all further performance of the contract, and rights accrued under the contract prior to termination remain enforceable (unless the contract otherwise provides): ***McDonald v Dennys Lascelles Ltd*** [1933] HCA 25; (1933) 48 CLR 457, 476 - 477.

247 The valid exercise of a right to terminate is a species of election and the general principle is that an election between inconsistent rights, once made, is final: Carter [1002], [1082], [1205].

248 Whether an election has been made is to be judged, not by the subjective intention of the party with the choice, but by that person's words and conduct: ***GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*** [2003] FCA 50; (2003) 128 FCR 1 [359].

249 An election must be made within a reasonable time: ***GEC Marconi Systems v BHP Information Technology*** [358]. Prejudice to the other side may be relevant in determining whether an election should be

imputed to a person who is not shown to have made a conscious decision to elect: ***Khoury v Government Insurance Office (NSW)*** [1984] HCA 55; (1984) 165 CLR 622, 633; ***Sargent v ASL Developments Ltd*** [1974] HCA 40; (1974) 131 CLR 634, 656 (Mason J); ***Tropical Traders Ltd v Goonan*** [1964] HCA 20; (1964) 111 CLR 41, 55; ***Champtaloup v Thomas*** (1976) 2 NSWLR 264, 273; cf ***Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)*** [1993] HCA 27; (1993) 182 CLR 26, 42 - 43, where the plurality noted (43) that '[N]o prejudice was caused' by the actions of the party seeking to rescind.

250 The onus is on the party terminating to show the existence of a right to terminate and the valid exercise of that right: Carter [1004].

251 As a general rule, a party who has elected to terminate by reference to one ground may justify the election by reference to any ground for termination extant at the time of election: Carter [1006]. This is subject to questions of estoppel or waiver: see, eg, [226] and [240] above.

252 An election to affirm a contract in respect of a breach of contract, or a repudiation of the contract, will not prevent the elector from relying upon an available later breach or repudiation to terminate, provided that there is a later breach or repudiation that is distinguishable from the earlier one: ***GEC Marconi Systems v BHP Information Technology*** [363].

253 In relation to whether a breach is a 'continuing breach' of a promise, Fullagar J in ***Carr v JA Berriman Pty Ltd*** [1953] HCA 31; (1953) 89 CLR 327, 349 referred to the particular nature of the promise, which involved, in that case, performance of an obligation by a certain time, and said:

> It cannot, in my opinion, be maintained that the right to rescind for breach of that promise *as such* had not been lost. Owen J was of opinion that there was a 'continuing breach' of that promise: in other words he seems to have held that a fresh right to rescind accrued from day to day. But, as Dixon J pointed out in ***Larking v Great Western (Nepean) Gravel Ltd*** [(1940) 64 CLR 221, 236] 'If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant'. (original emphasis)

See also ***Whitecap Leisure v John H Rundle*** referred to in [258] below in the context of a sale of goods.

254 Rejection of goods when a party has a right to reject must also occur within a reasonable time: ***Fisher, Reeves & Co Ltd v Armour & Co Ltd*** [1920] 3 KB 614, 624.

255 In broad terms, acceptance may be regarded as a form of expression of the principles of election, although acceptance may also occur in certain circumstances in the absence of the requisite knowledge required for election. See generally, Carter [1095]; and ***Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)*** [1990] 1 Lloyd's Rep 391, 398.

256 In the context of a c.i.f. sale, in ***Kwei Tek Chao v British Traders & Shippers*** Devlin J said (475):

> Of course, if goods have been properly rejected, and the price has already been paid in advance, the proper way of recovering the money back is by an action for money paid for a consideration which has wholly failed, ie, money had and received; but that form of action is governed by exactly the same rules with regard to affirming or avoiding the transaction as in any other case.

257 A party who has accepted the goods in circumstances where a breach of condition would give it a right of rejection, is in the same position as if the person had voluntarily elected to take the remedy of damages: ***Wallis, Son & Wells v Pratt & Haynes*** [1910] 2 KB 1003, 1013 (Fletcher Moulton LJ), affirmed in ***Wallis, Son & Wells v Pratt & Haynes*** [1911] AC 394.

258 ***Whitecap Leisure v John H Rundle*** was a case where the court found that the buyer had accepted the goods by the date of purported rejection, and that the buyer would thereby have lost the right to terminate the contract were it not for the seller's subsequent acquiescence in the purported rejection. The court after discussing s 35 of the English sale of goods legislation (relevantly for present purposes the same as s 35 of the Act) said [45]:

> In conjunction with section 34 [sic - presumably s 35] section 11(4) provides a statutory affirmation of the contract which prevents the buyer from subsequently treating a breach of condition as grounds for rejecting the goods and treating the contract as discharged. It is no answer to say, therefore, as [the buyer] did, that the effect of rejecting goods is to treat the contract as discharged by repudiation and that in support of its right to do so [the buyer] was entitled to rely on facts of which it was unaware at the time. By [the date of purported termination the buyer] had no such right. Nor is it an answer to say that a person does not lose his right to treat the contract as discharged simply by calling for proper performance and that

> even if he has affirmed the contract a subsequent breach of a repudiatory nature will entitle him once again to treat the contract as discharged. Stated in general terms these propositions are not controversial, but in this case they have to be considered in the context of a contract for the sale of goods. Subject to any agreement to the contrary, the implied terms [of merchantability and fitness for purpose] of the Sale of Goods Act relate to the condition of the goods at the time of delivery. It is at that point that compliance with the conditions must be satisfied. Although a breach of condition may be reflected in failures which occur over the days, weeks or months following delivery, the breach itself occurs at the date of delivery. It follows that it is not correct to treat each succeeding breakdown as involving a fresh breach of contract; nor, in the absence of a continuing obligation on [the seller] to maintain the equipment in good working order, was there anything that might properly be characterised as a continuing breach.

259 In a sale of goods where property in the goods has passed to the buyer defeasibly, the buyer could not elect to retain the property in the goods, as well as sue in restitution to recover the price. The two would involve the adoption of inconsistent rights, between which an election would have needed to have been made: see ***Sargent v ASL Developments***; ***Immer (No 145) v Uniting Church in Australia Property Trust (NSW)***; ***Whitecap Leisure v John H Rundle***.

260 The letter from the plaintiff's solicitors dated 3 December 2007 clearly evinced, in my view, an unequivocal intention to terminate. It referred to the defendant having 'repudiated' the contract, it demanded the return of the price, and it indicated where the rig was available for collection. Although the word 'terminate' was not used, the clear intent of the letter was to communicate termination. It is another question whether the plaintiff had proper grounds to terminate.

261 The ground relied upon by the plaintiff in this case was the breach of the alleged term to commission. No other ground is sought to be relied upon. For reasons explained later, the plaintiff has not established this as a proper ground for termination.

The terms of the contract on its proper construction

262 In my opinion, upon its formation in September/October 2003, the contract contained, on its proper construction, the following express terms:

(a) the defendant would sell to the Department, on c.i.f. terms, an Edson 6000W multi-purpose drill rig in accordance with the Specifications, together with a compressor, a carrier truck for the

rig and technical manuals and hydraulic schematics (collectively the 'other items'), and spare parts (from here onwards, 'the goods' refers to, collectively, the rig, the other items and the spare parts);

(b) in relation to freight, the defendant would arrange for the goods to be shipped from Fremantle to Durban and then transported by road from Durban to Gaborone, Botswana;

(c) once the goods were received by the Department in Gaborone, the defendant would commission the rig and provide a reasonable amount of operator training, over a period of three weeks;

(d) for the purpose of commissioning and training, the defendant would:

(i) make the rig ready for active service; and

(ii) carry out test drilling of both down-the-hole and diamond core drilling on a site in Botswana, the location of which would be decided upon by the Department;

(e) after the rig and other items had been received in Gaborone by the Department ('handover'), the defendant would (subject to the implied term in subpar (b) of [263] below) warrant the materials and workmanship of the rig for a further 12 months and the defendant would procure, for the benefit of the Department, the standard Mercedes Benz vehicle warranty in relation to the carrier vehicle; and

(f) the Department would pay the defendant:

(i) $999,872 for the rig and other items, and the commissioning and training, by the establishment of an irrevocable letter of credit confirmed by an Australian bank which could be drawn on presentation of the c.i.f. documents;

(ii) the sum of $73,060 for spare parts.

263 In my view, there were also the following implied terms:

(a) the goods would be suitable for multi-purpose mineral exploration and drilling; and

(b) the warranty, which was to run for 12 months from handover, was predicated upon the goods being suitable for multi-purpose mineral exploration and drilling upon handover.

264 It is convenient to address, at the outset, the implied term referred to in subpar (a) of the preceding paragraph. As, by the invitation to tender, the Department made known the purpose for which the rig was required, namely, multi-purpose mineral exploration and water-well drilling, this would ordinarily import an implied condition that the rig and equipment would be fit for purpose. As it was a sale by description, there would also, ordinarily, be a condition that the goods would be of merchantable quality. Both I think would be implied in the contract here, although I make no finding about that as neither party pleaded those terms. Nevertheless, as the purpose for which the goods were required was made known through the invitation to tender, I find that the term pleaded by the plaintiff referred to in subpar (a) of [146] above is an implied condition of the contract. I understand this term to be, in substance, the same as or analogous to a condition of fitness for purpose.

265 I will refer to this term pleaded by the plaintiff in subpar (a) of [146] above as 'the suitability condition'. The term has significance for an understanding of the proper construction of the contract as a whole, but its application to the facts was not examined in this case as the plaintiff did not plead a breach of it. I would also note, in this context, that the issues on the pleadings in this case did not bring to the surface, and there was consequently no proper examination or elucidation of, a point which was arguably latent within the plaintiff's case. That was whether, and if so to what extent, the plaintiff's plea of the commissioning term as formulated in subpar (d) of [146] above, insofar as it imposed an obligation to demonstrate a degree of 'functionality', imposed a standard which was congruent or coextensive with the suitability condition (or, for that matter, with any potentially implied conditions of fitness for purpose and merchantable quality). The case for the plaintiff was conducted on the basis of the plaintiff's plea of the commissioning term as formulated in subpar (d) of [146] above, without reference to the suitability condition. It would be unsafe and inappropriate, having regard to the way the issues were fought, and the different formulations in the two pleas, to assume that the two could be conflated.

266 The express contractual terms which I have found in [262] above are, in my view, for the most part apparent from the contractual documents referred to earlier. The terms referred to in subpars (c), (d), and (e) of [262] above require, however, particular explanation.

267 The term referred to in subpar (d) in [262] above is, in my view, a term of the contract having regard to the following considerations. First, the word 'commissioning' means, in its ordinary usage, to 'bring [a machine, equipment, etc] into operation' (*The Australian Concise Dictionary*, 4th ed), or 'to transfer ... to active service' (*Macquarie Dictionary*, 4th ed). In my view, the parties would have contemplated that after a long sea voyage, the rig would require unpacking, the carrying out of any consequential assemblage, mounting the rig on the carrier vehicle, checking the operation of the parts and making any necessary adjustments or calibrations, in order to prepare it for actual service.

268 Secondly, the use of the word 'commissioning' in the invitation to tender dated 28 April 2003, in my view, imports the ordinary meaning of the word, and then gives additional content to the scope of the term by providing that commissioning was 'to be carried out ... by *applying all methods of drilling*' on a site in Botswana (emphasis added). The reference in the invitation to tender to 'applying all methods of drilling' was, having regard to the multi-purpose nature of the rig, a requirement that it be applied to diamond core drilling and down-the-hole drilling.

269 Thirdly, whilst the invitation to tender was not itself a contractual document, it provided the background and context within which the offer was to be read. The offer of 13 May 2003, in my view, is to be read as meeting the Department's requirements in relation to commissioning and training, save to the extent otherwise indicated in the offer, as subsequently amended.

270 Fourthly, the offer of 13 May 2003 had an important feature. It used the phrase 'commissioning and training' as a composite term in both places in the document. Point 3 of the defendant's letter of 17 June 2003, although not using 'commissioning and training' as a composite term, nevertheless, combined both elements in the single promise that those activities 'will take 3 weeks'.

271 Fifthly, insofar as commissioning and training involved undertaking operations in the field, its evident purpose, in my view, was to provide the Department with the opportunity to see how it practically operated under load in field conditions and to give the Department's employees training on the rig in a practical, rather than theoretical, environment. The former aspect was relevant to its right to reject the goods if they were not suitable within the meaning of the suitability condition.

272 In relation to the timing of commissioning in the express term referred to in subpar (c) in [262] above, it may, I think, be inferred that the parties saw commissioning and training as something that would be undertaken upon, or at least very shortly after, the arrival of the goods in Gaborone. That expectation, as events transpired, was not fulfilled, but those subsequent events cannot throw light on the proper construction of the contract when it came into being in September/early October 2003: ***The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)*** [2008] 225 FLR 1 [2667], [2672]. There was nothing in the background circumstances to indicate that commissioning and training would not be done promptly after the goods were received in Gaborone, and there was certainly nothing to indicate that a two-stage commissioning process (as in fact happened) was in contemplation.

273 In relation to the term referred to in subpar (e) of [262], this derives, in my view, from the following considerations. First, as I have said, the parties, in my view, contemplated a c.i.f. sale with delivery being effected by delivery of the documents representing the goods, in exchange for the price. Also, as I have said, delivery was not 'ex works'.

274 The third page of the offer of 13 May 2003 referred to 'Delivery to Gaborone, Botswana'. The subheading 'Delivery' on page 4 of the offer also referred to the 'delivery' by the defendant having the goods transported to Gaborone. In both cases, the word 'delivery' in the context of the offer as a whole connotes, in my opinion, the goods being physically handed over to the Department in Gaborone, and does not refer to delivery in the sense of the transfer of possession in exchange for the price.

275 The word 'handover' appears expressly on page 4 of the offer of 13 May 2003. 'Handover' means, in its ordinary usage, the 'surrendering or transferring of something' (*Macquarie Dictionary*). The defendant's quotation of 13 May 2003 referred to a 12-month period of 'warranty' of the rig after 'handover'. Handover was used in its ordinary meaning. Handover involved the physical transfer of the goods, which was complete when the goods were handed over by the carrier to the Department in Gaborone: cf Benjamin [19-072].

276 In relation to the warranty aspect of the express term referred to in subpar (e) of [262] above, and the implied term referred to in subpar (b) of [263] above, the following considerations are relevant. If the goods were not suitable within the meaning of the suitability condition, they could, prior to acceptance or deemed acceptance, at the election of the buyer, be

rejected. In that case, the buyer would in effect disclaim the contract, including the warranty term, which would have no further application. If, at the time of acceptance or deemed acceptance, any defects were of such a nature as not to amount to a breach of the suitability condition, or if the goods were free from defects, the warranty would ensure that the buyer was indemnified against the cost of repairing defects which existed or which subsequently appeared in the period of up to 12 months from handover.

277 However, the warranty could not, in my view, have been intended to be used to make the goods suitable within the meaning of the suitability condition. In my view, the presumed intention of the parties must have been that the warranty would apply to goods which were suitable, and that if the goods were not of that condition, and not rejected, the buyer would be entitled to claim or sue for damages to have them put in that condition, before the warranty period commenced. Accordingly, in my opinion, there was an implied term to the effect referred to in subpar (b) of [263] above.

The commissioning obligation on the proper construction of the contract

Nature and scope

278 Accordingly, I am unable to accept that, on the contract properly construed, the commissioning obligation corresponds with the plaintiff's (or for that matter the defendant's) pleaded case. The terms as I have found them are, to a considerable extent, a blend, with some refinements and qualifications, of each party's case.

279 The nature and scope of the obligation to commission the rig was, in my view, contained in the terms referred to in subpars (c) and (d) of [262] above (the commissioning and training terms). Those terms were, in my view, warranties for the reasons explained in [285] - [288] below. The commissioning obligation was not of the nature pleaded by the plaintiff in subpar (d) of [146] above, which I will call 'the plaintiff's commissioning term'. Some further observations should be made on this. First, the question of construction involves the parties' presumed objective intention as at the formation of the contract, whereas the plaintiff's construction of the contract appeared to me to be, at least in part, influenced by the series of events which actually occurred after the goods were received in Gaborone by the Department.

280 Secondly, the plaintiff in its submissions drew attention to ***Mcdougall v Aeromarine of Emsworth Ltd*** (1958) 1 WLR 1126. In that case, there was a sale of goods involving a yacht. The statutorily implied conditions of fitness for purpose and merchantable quality were expressly negatived (1131). Nevertheless, there were other express terms to the effect that the buyer could reject the goods if the buyer was not reasonably satisfied of the performance of the craft at a designated trial run, in relation to which its satisfaction was to be indicated by executing a memorandum for that purpose (1127, 1131 - 1132). In construing the contract as a whole, Diplock J (as his Lordship then was) considered the interrelationship between the exclusion clauses negativing merchantable quality and fitness for purpose, with the scope of the provisions entitling the buyer to reject the goods if they did not perform to the buyer's reasonable satisfaction (1131 - 1132). His Lordship also held that in that case, a provision concerning the interim passing of property, which was for the purpose of protecting the buyer in the event of the seller's insolvency, did not operate on the facts to pass any property, but that if it did, any property passed defeasibly, subject to the right of the buyer to reject the goods if the seller failed to perform the contract by delivering a craft, the performance of which was to the reasonable satisfaction of the buyer (1130).

281 In the present case, however, in the contract between the defendant and the Department, there was also the suitability condition. Unlike in ***Mcdougall v Aeromarine of Emsworth***, there were no express terms here giving the Department a right to reject if the rig did not perform to its reasonable satisfaction. Nor, do I think, were any such terms necessarily implicit in light of the suitability condition, which would itself operate to safeguard the underlying object of the transaction from the buyer's point of view. The property in the goods could revest in the seller in this case at the election of the buyer if the goods were, in fact, not suitable within the meaning of the suitability condition. Whether or not the goods were suitable in the context of this contract, could be expected to be demonstrable in the process of commissioning and training on site in Botswana. Of course, if in the commissioning of the rig it was not shown to be suitable, the seller would be in breach of the suitability condition, not because it had failed to test drill so as to *demonstrate* compliance with the matters pleaded in the plaintiff's commissioning term, but because the rig was, objectively, not suitable within the meaning of the suitability condition.

282 Accordingly, the plaintiff's case is not established with respect to the nature and terms of the contract said to form the contractual background against which breach and the claim for restitution are to be considered.

283 Although I have found the commissioning obligation to be different from that pleaded by the plaintiff (and the defendant), I nevertheless proceed to consider for completeness whether, on the nature of the commissioning obligation as I have found it, the plaintiff was entitled to terminate the contract on 3 December 2007 and sue for the recovery of the price. This raises questions including the nature of the contractual obligations, the nature of any breach found and rights of, and restraints on, termination in light of the answers to questions of construction and breach. I am cognisant that the analysis is inextricably bound with the starting point of the terms of the contract as I have found them, which differ from each party's pleaded case. Later in these reasons I consider the position with respect to the plaintiff's pleaded commissioning obligation in the event that I am wrong in my analysis of the contract and its terms.

284 I should also reiterate at this point that nothing in the succeeding parts of these reasons involves any finding as to whether or not the goods were fit for purpose, or of merchantable quality, or suitable within the meaning of the suitability condition as at 3 March 2006 or 3 December 2007, or at any other time - these matters were not issues in the case.

Whether termination available for breach of the commissioning obligation properly construed

285 In my view, the obligation to commission which I have found was not a condition of the contract, any breach of which would justify termination. It was an aspect of a composite obligation to commission and provide training for a period of time and it could not have been intended that any breach, however slight (but beyond the *de minimis* rule), in connexion with the provision of commissioning and training, could justify termination of the whole contract.

286 Further, in my view, the commissioning and training terms (referred to in (c) and (d) of [262] above) were warranties, on the proper construction of the contract. The essential obligation to be undertaken by the defendant was to supply and have shipped the drill rig and other items, including manuals and spare parts, to the Department in Gaborone. The performance of that obligation involved property passing to the Department in exchange for the price, conditional upon the property being revested if the goods were not subsequently found to be in conformity with the contract, including if they were not suitable within the meaning

of the suitability condition. If the goods were so conforming, the absence of commissioning and training by the defendant would not diminish the attainment of the underlying object of the transaction.

287 On the contract's proper construction, the commissioning and training terms were important, but not essential features, which were collateral to the principal object of the transaction. The general nature and function of the goods, being an Edson drill rig with which the Department already had some familiarity and experience, the requirement to provide manuals, and the right to revest property in the goods if they were not suitable, tend to indicate, in my mind, that the contractual requirement for the defendant itself to provide commissioning and training was one the breach of which would sound only in damages.

288 Considering the question as a matter of presumed intention at the formation of the contract, if the defendant were to breach the term by not providing training and commissioning at all (as might have happened, eg, if the defendant had gone into liquidation after shipment), it may be supposed that the Department by itself, or by a contractor, would commission the rig and test it under load, with a view to ascertaining its suitability. The costs of that exercise would be adequately compensable by damages. There were, no doubt, real advantages in the defendant itself providing commissioning and training, and, correspondingly the provision of commissioning and training by others might be expected to involve more time and expense. Nevertheless, the additional inconvenience of that course could be expected to be sufficiently alleviated by a claim in money terms. It could not, in my view, be presumed from the nature, subject matter and terms of the contract that the parties intended that if the defendant had manufactured the rig (which was itself a substantial undertaking with a 20 week lead time), procured the Mercedes Benz truck and the compressor, and shipped the rig, the truck, the compressor and spare parts to Botswana, the Department could, nevertheless, reject the goods without knowing that they were not suitable within the meaning of the suitability condition. That result would seem to me to flout business sense.

289 If, however, I am wrong in finding that the commissioning and training terms were warranties, and if, on the proper construction of the contract, they were, instead, intermediate terms, the next question is whether the defendant was in breach of the terms and whether the Department was entitled to terminate for breach of the terms.

290 In my view, the obligation to commission and provide training was partly, but not wholly, performed. The defendant performed the commissioning and training terms to the extent that it attended in Botswana in November 2004 to unpack the rig, set it up, and remedy certain defects which were capable of being remedied in Botswana. It also arranged for modifications or repairs to the hydraulic control system, and generally had the rig prepared for on-site drilling. This also involved the defendant arranging for Minetech to undertake work in 2005. The defendant returned in early 2006 to undertake on-site test drilling. That involved down-the-hole drilling to the depth of 80 m, in the course of which certain items were observed to require replacement (the tilt rams and the water pump), and further modifications were seen to be required to the hydraulic controls. Nevertheless, the down-the-hole drilling worked well. There was also some limited training provided.

291 On the other hand, the defendant, in my view, breached its obligation to commission the rig insofar as it failed to carry out any test diamond core drilling on site. That breach did not itself, however, go to the root of the contract, so as to deprive the Department of substantial part of the benefit to which it was entitled under the contract: cf ***Koompahtoo Local Aboriginal Land Council v Sanpine*** [54] - [55]. The fundamental nature of the contract was one of sale, and the relationship created was one of buyer and seller, in which the buyer had the collateral benefit of the seller being obliged to commission, and train the buyer in the operation of, the goods sold. The breach was not wholesale, in that much of the commissioning and some training obligations had been performed, as noted earlier. The consequences of the failure to carry out test diamond core drilling by the defendant itself were not great, in that the task of testing diamond core drilling was undertaken by the Department in the defendant's absence. Diamond core drilling, as I have found, is the same or similar in operation to down-the-hole drilling. The Department's evident familiarity with diamond core drilling from using its existing Edson rig, the Department's acceptance of that task on site after having seen and been involved in operating the rig in down-the-hole drilling to a depth of 80 m, and the evident expertise of people such as Mr Ntloedibe, indicate that the Department was not unfamiliar with diamond core drilling operations so as to be incapable of fitting the rods or ignorant of the mechanisms to be employed in the course of diamond core drilling. The actual difficulty in carrying out diamond core drilling which transpired, proved to be the consequence (albeit significantly exacerbated) of the same problem which had arisen with down-the-hole drilling, namely the responsiveness of the hydraulic controls. At the time of

breach, the Department was aware that the hydraulic controls had been agreed by the defendant to be the subject of repair or modification work. Accordingly, even if the commissioning and training terms were intermediate terms, in my view, the failure by the defendant to carry out test diamond core drilling on or about 3 March 2006 was insufficient to justify termination on the basis of a breach of those terms.

292 If I am wrong in the foregoing, and the failure to carry out test diamond core drilling on or about 3 March 2006 gave rise to a right to terminate the contract, either on the basis that it was a breach of a condition or a sufficiently serious breach of an intermediate term, in my view, the right to terminate was lost. It is to be recalled that the right to terminate involves the termination of obligations with respect to further performance, and as the Department had no further obligations to perform, any exercise of the right to terminate involved, in substance, the exercise of a right to reject the goods.

293 The Department knew, on 3 March 2006, that the defendant did not intend to complete the second stage of commissioning in relation to test diamond core drilling. It did not, as a consequence, terminate on 3 March 2006 and require the defendant to take the rig back. Accordingly, it did not terminate for the defendant's breach in failing to carry out test diamond core drilling. Instead of terminating, it agreed to carry out test diamond core drilling itself, with a view to identifying any further problems with the rig which had not emerged in the course of down-the-hole drilling. It then sought to carry out test diamond core drilling in the next day or so, when the exacerbation of the slow responsiveness of the hydraulic controls was noted, and the problem with the winch line was observed. These problems were thereafter advised by the Department to the defendant in the period up to and including 23 March 2006, with a view to requiring the defendant to correct them at its cost. In the meantime, the goods were retained in Botswana by the Department. The property in the goods remained with the Department and the goods were under the control and in the possession of the Department, albeit that the goods were located in the field.

294 Although the Department, in its letter of 19 October 2005, had threatened rejection if commissioning were not complete by mid-November 2005, that threat was not carried out. The Department was kept informed by the defendant in its letters of 31 October 2005, 30 January 2006 and 14 February 2006 of the then intended commissioning to be undertaken in the field, and the Department participated in that commissioning process in early March 2006.

295 There was not, after 19 October 2005, and prior to 3 December 2007, any intimation by the Department that it was still contemplating rejection, or that rejection was a course of action which the Department was pursuing or intended to pursue. The Department's insistence on the performance of the contract up to October 2005 despite the then already significant delay particularly in the second stage of commissioning; its failure to reject in mid-November 2005 despite its threat to do so if commissioning had not been completed by then; its participation in the second stage of commissioning in early March 2006; its understanding by 3 March 2006 that the drill worked well for down-the-hole drilling; and its knowledge of the defects that became apparent in early March 2006 and of the defendant's arrangements to have them fixed, provide an important backdrop to what happened after 3 March 2006.

296 In the context of the above background factors, the Department's retention and use of the drill for test diamond core drilling after 3 March 2006, and its requirement by and on 23 March 2006 that the defendant carry out certain works at its cost, signified a retention of the goods after the lapse of a reasonable time, without a termination or rejection, and hence a deemed acceptance of the goods.

297 I would also mention here that there was no proof that the defects were of such a nature that they constituted a breach of the suitability condition - the plaintiff did not assume the burden of proving that matter (or that the goods were unfit for purpose or unmerchantable). Accordingly, there was no established right to reject the goods as being unsuitable within the meaning of the suitability condition (or unfit or unmerchantable) by about 23 March 2006. The only right to terminate, on the present hypothesis, arose by reason of the failure to complete commissioning by doing test diamond core drilling.

298 Having regard to the matters in [293] - [296] above, the plaintiff lost, after 3 March 2006 and by about 23 March 2006, any right to terminate for breach of the commissioning and training term to carry out test diamond core drilling, because it had not by then terminated the contract and instead had accepted the goods.

299 If I am wrong in finding that there was acceptance by 23 March 2006, I find that, in any event, there was acceptance after 23 March 2006, and at or prior to November 2007, for the following reasons.

300 In addition to the factors referred to in [293] - [296] above, the Department's persistence in procuring the defendant's continued

performance of the contract in circumstances where the drill remained out in the field for about 15 months; the Department's awareness of the progress of the defendant in despatching the replacement tilt rams and water pump; its monthly contact with the defendant throughout the remainder of 2006; the fact that by about 30 June 2007 the tilt rams had already been replaced and were working satisfactorily, and the directional control valve had been installed, at the defendant's cost; the Department's participation in the drawing up of the list of work and its concurrence in the remediation work including by Fluid Systems at the defendant's cost; and its willingness to use the spare head for its other drill, all without any intimation of rejection since 19 October 2005, lead me to conclude that, properly characterised, a reasonable time had elapsed and there was an acceptance within the meaning of s 35 of the Act. Even though in the period 30 June 2007 to November 2007 the goods were located in the workshop at Fluid Systems, Fluid Systems were merely a bailee and the Department remained the owner of the goods.

301 In the circumstances referred to in the preceding paragraph, there was a deemed acceptance of the goods after 23 March 2006, by at least July 2007.

302 If I am wrong in finding that there was a deemed acceptance by July 2007, I would find that there was a deemed acceptance by at least November 2007, by which time the other repairs and modifications had been effected, to the Department's knowledge.

303 For completeness, I would add that the matters pleaded by the defendant and referred to in subpars (a), (b) and (c) of [156] above did not, in my view, constitute acceptance as they were merely administrative steps signifying the physical receipt of the goods.

304 I would add, parenthetically, that even if the lack of responsiveness of hydraulic controls in diamond core drilling, the problem with the tilt rams, and the winch line problem, revealed from the down-the-hole and diamond core test drilling undertaken in early March 2006, had been pleaded and proved as indicating unsuitability for the purposes of the suitability condition (or as breaching implied conditions of fitness for purpose or merchantability) I would not have reached a different conclusion, notwithstanding the plaintiff's submissions (on 8 February 2010) to the effect that the Department retained the right to reject the goods up to 3 December 2007 for the purposes of the law outlined in the Canadian cases referred to in [238] above. My reasons are as follows.

305 First, the testing of the rig had been completed and the defects identified by mid-March 2006. The compressor had by then already been corrected, on site. As from at least 23 March 2006, it was plain that the Department positively required remedial and other works to be undertaken at the defendant's cost. Its conduct went beyond simply forbearing from rejecting whilst acquiescing in the defendant insisting on carrying out repairs. The Department, cognisant of the delays over the next 21 months, then left it until after the works had been completed, before purportedly rejecting the goods. Moreover, the defendant had not, in my view, expressly or impliedly represented, in the period after 23 March 2006, that it would not treat the Department's delay in rejecting the goods as an acceptance of the goods. On the contrary, it had described, in its communications after 23 March 2006, the replacement of the tilt rams and the water pump as being under warranty. The delay, after 23 March 2006, in the context of the circumstances referred to in [293] - [296] and [300] above, would indicate to me that there was deemed acceptance by at least July 2007, alternatively November 2007, by reason of the expiration of a reasonable time without intimation of rejection.

306 Secondly and further or alternatively, the Department's letter of 23 March 2006 was itself, in my view, inconsistent with the maintenance of a right to reject based on unsuitability. Even assuming for present purposes that items 1, 2, 5, 6, 7 and 11 of the 23 March 2006 letter were relevant to suitability within the meaning of the suitability condition (or merchantability or fitness for purpose), items 3, 8 - 10 and 12 - 16 of the 23 March 2006 letter (see [99] and [101] above) were, nevertheless, not established as relevant to the rig's suitability (or its fitness or otherwise for purpose, or its merchantability). Also, items 3, 8 - 10 and 13 - 16 went beyond matters which, prior to 23 March 2006, the defendant had agreed to rectify.

307 Similarly, and again on the assumption referred to in the preceding paragraph, the Department's conduct in requiring the items in the list of 30 June 2007 to be completed at the defendant's cost was also inconsistent with the maintenance of a right to reject. Only items 1 - 3 and 7 of the items in the list of 30 June 2007 related to the problem with the wire haul winch for diamond core drilling and the problem with the responsiveness of the hydraulic controls for diamond core drilling. None of the other items in the list of 30 June 2007 were shown to establish that the rig was unsuitable (or unfit for purpose or unmerchantable).

308 Thirdly, and in any event, there was no pleaded case by the plaintiff to the effect that after the completion of the works by November 2007, the

goods were not then suitable (or fit for purpose or merchantable). Nor was there a pleaded case that termination was or could have been effected on such a basis on 3 December 2007 (or at the alternative pleaded time of termination, 6 February 2008).

The plaintiff's pleaded commissioning obligation

309 I will now consider the position in the event that I am wrong in my view as to the proper construction of the contract concerning commissioning, and I will assume that there was an obligation to commission as pleaded by the plaintiff.

310 The obligation to commission, pleaded by the plaintiff in the plaintiff's commissioning term, required the defendant in effect to carry out test down-the-hole and diamond core drilling so as to demonstrate a reasonable and continuing functional capacity to conduct drilling for mineral exploration, geotechnical and water-well purposes. I will also assume, as the plaintiff contends, that the plaintiff's commissioning term was a condition or essential term.

311 The plaintiff's commissioning term could be breached in two ways. It could be breached if test drilling in one or both forms (down-the-hole and diamond core drilling) was not carried out. Alternatively, it could be breached if test drilling was carried out, but the defendant failed to demonstrate, in the process, a reasonable and continuing functional capacity to conduct drilling for the purposes specified.

312 In this case, there occurred a breach of the plaintiff's commissioning term in both senses. There was a breach in the former sense, by not carrying out test diamond core drilling (breach number 1). There was also a breach in the latter sense insofar as the tilt rams were shown to require replacement (breach number 2). The bowed tilt rams meant, in my view, that the rig was not demonstrated to have a reasonable and continuing functional capacity within the meaning of the plaintiff's commissioning term. I find that the need to replace the water pump is not a breach in the latter sense - the absence of the water pump did not, in my view, reveal that the rig did not have a reasonable and continuing functional capacity, as indicated by the evidence of Mr Hanias and Mr Adamson. The rig would still have a reasonable and continuing functional capacity by the use of the Bean pump. The compressor problem had been corrected on site. The difficulty with the hydraulic controls was not, in my view, sufficiently great in connexion with down-the-hole drilling to characterise the rig as not having a reasonable and continuing functional capacity. However, had test diamond core drilling been carried out by the defendant

(as it subsequently was attempted by the Department), the exacerbated problem of the lack of responsiveness of the hydraulic controls and the failure of the winch line would have been revealed. In my view, those revelations would have indicated that there was, on account of those matters, not a reasonable and continuing functional capacity in connexion with diamond core drilling within the meaning of the plaintiff's commissioning term. I will call this breach number 3.

313 The Department knew of breaches number 1 and number 2 (and insofar as relevant for present purposes breach number 3), by at least 23 March 2006. Assuming the plaintiff's commissioning term was a condition, the Department could have terminated the contract, arranged to have the goods collected and sued for the return of the purchase price. Yet it did not terminate on account of breaches of the plaintiff's commissioning term.

314 In relation to breach number 1, for the reasons in [293] - [296] and [300] above, the right to terminate was lost.

315 In relation to breaches 2 and 3, for the reasons in [305] above, and for reasons essentially the same as those referred to in [306] - [308] above, the right to terminate was lost.

316 In relation to [306] - [307] above in this context, items 3, 8 - 10 and 12 - 16 in the 23 March 2006 letter were not shown as establishing that the rig did not have a reasonable and continuing functional capacity to conduct drilling for the specified purposes. Also, only items 1 - 3 and 7 of the 30 June 2007 list were shown to be relevant to whether the rig did have a reasonable and continuing functional capacity to conduct drilling for the specified purposes.

317 In relation to [308] above in this context, there was no pleaded case to the effect that after the completion of the works by November 2007, the goods did not have a reasonable and continuing functional capacity to conduct drilling for the specified purposes, or a pleaded case to the effect that termination was or could have been effected on such a basis on 3 December 2007 (or 6 February 2008).

318 Accordingly, for the foregoing reasons, the plaintiff has not established a right to terminate and reject the goods on 3 December 2007 based on breaches of the plaintiff's commissioning term, and hence has not established a right to sue in restitution for a total failure of consideration. As I have indicated, no other ground for termination was relied upon.

Advance payment; entire contracts

319 I will now consider the transaction from the perspective of the law with respect to advance payments and the law with respect to entire contracts, upon which principles the plaintiff relies in the alternative.

Principles

320 A payment in advance made under a contract (as opposed to a deposit) may be recoverable by the payer if, on the proper construction of the contract, its retention by the payee is conditional upon performance of the payee's obligations under the contract: ***McDonald v Dennys Lascelles*** (477); ***Baltic Shipping Co v Dillon (The Ship Mikhail Lermontov)*** [1993] HCA 4; (1993) 176 CLR 344, 351 - 353 (Mason CJ, Brennan & Toohey JJ agreeing), 385 - 387 (Gaudron J), 389 - 391 (McHugh J). The basis for recovery of an advance payment has a superficial, but not close, resemblance to the concept of an entire contract: ***Baltic Shipping v Dillon*** (351) (Mason CJ).

321 An entire contract, or more accurately an entire obligation, is one in which the consideration to be provided in return for the payment of money is entire and indivisible: ***Baltic Shipping v Dillon*** (350). If a contract or obligation is entire, its complete performance is a condition precedent to payment or counter performance: ***GEC Marconi Systems v BHP*** [703].

322 In ***Baltic Shipping v Dillon*** Mason CJ said (350):

> The concept of an entire contract is material when a court is called upon to decide whether complete performance by one party is a condition precedent to the other's liability to pay the stipulated price or to render an agreed counter-performance. If this were a case in which the appellant sought to enforce a promise to pay the cruise fare at the conclusion of the voyage the concept would have a part to play; then, if the appellant's obligations were entire, on the facts as I have stated them, the appellant's incomplete performance of its obligations would not entitle it to recover.
>
> When, however, an innocent party seeks to recover money paid in advance under a contract in expectation of the entire performance by the contract-breaker of its obligations under the contract and the contract-breaker renders an incomplete performance, in general, the innocent party cannot recover unless there has been a total failure of consideration. If the incomplete performance results in the innocent party receiving and retaining any substantial part of the benefit expected under the contract, there will not be a total failure of consideration.

Application of principles

323 As a matter of construction, in my view, retention of the price of approximately $1 million in this case was not conditional on both the supply of the goods and the complete performance of the commissioning and training terms. There was no express term in the contract to the effect that retention was so conditional. Nor in my view could a term be implied to that effect. Property in the goods was to pass on the presentation of the c.i.f. documents, subject to the condition subsequent that property could revest if the goods were not in conformity with the contract upon examination. If the goods were in conformity with the contract, including being suitable, there could, in my view, be no presumed intention that the Department's retention of the goods should be defeasible because commissioning and training had not been provided by the defendant. If the goods were not in conformity with the contract, including not being suitable, the property in them, having passed defeasibly, could be revested in the defendant by the Department rejecting the goods and claiming recovery of the price on the basis of a total failure of consideration. I refer also to the discussion in [278] - [281] and [286] - [288] above.

324 Further, even if the money were paid 'in expectation of the entire performance' (cf ***Baltic Shipping v Dillon*** (350)), in my view, the plaintiff cannot recover on the basis of a total failure of consideration where it attained the property in the goods, and never lawfully exercised its right to reject them. It has, in those circumstances, received and retained a substantial part of the benefit expected under the contract, and there has, accordingly, been no total failure of consideration.

325 If no commissioning and training were provided at all, that component cost of the total price may have been recovered as a total failure of what may be seen as a severable part of the consideration (see [196] above). Alternatively, perhaps on the contract's proper construction, the parties may be presumed to have intended that the defendant's retention of $10,600 was conditional upon its performance of the commissioning and training terms. However, the plaintiff's claim is not put on those bases and, in any event, commissioning and training were provided to the extent outlined earlier.

Conclusion

326 For the foregoing reasons, I would dismiss the plaintiff's action.