Neutral Citation Number: [2018] EWHC 1658 (Comm)

Case No: CL-2016-000344

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2018

Before :

MRS JUSTICE MOULDER DBE

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Between :

(1) MINERA LAS BAMBAS SA
(2) MMG SWISS FINANCE AG — **Claimants**

- and –

(1) GLENCORE QUEENSLAND LIMITED
(2) GLENCORE SOUTH AMERICA LIMITED
(3) GLENCORE INTERNATIONAL AG — **Defendants**

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Fionn Pilbrow & Charlotte Thomas (instructed by **White & Case LLP**) for the **Claimants**
Conall Patton (instructed by **Linklaters LLP**) for the **Defendants**

Hearing dates: 23rd, 24th, 25th, 26th April and 1st May 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE MOULDER

Mrs Justice Moulder:

Introduction

1. This is a claim arising out of a share purchase agreement (the "SPA") entered into on 13 April 2014 between the claimants as Purchasers and the defendants as Sellers and Sellers' Guarantor for the sale of 100% of the shares in Xstrata Peru S.A. (later renamed Las Bambas Holdings S.A.). The dispute centres on the construction of certain tax indemnities in the SPA and related provisions.

Background

2. Xstrata Peru S.A., defined in the SPA as the "Company", indirectly owned the Las Bambas mining project, a large copper development project located in southern-central Peru (the "Project") through its wholly-owned subsidiary, then called Xstrata Las Bambas S.A. ("XLBSA"). Closing under the SPA took place on 31 July 2014.

3. The first claimant, Minera Las Bambas S.A. ("MLBSA"), is a company incorporated in Peru which now owns the Project. MLBSA is the successor to Minera Las Bambas S.A.C ("MLBSAC"). The second claimant, MMG Swiss Finance AG ("MMG Switzerland"), is a company incorporated in Switzerland. Both MLBSAC and the second claimant are together defined as the "Purchasers" under the SPA. MMG Limited ("MMG"), a company incorporated in Hong Kong with its principal place of business in Australia, was also a party to the SPA as the "Purchasers' Guarantor".

4. The first defendant, Glencore Queensland Limited ("GQL"), is a company incorporated in Australia. The second defendant, Glencore South America Limited ("GSAL"), is a company incorporated in the Cayman Islands. Both the first and second defendants are together defined as the "Sellers" under the SPA. The third defendant, Glencore International AG ("Glencore AG"), is a company incorporated in Switzerland. Glencore AG is a party to the SPA as the "Sellers' Guarantor".

5. I will deal below with the detailed factual background in relation to the various issues as it arises and to the extent relevant.

Issues for the court

6. The parties have raised numerous issues of law and fact for determination by the court, including issues of Peruvian law. In this judgment I propose to deal only with those matters which in my view require determination in order to resolve the issues between the parties. In that regard, whilst I have had the benefit of written opening and closing submissions from both counsel as well as oral opening and closing submissions, in this judgment I shall deal with only those submissions which are relevant to the issues which need to be resolved, having regard to my findings. Further, to the extent that a particular submission is not expressly dealt with in this judgment, it should be noted that all submissions have been considered in arriving at a conclusion.

7. I propose to deal with the issues under the following headings:

   i) NFB VAT – clause 3 of the Deed of Indemnity and clause 10.1.1 of the SPA;

   ii) Conduct of the NFB VAT proceedings; and

iii) Third Party VAT – clauses 10.1.1 and 10.1.2 of the SPA.

Evidence

8. For the claimants I heard evidence from Mr Heng and Mr Ossio as factual witnesses. For the defendants I heard evidence from Mr Weber and Mr Shimamoto as factual witnesses.

9. I also heard evidence from four foreign law experts: experts in Peruvian tax law and in Peruvian civil law. In relation to Peruvian tax law, the claimants called César Talledo Mazú and the defendants called Cecilia Delgado Ratto. Each expert produced a report and a joint memorandum summarising the points of agreement and disagreement. In relation to civil law I heard evidence from Professor Eduardo Barboza Beraún and Dr Enrique Ghersi Silva.

10. I state at the outset that I do not consider that Mr Talledo's evidence was anything other than impartial. Mr Talledo acknowledged in cross examination that his son works for Estudio Rodrigo, the law firm retained by the claimants in Peru. Although he did not originally disclose that he had sought factual information from Estudio Rodrigo in connection with the preparation of his report, in my view this was not as a result of any intention to mislead and in my view this did not affect the weight which I give to his evidence on tax matters. Further, on the evidence, the mere existence of the relationship of father and adult son in no way affected his impartiality or the weight which I attach to his evidence.

NFB VAT – clause 3 of the Deed of Indemnity and clause 10.1.1 of the SPA

Background to NFB VAT

11. The Project involved the resettlement of the Fuerabamba rural community (the "Community") from the Las Bambas site to the town of Nueva Fuerabamba (referred to as "NFB"), a new town which was to be built by MLBSA specifically for that purpose. In connection with the resettlement, XLBSA entered into an agreement on 23 November 2011 under which the Community agreed to vacate the land in question and to transfer such land to MLBSA and MLBSA agreed to transfer different land to the Community and to build a new town on part of the land (the "Swap Agreement").

12. No VAT was paid by MLBSA in Peru at the time the Swap Agreement was entered into. Following closing under the SPA, MLBSA received a number of requests for information ("Requirements") from the Peruvian tax authority (referred to in this judgment by its initials, "SUNAT") relating to VAT which SUNAT said was payable by MLBSA in connection with the relocation of the community to the NFB town (the "NFB VAT").

13. By way of a letter dated 21 November 2014 the Sellers and Glencore AG gave notice to the Purchasers and the Purchasers' Guarantor that the Sellers wished to exercise their right under clause 12.5.1(iv) of the SPA to take conduct of the claim made by SUNAT in relation to the NFB VAT.

14. On 24 November 2014, the parties to the SPA entered into a Deed of Indemnity, pursuant to which the Sellers took conduct of the claims in relation to the NFB VAT.

15. On 30 October 2015 SUNAT issued a Requirement asking MLBSA to explain why no VAT was declared or paid in connection with the Swap Agreement in June 2014.

16. MLBSA submitted a response to SUNAT's Requirement on 9 November 2015, prepared by and on the instruction of the defendants. The response argued that the VAT obligation only arose on 15 August 2014 (rather than in June 2014 as previously determined by SUNAT) i.e. after the closing date of the SPA.

17. Further Requirements and responses followed culminating on 29 January 2016 with SUNAT issuing a tax assessment (the "Tax Assessment"), comprising Assessment Resolutions and Penalty Resolutions. The Tax Assessment determined that MLBSA had an obligation to pay the NFB VAT on the date that the town of NFB effectively existed, which SUNAT determined was 27 June 2014. Payment was due on 17 July 2014 and penalties and interest on such penalties were also payable.

18. On 1 March 2016, MLBSA appealed to SUNAT against the Tax Assessment. SUNAT confirmed its determination by a resolution (the "Intendancy Resolution") dated 1 December 2016 (received by MLBSA on 6 February 2017).

19. On 27 February 2017 MLBSA lodged an appeal before the Peruvian tax court challenging the Intendancy Resolution in relation to the NFB VAT (which remains to be determined and which, it is common ground, is unlikely to be resolved until 2019).

20. SUNAT had reduced MLBSA's accumulated VAT credit balance by the principal amount of the NFB VAT and (by resolution 9510 on 8 February 2016) had set off the liability in respect of NFB VAT penalties and interest against a VAT refund due to MLBSA. However the Intendancy Resolution also concluded that there was no legal basis for the steps taken by SUNAT to offset MLBSA's liabilities to SUNAT under the Tax Assessment (i.e. including penalties and interest due in relation to the NFB VAT). MLBSA sought the return of the funds and a refund was paid, refunding the offset amounts plus interest.

21. In relation to penalties SUNAT issued further penalty resolutions (the "New Penalty Resolutions") in May 2017 (to replace the resolutions which had been nullified). One of those resolutions ("Resolution 251") imposed a fine of PEN 14,355,887 (before the application of any discount). Almost all of this was attributable to the NFB VAT, but a small amount was attributable to Third Party VAT. The balance of the penalties/interest in relation to Third Party VAT were dealt with by other resolutions issued the same day.

22. MLBSA appealed the New Penalty Resolutions in July 2017. SUNAT rejected the appeal by way of further Intendancy resolutions in December 2017. MLBSA then appealed to the Peruvian tax court and that appeal is continuing.

23. By way of letter from Linklaters LLP ("Linklaters"), solicitors acting for the defendants, to White & Case LLP ("White & Case"), solicitors acting for the claimants, dated 17 January 2018 the defendants directed MLBSA to pay the NFB VAT component of Resolution 251 in the sum of PEN 8,520,198 plus any interest payable. The payment was made on 22 January 2018 thereby securing a 40% discount of its liability to SUNAT for penalties and interest in respect of NFB VAT. On 8 February

2018 the defendant reimbursed MLBSA for the payment insofar as it related to the penalties and interest (up to 18 January 2018) on the NFB VAT.

Issues of construction

24. It is the claimants' case that pursuant to clause 3.1 of the Deed of Indemnity the sum determined by SUNAT in the Tax Assessment to be payable in respect of NFB VAT constitutes an amount that is "*payable"* by the Purchasers' Group, namely MLBSA, in respect of an "*Assumed Tax Matter*" that has been "*adversely determined*" (by SUNAT) against MLBSA.

25. In addition, the claimants also assert that the failure to indemnify the claimants constitutes a breach by GQL and GSAL of their obligations as Sellers under clause 10.1.1 of the SPA and a breach by Glencore AG of its obligations as Sellers' Guarantor under clause 17.2 of the SPA.

26. The relevant provisions are as follows (so far as material): Clause 3.1 of the Deed of Indemnity provides:

> "3.1 Each of the Sellers and the Sellers' Guarantor hereby irrevocably and unconditionally undertakes, jointly and severally, to indemnify the Purchasers against the full amount (if any) payable by the Purchasers' Group under each of the Assumed Tax Matters (if adversely determined)." [emphasis added]

Clause 10.1 of the SPA provides:

> "10.1 The Sellers shall indemnify the Purchasers in relation to, and covenant to pay the Purchasers an amount equal to:
>
> 10.1.1 the amount of any Tax payable by a Group Company to the extent the Tax has not been discharged or paid on or prior to the Effective Time and it: …" [emphasis added]

Claimants' submissions

27. The claimants submit that as a result of the Tax Assessment MLBSA has an actual liability for the purposes of the SPA and/or the Deed of Indemnity and the sums prescribed by the Tax Assessment in relation to the NFB VAT constitute "*tax payable*" and/or an "*amount… payable*" for the purposes of the SPA and/or the Deed of Indemnity.

28. It is the claimants' case that as a matter of Peruvian law pursuant to Article 76 of the Peruvian tax code (the "Tax Code") an assessment resolution of SUNAT establishes the existence of the relevant tax debit or tax credit. In this case the Tax Assessment established the existence of a tax debt on the part of MLBSA and that tax debt was unaffected by the appeal of the assessment resolutions to the Peruvian tax court and the debt remains in existence unless and until MLBSA is successful in the tax appeal.

29. Alternatively, the claimants assert that the sums deducted by SUNAT from MLBSA's accumulated VAT credit balance i.e. the sum of PEN 38,817,640 comprising PEN

28,400,661 in respect of the NFB VAT is an amount which has in fact been collected by SUNAT and accordingly these sums constitute an actual loss suffered and this amounts to an actual liability and "*tax payable*" and/or an "*amount… payable*" for the purposes of the SPA and/or the Deed of Indemnity.

30. In relation to the penalties and interest, MLBSA has received a payment from the defendants pursuant to clause 2.2 of the Deed of Indemnity and clause 12.5.1(v) of the SPA but MLBSA seeks to recover the balance which remains outstanding on the basis that it amounts to an actual liability and is "*payable*" for the purpose of the SPA and/or the Deed of Indemnity.

Defendants' submissions

31. It is the defendants' case that no amount of NFB VAT has to date become "payable" under either the SPA or the Deed of Indemnity and that no amount will become payable in respect of the NFB VAT unless and until the tax appeal has been finally determined in SUNAT's favour by the Peruvian tax court. The defendants accept that Article 76 of the Tax Code is the relevant statutory provision by which the existence of a tax credit or tax debt is established and that the Tax Assessment established the existence of a tax debt in respect of the NFB VAT. But it is the defendants' case that this is subject to Article 115 of the Tax Code which treats a tax debt as "collectable" or "enforceable" only where it has not been appealed. Accordingly it is the defendants' case that as a matter of Peruvian law no "enforceable liability" has arisen in respect of the NFB VAT.

32. Alternatively the defendants assert that no NFB VAT is chargeable on the transaction carried out pursuant to the Swap Agreement as a matter of Peruvian law. Accordingly there is no amount of "*Tax payable*" within the meaning of clause 10.1.1 of the SPA or, if an amount is payable, the amount relates to the period falling after the closing date under the SPA because as a matter of Peruvian law the NFB VAT did not become chargeable until August 2014.

Discussion

Approach to contractual interpretation

33. It is common ground that the word "payable" means the same thing in both the SPA and the Deed of Indemnity. Counsel for the defendants submitted that it was "logical" to ask whether the claim would be well-founded under the SPA and then to ask whether the answer was changed by the Deed of Indemnity. The first issue for the court to determine is therefore the meaning of the word "payable" in the SPA. Counsel for the claimants seeks to draw a distinction between the payment obligation and enforceability. Counsel for the defendants seeks to draw a distinction between the debt obligation and the payment obligation.

34. Although it was common ground that the construction of the word "payable" is an objective test to ascertain the meaning of the words, each counsel sought to stress different aspects of the approach from the leading authorities *(Rainy Sky v Kookmin Bank* [2011] UKSC 50*, Arnold v Britton* [2015] UKSC 26, and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24*)*.

35. Counsel for the claimants submitted that the "usual starting point" of contractual construction is the identification and assessment of the context in which the words in question have been used and then consideration of the words used in that context. He submitted that it was "not usual" to start with the authorities and that this was not a case in which a great deal of assistance is likely to be gleaned from the authorities: the word "payable" was not a term of art and its interpretation was a matter of interpretation in any given case.

36. Counsel for the defendants submitted that the issue of construction should be approached from three different prisms: the authorities on what the word "payable" "ordinarily means", the rest of the contract to see what light it sheds on clause 10.1 and "commercial common sense".

37. Counsel for the claimants sought to stress the relevant "commercial context" and submitted that this was the starting point for contractual construction. However it seems to me on the most recent authority of the Supreme Court in *Wood v Capita Insurance Services Ltd* that the approach to be taken was set out by Lord Hodge at [12]:

> "… once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

38. Lord Hodge described the approach of the court as follows:

> "[10] The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning…" [emphasis added]
>
> [11] … Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause …and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the Arnold case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms." [emphasis added]

39. I therefore propose to take each of the elements in turn: the language of the relevant clause, the documentary context, the factual matrix and the commercial consequences.

The language of the relevant clause

40. Counsel for both the claimants and the defendants referred the court to a number of authorities on the meaning of the word "payable". I propose to deal with these quite shortly as, in my view for the reasons set out below, they were of limited assistance.

41. Counsel for the defendants relied on dicta in *Morton v The Chief Adjudication Officer* [1988] IRLR 444 (CA). In that case the question on the appeal was whether, on the true construction of the Social Security Regulations, Mrs Morton was entitled to payment of unemployment benefit. Slade LJ observed at [16]:

> "The word "payable" is not a term of art, as Lord Porter pointed out in Latilla v. Inland Revenue Commissioners (1943) A.C. 377 at p. 384. It is a word which is capable of bearing different meanings in different contexts. However, I start from the definition of the word "payable", which is to be found in the Oxford Dictionary and was brought to our attention by Mr Mummery on behalf of the Chief Adjudication Officer. The primary meaning there given is as follows: "Of a sum of money, a bill, etc. That is to be paid; due; falling due (usually at or on a specified date or to a specified person)""

42. Counsel for the defendants referred the court in particular to paragraph 35 of the judgment:

> "I add merely one rider. If the award in any case were to be followed by an appeal, the sum awarded would, I think, cease to be "payable" if there was either an order staying payment of the original award, or the appeal was allowed."

43. However in my view the context of *Morton* was very different and the court was construing the term in the context of the statutory regulations. I do not see that it provides any specific guidance to the particular facts of this case.

44. Similarly the case of *In re Howells Application* [1972] 1 Ch 509, relied on by the defendants, was in a very different context. It concerned a lien for unpaid rent and when a debt may be "payable" under the relevant statute, the Leasehold Reform Act 1967. The court found that rent payable meant rent which the tenant was under an enforceable obligation to pay and did not extend to arrears of rent which was statute barred. Although counsel for the defendants submitted that this was similar to the present situation where the debt could not be "coercively enforced", in my view the context was very different: Pennycuick VC said that:

> "it would not, I think, be natural upon the ordinary use of language to describe a statute barred debt as "payable" without qualification."

The court then reached its conclusion having regard to the scheme and purpose of the Act and the interrelationship of the relevant provision with other provisions of the statute.

45. Counsel for the defendants submitted that in commercial contracts it will often be necessary to distinguish between an underlying indebtedness obligation on the one hand and the payment obligation on the other. An indebtedness arises when the relevant amount becomes "due" and a payment obligation arises when the relevant amount becomes "payable". Counsel for the defendants cited the sentence in *Videocon Global Ltd, Videocon Industries Limited v Goldman Sachs International* [2016] EWCA Civ 130 at [55] that where a payment obligation is suspended, "*an amount may be due but not payable*".

46. Whilst it is undoubtedly the case that a distinction may be drawn in some contexts, that particular case was concerned with the construction of the ISDA Master Agreement in which as Gloster LJ noted at [53]:

> "… the distinction between the debt obligation and the payment obligation, and the different dates upon which those obligations respectively arise, is clear in the scheme of the contract. That distinction is particularly clear, for example, in the definition of payment date in section 6(d)(ii)." [emphasis added]

47. Counsel for the claimants sought to derive assistance from the observations of Christopher Clarke LJ in *Petrosaudi Oil Services (Venezuela) Ltd v Novo Banco SA* [2017] EWCA Civ 9 that a debt could be due and payable now even though there may be some restriction on the discharge that obligation. He held at [68]:

> "In my judgment, in the particular circumstances of this case, a statement that PDVSA was obligated to pay must be taken to mean that the obligation to pay has accrued due so that PDVSA had become liable to make the payment, even though precluded from discharging that liability until the article 141 procedure had been complied with or an award made. In a case where there is a potential distinction between a liability to pay and an immediate obligation to discharge that liability, "obligated to pay" is perfectly apt to refer to the former…" [emphasis added]

48. Counsel for the claimants submitted that *Petrosaudi* drew a clear distinction between the debt obligation and the payment obligation and reached the conclusion that a statement such as "obligated to pay" or "payable" is capable of referring to a debt for which the payment cannot presently be coercively compelled.

49. However the judgment at [65] stressed the importance of focusing on the precise words:

> "it is important, in this respect, to focus on the precise words, rather than considering what might have been the true interpretation if the words used were "now obligated to pay"… or incorporated some phrase with the words "payable" or "due". Differences in phraseology may matter and the introduction of

> "now" begs the question as to what it applies to." [emphasis added]

50. Counsel for the claimants also referred to *McGreavy v Benfleet Urban District Council* [1950] Ch 269, a case which concerned business rates and whether the rating authority to whom the rates were due could present a bankruptcy petition where the statute required that there was a liquidated sum, "*payable either immediately or at some certain future time*". It was held that when a sum for rates had been lawfully demanded it did "*in the ordinary meaning of the words become due and payable, although not actionable.*" However the distinction that was being drawn was in the context of rates which were not actionable but could only be recovered by distress. The dicta relied on by the claimants are therefore of no assistance in the present context given the particular circumstances of that case. Similarly *Underground Electric Rly Co v Commissioners of Inland Revenue* [1906] AC 21 was another case which was dependent on the construction of the relevant statute.

51. I was also referred to the decision in *Atheer Telecom Iraq Ltd v Orascom Telecom Iraq Corp Ltd* [2017] EWHC 279 (Comm). Under a share purchase agreement, the defendant covenanted to pay to the claimant any tax liability of the company which arose from an event occurring on or before the completion date of the sale. The agreement provided for the defendant to pay any tax liability arising within 10 days before the date on which the company became "*finally liable to pay the tax*". Knowles J held that the words of the relevant clause did not require finality in the narrow sense of the absence of any possibility of appeal or subsequent compromise. However it is to be noted that, as stated in the judgment at [43], under the tax law of Iraq payment of the tax had to be made as a precondition to any objection to the tax assessment.

52. By contrast, in this case, it is common ground between the experts that pursuant to Article 76 of the Tax Code, an assessment resolution establishes a tax liability (paragraph 43 of the Joint Statement). It is also agreed between the experts that where an assessment resolution determines a VAT debt the taxpayer does not have to settle the tax and fine if the assessment is being challenged (paragraph 47 of the Joint Statement).

53. The distinction which was drawn in *Videocon* between "due" and "payable" was on the basis of the express wording in the contract and no such express distinction is drawn here. Here the distinction is between a debt which has come into existence but, while subject to appeal, cannot be enforced. The meaning of the term "payable" in the clause 10.1.1 of the SPA is unclear and accordingly the court has to consider the meaning in the light of the documentary context and the factual matrix.

The documentary context

54. The documentary context has two elements in my view:

    i) the use of the term "payable" elsewhere in the SPA including in clause 10.1; and

    ii) consideration of the provision against the overall structure of the contract, in particular the provision for reimbursement in clause 11.13 of the SPA, the time bar in clauses 11.1 and 12.2 and the provision relating to contingent liabilities in clause 11.5.1.

The use of the term "payable" elsewhere in the contract

55. Counsel identified 35 places where the word "payable" was used elsewhere in the SPA. Given that the word was used in many different contexts, it is not helpful in my view to consider all these instances. However it is instructive to consider the use of the term within clause 10.1.1 itself. Clause 10.1.1 (so far as material) reads:

> "The Sellers shall indemnify the Purchasers in relation to, any covenant to pay the Purchasers an amount equal to:
>
> 10.1.1 the amount of any Tax payable by a Group Company to the extent the Tax has not been discharged or paid on or prior to the Effective Time and it: …
>
> (iii) arises as a result of entry into this Agreement or Closing… including, without limitation, to Tax (including capital gains tax) incurred by the Sellers or any Group Company in connection with the Transaction, which shall not include, for the avoidance of doubt, any amounts payable under Clauses 7.6.1 or 8.4.1 but will include, for the avoidance of doubt, any amounts of tax payable due to a shortfall in the amount of Tax paid under clauses 7.6.1 or 8.4.1 arising from the calculation of the Initial Sellers' Capital Gains Tax Amount and the Further Sellers' Capital Gains Tax Amount under clauses 7.6.2 and 8.4.3 being less than the Sellers' Capital Gains Tax…" [emphasis added]

56. The clauses to which cross-references are made read as follows:

> "7.6.1 The Purchasers shall, on behalf of the Sellers, pay an amount in Peruvian Nuevos Soles equal to the Initial Sellers' Capital Gains Tax Amount to SUNAT in cleared funds by no later than the date required by Peruvian law… [emphasis added]
>
> 8.4.1 In the event that the Consideration Adjustment Amount is a positive number, the Purchasers shall, on behalf of the Sellers, pay an amount in Peruvian Nuevos Soles equal to the Further Sellers' Capital Gains Tax Amount to SUNAT in cleared funds by no later than the date required by Peruvian law…" [emphasis added]

57. It is clear from the language that under clause 7.6.1 there is an obligation on the Purchasers to make a specific payment in respect of capital gains tax by a specific date and this obligation is excluded from the right to be indemnified under clause 10.1.1 except in respect of any shortfall. It would appear from the language that there is a date which is "required" by Peruvian law by which a sum is to be paid although there was no evidence before me as to the position in relation to capital gains tax. Counsel for the defendants submitted that it was "striking" that clause 10.1.1(iii) used the word "*amounts payable*" as shorthand for sums which had to be paid by the deadline required by Peruvian law and that that was consistent with the defendants' case as to what is meant by "*Tax payable*" in the opening words of clause 10.1.1. There is no indication

in the language of clause 7.6.1 of a distinction being drawn or arising between a tax debt coming into existence and it being capable of being enforced, but it is significant in my view that the same term "*payable*" is used in relation to the requirement to indemnify against any shortfall in capital gains tax. The use of the same term "*payable*" (in the absence of any evidence relating to Peruvian capital gains tax) would tend to suggest that no distinction was being drawn in clause 10.1.1 in relation to "payable" and "coercively enforceable".

58. The term "*payable*" is also used in clause 10.2 which reads as follows:

> "Notwithstanding any other provisions of this Agreement, the Purchasers shall not be entitled to make a claim or recover, and the Sellers shall not be liable, in respect of any fines, penalties or interest charged to, or paid or payable by, any Group Company, the Purchasers or any member of the Purchasers' Group to the extent that such amounts are charged, paid or payable as a result of, or are attributable to, any act or omission of the Purchasers' Group which constitutes a breach by the Purchasers of their obligations under Clauses 7.6.1 or 8.4.1." [emphasis added]

59. This subclause excludes from the indemnity in clause 10.1.1 fines, penalties or interest to the extent they result from a breach of obligation on the part of the Purchasers. By using the word "*charged*", this would suggest that the exclusion from the indemnity is a broad one and applies to penalties or interest even where they are not "*paid or payable*" and is to be contrasted with the use of the single word "*payable*" in the opening sentence of clause 10.1.1.

Consideration of the provision against the overall structure of the contract

60. Counsel for the claimants sought to support their interpretation of clause 10.1.1 by reference to certain other clauses in the SPA, in particular clause 11.13.2, the provision for reimbursement, and clauses 11.1 and 12.2 which contain limitation and notification provisions.

61. Clauses 11.13.1 and 11.13.2 provide as follows:

"11.13.1 Prior to Recovery from the Sellers etc.

> "If, before the Sellers pay an amount in discharge of any claim under this Agreement, the Purchasers or any Group Company recovers or is entitled to recover (whether by payment, discount, credit, relief, insurance or otherwise) from a third party a sum which indemnifies or compensates the Purchasers or Group Company (in whole or in part) in respect of the loss or liability which is the subject matter of the claim, the Purchasers shall procure that, before steps are taken to enforce a claim against the Sellers following notification under Clause 12.2 of this Agreement, all reasonable steps are taken to enforce the recovery against the third party and actual recovery (less any reasonable costs incurred in obtaining such recovery) shall reduce or satisfy,

> as the case may be, such claim to the extent of such recovery." [emphasis added]

11.13.2 Following Recovery from the Sellers etc.

> "If the Sellers have paid an amount in discharge of any claim under this Agreement and subsequently the Purchasers or any Group Company is entitled to recover (whether by payment, discount, credit, relief, insurance or otherwise) from a third party a sum which indemnifies or compensates the Purchasers or Group Company (in whole or in part) in respect of the loss or liability which is the subject matter of the claim, the Sellers shall be subrogated to all rights against the third party or, if subrogation is not possible, the Purchasers shall, subject to being indemnified by the Sellers, and receiving payment in advance, in respect of reasonably anticipated costs and expenses of the Purchasers in relation thereto, if requested, procure that all steps are taken as the Sellers may reasonably require to enforce such recovery and shall, or shall procure that the relevant Group Company shall, pay to the Sellers as soon as practicable after receipt an amount equal to (i) any sum recovered from the third party less any costs and expenses incurred in obtaining such recovery less any Taxation attributable to the recovery after taking account of any tax relief available in respect of any matter giving rise to the claim or if less (ii) the amount previously paid by the Sellers to the Purchasers less any Taxation attributable to it. Any payment made by the Purchasers to the Sellers under this Clause shall be made or procured by way of further adjustment of the Share Consideration and the provisions of Clause 3.3 shall apply mutatis mutandis." [emphasis added]

62. Counsel for the claimants submitted that clause 11.13.2 gives the Sellers a clear right of reimbursement which will apply in the event that the Peruvian tax court decides in MLBSA's favour at the end of the day. Counsel submitted that the presence of that right to reimbursement is itself indicative that the claimants' case, that payment is required on SUNAT's determination, is correct. Counsel submitted that the presence of the reimbursement provisions "makes plain" that the parties understood that the defendants' liability under the SPA, that would require it to make payments to the Purchasers, "might shift over time"; for example a tax might be payable following an assessment by SUNAT but cease being so at a later date following a tax court decision.

63. Counsel for the defendants submitted that although clause 11.13.2 offers a safeguard, it does not answer the question as to whether the amount is "*payable*".

64. In my view clause 11.13.2 was not intended to be a contractual mechanism for reimbursement in respect of the tax indemnity. The language is that of "*recovery*" from a third party of a sum which "*indemnifies or compensates*" the Purchasers. Whilst I accept that it is broad enough to cover the present situation in relation to VAT, in my view it does not support an inference that the parties "understood" that the liability might shift over time. The language of indemnification and compensation is very different from the language of adjustment which might have been used if this clause

was intended to cover the position that liability under the tax indemnity could change over time leading to a need to reimburse the Sellers for an earlier payment. The structure of clause 11.13 is that clause 11.13.1 extends to recovery where the seller has not yet paid out such that the claim is reduced and clause 11.3.2 deals with the situation where the seller has paid out. The overall structure of clause 11.13 is not therefore one merely of reimbursement of earlier amounts.

65. Accordingly I do not accept that clause 11.13 is clearly intended as a way of providing an "adjustment" for the liability for the NFB VAT under the indemnity such that the term "*payable*" in clause 10.1 should be construed as arising on the Tax Assessment, even though not enforceable.

66. Counsel for the claimants also rely on clauses 11.1 and 12.2 to support their interpretation. Clauses 11.1 and 12.2 read as follows:

> "11.1 Time Limitation for Claims
>
> Neither Seller shall be liable under this Agreement in respect of any claim unless a notice of the claim is given by the Purchasers to each of the Sellers specifying the matters set out in Clause 12.2:
>
> 11.1.1 in the case of any Tax Claim, within six years following Closing save to the extent that the Tax Claim relates to any shortfall in Tax withheld which has not been paid (including penalties and interest) by a Group Company or the Purchasers to SUNAT, in which case within 10 years after Closing;…"
>
> "12.2 Notification of Claims under this Agreement
>
> Notices of claims under this Agreement shall be given by the Purchasers to each of the Sellers within the time limits specified in Clause 11.1 and shall specify (to the extent reasonably possible based on the information available to the Purchasers) full information in relation to the legal and factual basis of the claim and the evidence on which the Purchasers (or the relevant Purchaser) rely (including, where the claim is the result of or in connection with a Third Party Claim, a description of the Third Party Claim) and setting out the Purchasers' estimate of the amount of Losses which are, or are to be, the subject of the claim (including any Losses which are contingent on the occurrence of any future event."

Pursuant to these clauses, the Purchasers are obliged to notify any tax claim within six years following closing (the exception in relation to withholding tax is not relevant for present purposes) and, in the absence of any such notification, the Sellers' liability is excluded. Clause 12.3 provides that any claim notified pursuant to clause 12.2 shall be deemed to be irrevocably withdrawn 12 months after the six year time limit unless legal proceedings in respect of the relevant claim have been commenced.

67. Counsel for the claimants submitted that given the time taken to complete an audit and the fact that disputes with SUNAT may well be protracted, there is a very real prospect that tax court proceedings will not be completed within seven years of closing. Accordingly counsel submitted that it could not have been intended by the parties that the slow progress of disputes would have the effect of preventing the Sellers from being liable for potentially substantial tax liabilities for which they would otherwise be liable. If the trigger under clause 10.1 is the final decision of the tax court, as the defendants contend, this would have the result that there would be no breach of the tax indemnity in respect of which proceedings could be commenced within the period of seven years after closing.

68. Counsel for the defendants submitted that there is no reason to think that generally claims would take more than six years and that where a limitation period would shortly expire and a tax court decision had not been handed down it would be open to the claimants to make the relevant notification, issue the court proceedings and then seek a stay of those proceedings. Counsel for the claimants responded that there was no guarantee that the defendants would consent to a stay in such cases.

69. It seems to me that this argument on behalf of the claimants in support of the language in clause 10.1.1 is not an argument which can be sustained purely from the language of clauses 11.1 and 12.2. Although the time taken by the Peruvian tax courts to resolve disputes may have been part of the factual context against which clause 10.1 was negotiated, there is no indication from the language of clause 10.1 of any particular concerns in this respect affecting the drafting of clause 10.1. It is relevant however when the court considers the competing constructions and the commercial consequences of the competing constructions and I deal further with this below.

70. Counsel for the defendants sought to gain support for their construction from the provision relating to contingent liabilities in clause 11.5.1 of the SPA. Clause 11.5.1 reads:

> "Neither Seller shall be liable under this Agreement in respect of any liability which is contingent unless and until such contingent liability becomes an actual liability."

Counsel for the defendants submitted that clause 11.5.1 "reinforced the conclusion" that no indemnification is to occur until MLBSA can actually be required to hand money over to SUNAT. Counsel rejected the claimants' reliance on *Integral Memory plc v Haines Watts* [2012] EWHC 342 (Ch) submitting that in normal debt proceedings, the court's judgment is declaratory of a pre-existing liability. Counsel submitted that by contrast a tax court decision suspends the enforceability of the debt pending the resolution of the appeal against the assessment. Counsel submitted that therefore the liability is contingent because the disputed liability is unenforceable pending the appeal.

71. In my view, based on the evidence of the experts upon which they are agreed, there is an existing liability upon the Tax Assessment and the liability cannot be said to be contingent. The liability is not enforceable (in the sense of "coercive action" being permitted to be taken) and the liability may be set aside by the tax court but it remains an actual liability unless and until there is a decision of the tax court which sets it aside. This conclusion is reinforced by the fact that interest continues to accrue on the debt and penalties are levied and these are actual liabilities which although they cannot be

enforced, remain in existence unless and until set aside by the tax court. Accordingly in my view clause 11.5.1 provides no support or assistance to the defendants' case on interpretation.

The factual matrix

72. Counsel for the claimants sought to rely on two elements as forming the relevant factual and commercial context:

    i) the commercial position which counsel described as the nature and purpose of the transaction, the nature of the asset acquired and the "essential commercial deal"; and

    ii) the Peruvian tax system – the knowledge of the parties as to how it operated and the risks which it presented to the commercial position and to the Project.

73. In relation to the commercial position, counsel for the claimants submitted that the essential commercial purpose of the SPA was to effect the transfer of a mine that was under construction. In particular both parties would have understood the funding requirements, the cash flow requirements and the risks to the Project including economic risks and tax risks. The essential commercial purpose of the SPA was to preserve and maintain the basic commercial bargain to transfer the asset at a particular price on a particular day. Counsel submitted that risks were allocated on a clearly defined basis by way of the contractual warranties and indemnities. In this context the tax indemnity recognised that if unanticipated tax became payable or anticipated tax credits became unavailable during the course of development and construction of the project, it would have a significant and adverse impact on the Project, its economics and cash flow and ultimately on its development and operation. In particular in relation to VAT, the Project was in the middle of the construction phase and was going to be in a period in which its cash flow was extremely tight. As a consequence the ability of the Company to seek repayments of VAT credits through the refund system (the "VAT Early Refund Scheme") was important to the financial viability of the transaction.

74. Counsel for the claimants sought to rely on internal emails at the claimants to demonstrate the importance of the early recovery of VAT. Counsel further pointed to the evidence of Mr Ossio that in December 2015 the mine stopped for two weeks in order to retain cash in the Project and submitted that in consequence the effect of the Project being unable to obtain refunds under the VAT Early Refund Scheme was material.

75. Counsel for the defendants, whilst not disputing the economic position and prospects of the Project, submitted that this has no bearing on the meaning of the disputed provisions of the SPA and that the SPA should not be given interpretation contrary to its "ordinary meaning" merely because this would enhance the benefit of the bargain from the claimants' perspective.

76. The approach of the court to the factual matrix was expressed as follows by Lord Hodge in *Wood* at [13]:

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual

> interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in Sigma Finance Corpn [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions." [emphasis added]

77. Accordingly, whilst accepting that the context or factual matrix is a tool which the court should use in interpreting a contract, I note that the SPA was negotiated and prepared with the assistance of leading international law firms. Whilst therefore as Lord Hodge in *Wood* noted, the correct interpretation of some contracts may be achieved by greater emphasis on the factual matrix because of their informality or the absence of skilled professional assistance, the SPA cannot be so characterised.

78. In the light of these observations and the characteristics of the particular agreements, it seems to me that the factual matrix on which the claimants sought to place particular reliance does not assist the interpretation. As regards the submission that the term "*payable*" in Clause 10.1.1 should be construed having regard to the availability of the VAT Early Refund Scheme, clause 10.1.1 is accepted to be a broad indemnity in relation to tax and is not limited to VAT. The breadth of the indemnity in clause 10.1.1 is evident from the definition of Tax in the SPA:

> ""Taxation" or "Tax" means all forms of taxation (other than deferred tax) and statutory, governmental, state, provincial, local governmental or municipal impositions, duties, contributions and levies, in each case in the nature of tax, whether levied by reference to income, profits, gains, net wealth, asset values, turnover, added value or otherwise and shall further include payments to a Tax Authority on account of Tax, whenever and

> wherever imposed and whether chargeable directly or primarily against or attributable directly or primarily to a Group Company or any other person and all penalties and interest relating thereto"

79. I accept the submission that the basic commercial bargain was to transfer the asset at a particular price on a particular day. However, as counsel for the claimants noted, risks were allocated on a "clearly defined basis" by way of the contractual warranties and indemnities in the SPA. In a professionally negotiated agreement, it was for the parties to deal with any specific concerns including any risks to cashflow arising out of the operation of the VAT Early Refund Scheme**.** The claimant cannot rely on internal emails to demonstrate the importance of the early recovery of VAT as these may not reflect the outcome of the negotiations. As observed by Lord Hodge in *Wood* at [11]:

> "… Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause …and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the Arnold case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms." [emphasis added]

There is therefore little or no evidence to support the submission that the availability of the VAT Early Refund Scheme was a particular concern in the broad scope of the tax indemnity which would affect the objective interpretation of the language

80. As to the operation of the Peruvian tax system more generally, as noted above, it is common ground between the experts that pursuant to Article 76 of the Tax Code, an assessment resolution establishes a tax liability. It is also agreed that where an assessment resolution determines a VAT debt it cannot be collected by way of the "coercive collection procedure" until it is enforceable in accordance with Article 115 of the Tax Code. The experts agree that an assessment resolution establishes the existence of a tax credit (paragraph 43 of the Joint Statement) but that a tax credit is not a monetary credit but is deductible from the gross tax that the taxpayer would be required to pay (paragraph 39 of the Joint Statement). The experts do not agree whether tax debts can properly be offset against refund requests.

81. Whilst the position in relation to the enforceability of tax debts as a matter of Peruvian law is common ground, it has not been established in my view that the tax law concepts in relation to VAT referred to above, should inform the interpretation of the term "*payable*" where the parties in a lengthy and detailed agreement between sophisticated parties, and with the assistance of experienced lawyers, have not dealt with the issue specifically. In my view the absence of any reference to VAT in clause 10.1 is all the more notable by the specific references to capital gains tax in clause 10.1.1 and VAT Receivables in clause 10.1.2.

The commercial consequences

82. As quoted above, Lord Hodge in *Wood* said that the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense.

83. Counsel for the claimants submitted that tax can be "collected" prior to the determination of the tax court and that MLBSA should be able to pay the sum owing in order to take advantage of the discount in penalties and interest. Counsel accepted that in some cases the claimants' interpretation would result in MLBSA being in funds prior to it being obliged to make payment to the tax authorities but submitted that the defendants are protected by the reimbursement provisions in the SPA.

84. Counsel for the defendants submitted that it made no sense to require payment if MLBSA was just holding on to money and not yet required to pay it over to SUNAT. Further that it accorded with commercial common sense to await a decision of the tax court which was conclusive as to the existence of, and basis for, tax liability rather than SUNAT's "provisional view".

Conclusion on construction of clause 10.1.1

85. Looking at the language of clause 10.1.1 the natural meaning of the word "*payable*" is in my view, "*to be paid*" or "*due*". Here it is "*due*" in the sense that a liability has arisen but it is not "*to be paid*" given that it cannot be coercively enforced. There is a well recognised distinction in the authorities between debts which are "*due*" and debts which are "*payable*" even though this is not a distinction which is expressly made in the language of 10.1.

86. Given the rival interpretations on the language, I have regard to the use of the term "*payable*" elsewhere in the contract. In this regard I note that there is no mention of VAT in clause 10.1.1 even though there is express mention of capital gains tax and in clause 10.1.2 express provision for certain VAT receivables. It is noteworthy in my view that in clause 10.2 the parties used broader language referring to "*charged, paid or payable*" whereas in clause 10.1.1 the term used is only "*payable*" and the inference I draw is that the objective meaning in clause 10.1.1 is limited to a narrower concept.

87. Having regard to the structure of the overall contract, for the reasons discussed above, I do not consider that the reimbursement provisions of clause 11.13 support the claimants' interpretation. I accept that, as a consequence of the defendants' interpretation, a claim might fall foul of the limitation period under clause 11.1 but that is only a possibility (which on the current tax appeal is not expected to arise in any event) and that possibility is not sufficient to conclude that the interpretation of the term should be influenced by the limitation provisions.

88. As to the factual matrix, for the reasons stated above, I attribute less weight to the commercial background than might be the case in other circumstances. If the financial position of the Project (and the VAT Early Refund Scheme in particular) was of such importance, one would have expected it to have been dealt with specifically in the tax indemnity in clause 10.1.1 in the same way that capital gains tax was dealt with specifically and VAT Receivables were dealt with specifically in clause 10.2. Even if it was part of the specific factual matrix, the absence of any reference to Peruvian VAT

(other than VAT Receivables) may reflect the outcome of negotiations between the parties or it may be a matter which has only become important with hindsight.

89. Finally, as to the commercial effect of the competing interpretations, the purpose of clause 10.1 of the SPA is to preserve the position of the parties as at closing and the amount agreed as the price for the shares. That purpose is achieved in my view if the tax indemnity operates only when the tax debt has to be paid to SUNAT and does not require MLBSA to be put in funds even when no payment will be made.

90. The claimants assert that since sums of money have in fact been collected by SUNAT from MLBSA through deductions to the accumulated VAT credit balance, they constitute an actual loss suffered and this amounts to an actual liability and "*tax payable*" and/or an "*amount… payable*" for the purposes of the SPA and/or the Deed of Indemnity. In my view reducing the accumulated VAT credit balance is not equivalent to an actual payment: the experts agree that a tax credit is not a monetary credit, it is a deduction from the gross tax that the taxpayer would be required to pay. Accordingly the reduction in the accumulated balance does not amount to a tax debt nor is it a tax amount which is payable.

91. The claimants also seek to rely on the possibility of an offset of the tax credit against a refund to assert that the tax is currently "*payable*". The position as stated by SUNAT is that the offset was not permissible pending determination by the tax court and has been reversed. Whilst Mr Talledo disagrees with this conclusion, (for the reasons set out more fully below under Third Party VAT) even if an offset were permissible, an offset against a refund does not result in a tax debt which is payable by MLBSA but in the reduction of an amount payable to MLBSA.

92. Accordingly I find that under clause 10.1.1 of the SPA the amount of the NFB VAT assessed by SUNAT is not currently "*payable*" within the meaning of that clause but will only be "*payable*" if and to the extent that the Peruvian tax court determines that any amount of NFB VAT is payable and such debt becomes "coercively" enforceable in accordance with the Tax Code.

Deed of Indemnity

93. Counsel for the claimants submitted that the contractual "trigger" is the same under the Deed of Indemnity and the question is still whether any amount in respect of the "*Assumed Tax Matters*" is "*payable*".

94. As stated above, counsel for the defendants agreed that clause 3.1 of the Deed of Indemnity (set out above) was triggered by the same event as clause 10.1.1 of SPA namely an amount "*payable*" and that the word "*payable*" means the same thing in both clauses. However counsel further submitted that the conclusion that no amount of NFB VAT has become "*payable*" is reinforced by the fact that clause 3.1 is triggered only if the Assumed Tax Matters have been "*adversely determined*".

95. I accept that in the Deed of Indemnity the word "*payable*" falls to be construed as discussed above in relation to clause 10.1.1 and in addition against the factual matrix of the SPA pursuant to which the Deed of Indemnity is entered into. I also accept the defendants' submission that the addition of the words "*if adversely determined*" reinforces the conclusion that an adverse determination only occurs once the claim, the

subject matter of the Deed of Indemnity, has been resolved. For the reasons discussed more fully later in this judgment, I do not accept the claimants' submission that reference to "*adversely determined*" is to be interpreted as a reference to an adverse determination of SUNAT: as is clear from clause 2.1 of the Deed of Indemnity, the Deed of Indemnity is entered into where a third party claim has arisen and the Sellers wish to take action to dispute or contest the claim and to have conduct of any related proceedings or appeals. It is therefore the adverse determination of that claim which is referred to in clause 3.1, as distinct from a determination which is adverse: the words "*if adversely determined*" in clause 3.1 have to be read in the light of the other provisions of the contract specifically clause 2.1 of the Deed of Indemnity and against the context of the SPA.

96. Accordingly I find that under clause 3.1 of the Deed of Indemnity the amount of the NFB VAT assessed by SUNAT is not currently "*payable*" within the meaning of that clause but will be "*payable*" only if and to the extent that the Peruvian tax court determines that any amount of NFB VAT is payable and such debt becomes "coercively" enforceable in accordance with the Tax Code.

NFB VAT penalties and interest

97. In relation to the NFB VAT penalties and interest, MLBSA has received a payment from the defendants pursuant to clause 2.2 of the Deed of Indemnity and clause 12.5.1(v) of the SPA but MLBSA seeks to recover the balance which remains outstanding on the basis that this amounts to an actual liability and is "*payable*" for the purpose of the SPA and/or the Deed of Indemnity.

98. The experts are agreed (paragraph 47 of the Joint Statement) that where a VAT debt is to be paid, the taxpayer does not have to settle the penalty if a contentious tax procedure has been initiated within the relevant deadline. Accordingly, in line with my conclusion set out above on the meaning of "*payable*", I find that the sums in respect of penalties and interest are not currently payable to MLBSA under clause 10.1.1 but will be "payable" if NFB VAT is found by the tax court to be chargeable and becomes "coercively enforceable". In the alternative, if the tax court finds that NFB VAT is not payable and the amounts paid in respect of penalties and interest fall to be repaid by SUNAT, the claimants will be obliged to refund to the defendants amounts received.

99. There is a further point as to whether, if the claimants are entitled to be reimbursed for the NFB VAT penalties and interest on the basis of the findings in this judgment, the claimants would be entitled to interest on the NFB VAT for the four days between 18 and 22 January 2018. The sums are claimed pursuant to clause 12.5.1(v) of the SPA and the question is whether the sums are "*reasonable costs and expenses*".

100. There also appears to be an outstanding issue between the parties as to whether the defendants' direction to the claimants to pay the NFB VAT component of Penalty Resolution 251 was, on a proper construction, a direction to pay the Third Party VAT component of Penalty Resolution 251. Counsel for the defendants in closing submissions accepted that Resolution 251 had to be paid in its entirety in order to avail of the 40% discount; however it is not clear whether the defendants accepted that the claimants were directed to pay the Third Party VAT component. To the extent that this remains an issue, I will deal with it briefly.

101. Linklaters wrote to White & Case on 17 January 2018. Whilst expressly reserving their rights in relation to the English proceedings, Linklaters on behalf of the defendants, directed MLBSA:

> "to pay the NFB VAT component of Penalty Resolution 251…"

102. The letter continued:

> "in order for the 40% discount to be secured the relevant penalty needs to be paid in full. MLBSA will therefore also need to pay the Third Party VAT component (plus applicable interest) of Penalty Resolution 251. Further, to obtain the 40% discount, payment must be made by 22 January 2018.
>
> Please confirm the date of payment to us once it has occurred…" [emphasis added]

103. Reading the letter as a whole, it seems to me that the objective interpretation of the language is that the direction given by that letter is to make payment of the NFB VAT component and the Third Party VAT component. The letter clearly states that the penalty needs to be paid "*in full*", that payment must be made by 22nd January and that MLBSA should confirm the date of payment. The natural inference, in my view, from the instruction is that the direction extended to the Third Party VAT component.

104. The issue then arises as to whether the defendants are liable pursuant to clause 12.5.1(v) to reimburse the claimants in respect of the Third Party VAT component of Penalty Resolution 251 plus applicable interest thereon.

105. Clause 12.5.1(v) of the SPA, reads:

> "12.5.1 Subject to Clause 12.5.2, if the matter or circumstances that may give rise to a claim against the Sellers under this Agreement is a result of or in connection with a claim by, or action against, a third party (a "Third Party Claim") then: …
>
> (v) if the Sellers send a notice to the Purchasers, and the Sellers are entitled to take action in relation to a Third Party Claim, in each case in accordance with Clause 12.5.1(iv) above, the Purchasers shall, and the Purchasers shall procure that any member of the Purchasers' Group shall give, subject to the Purchasers being paid all reasonable costs and expenses, all such information and assistance including access to premises and personnel, and the right to examine and copy or photograph any assets, accounts, documents and records, as the Sellers may reasonably request, including instructing such professional or legal advisers as the Sellers may nominate to act on behalf of the Purchasers or other member of the Purchasers' Group concerned but in accordance with the Sellers' instructions." [emphasis added]

106. Given that it is common ground between the parties that it was not possible to pay the penalties in respect of only the NFB VAT, in my view the total amount of the penalties and interest paid pursuant to the direction of the letter of 17 January 2018 were costs which fall within the language "*reasonable costs and expenses*" as MLBSA would otherwise have been unable to comply with the direction without incurring costs on its own account. I therefore find that the defendants are obliged to reimburse the claimants in respect of the Third Party VAT component of Penalty Resolution 251 plus applicable interest.

107. In relation to the interest which was incurred for the four days between the direction being given by the defendants to pay the penalties on 18 January 2018 and payment being made on 22 January 2018, it seems to me on the evidence that the additional interest for those four days was a reasonable cost within the meaning of clause 12.5.1(v): the short delay of four days was attributable to firstly, the fact that the claimants sought confirmation through the lawyers that they would be reimbursed for making the payment; secondly, internal authorisation for the payment needed to be obtained and thirdly, given the currency involved, the actual process of making payment in the Peruvian currency was not and could not be immediate. In my view these were reasonable steps. For these reasons, I find that the additional interest for these four days is recoverable pursuant to clause 12.5.1(v) as a cost which was incurred by the Purchasers and which was a reasonable cost in the circumstances.

Substantive position under Peruvian law

108. In the light of my finding as to the meaning of the term "*payable*" it is not necessary for me to decide the question of whether MLBSA has a liability in respect of the NFB VAT as a matter of Peruvian law, or the amount of any such liability. It is further not necessary in the light of my conclusion for this court to decide when the NFB VAT, assuming it is chargeable on the transaction, arises as a matter of Peruvian law. Both these matters will be determined in due course by the Peruvian tax court.

Conduct of the NFB VAT proceedings

109. Clause 12.5.1 of the SPA states:

> "12.5.1 Subject to Clause 12.5.2, if the matter or circumstances that may give rise to a claim against the Sellers under this Agreement is a result of or in connection with a claim by, or action against, a third party (a "Third Party Claim") then: …
>
> (iv) provided that the Sellers give notice to the Purchasers and agree in writing to indemnify the Purchasers against the full amount (if any) payable under such Third Party Claim (if adversely determined), the Sellers shall be entitled at their own expense and in their absolute discretion, by notice in writing to the Purchasers, to take such action as it shall deem necessary to avoid, dispute, deny, defend, resist, appeal, compromise or contest the Third Party Claim (including making counterclaims or other claims against third parties) in the name of and on behalf of the Purchasers or member of the Purchasers' Group concerned and to have the conduct of any related proceedings,

> negotiations or appeals, subject to the Sellers not taking any action or conduct which, could reasonably be considered to be likely to be materially prejudicial to the legitimate commercial interests of the Las Bambas Project or the Group Companies;" [Emphasis added]

110. As noted earlier, pursuant to clause 12.5(iv) of the SPA the defendants gave notice to assume conduct of the NFB VAT claim and entered into the Deed of Indemnity. Counsel for the defendants submitted that it was a "moot question" whether, if NFB VAT becomes payable in the future, the Sellers would remain liable under the indemnity for the NFB VAT, even if the NFB VAT were held to have accrued after closing. Counsel submitted that it was for now a "purely hypothetical question" which should be addressed in due course if and when it arose and in the light of the facts that are known at that time.

111. In my view it is not a hypothetical question for the reasons effectively acknowledged in the defendants' opening submissions: the claimants argue that there is a constraint on the exercise by the defendants of their right to conduct the Peruvian proceedings pursuant to clause 12.5.1(iv) of the SPA and the Deed of Indemnity and that it can only be exercised for the limited purpose of eliminating or reducing MLBSA's alleged liability to SUNAT but not for the purpose of eliminating or reducing the Sellers' potential liability to the Purchasers under the SPA. The issue of whether, once the Sellers have exercised their rights under clause 12.5.1(iv) of the SPA to take control of the Third Party Claim, the Sellers are obliged to indemnify MLBSA against any amount that becomes payable (irrespective of whether it relates to the period pre- or post-closing) is therefore relevant in the interpretation of the rights to conduct the proceedings conferred by clause 12.5.1(iv) and clause 2 of the Deed of Indemnity: if the defendants are obliged to indemnify the claimants under the terms of the Deed of Indemnity in any event, the commercial effect on the claimants of the defendants' conduct is limited as the claimants are insulated against the outcome.

112. I therefore propose to consider:

i) whether as a matter of construction of clause 3.1 of the Deed of Indemnity the Sellers are liable for amounts payable even if they relate to amounts which accrued post-closing;

ii) the exercise of powers by the Sellers pursuant to the Deed of Indemnity; and

iii) the conduct complained of.

<u>The construction of clause 3.1 of the Deed of Indemnity</u>

113. Clause 3.1 of the Deed of Indemnity indemnifies the Purchasers against "*the full amount (if any) payable by the Purchasers' Group under each of the Assumed Tax Matters (if adversely determined)*". There are thus two possible interpretations:

i) that there is no qualification in time so that the Sellers are liable to the Purchasers even if it is determined that the NFB VAT liability arose post closing; or

ii) the Sellers are only liable, and the claim is only "*adversely determined*" if the determination of the NFB VAT claim is that the liability for NFB VAT arose pre-closing.

114. Counsel for the defendants submitted that the Deed of Indemnity is entered into pursuant to the SPA and must be construed in that context: *MRI Trading AG v Erdenet Mining Corporation LLC* [2012] EWHC1988 (Comm). In that case three contracts were entered into pursuant to a settlement agreement and the question was whether one contract was intended to create legally enforceable obligations. On the appeal from an arbitrator the question was whether the construction of the contract should be based solely on the wording of the contract without taking into account the settlement agreement pursuant to which it was entered into and the other contracts which were entered into alongside and the court held that this was not the correct approach: the relevant contract was entered into pursuant to, and effectively formed part of, the settlement agreement and therefore the arbitral tribunal ought to have considered the settlement agreement (and the other two contracts entered into pursuant to it) when construing the contract in question.

115. As to the documentary/factual context, the recitals to the Deed of Indemnity cross-refer to the notice given pursuant to clause 12.5.1(iv) of the SPA and state (in Recital D) that:

> "in connection with the implementation of clause 12.5.1 (iv) of the SPA each of the Sellers and the Sellers' Guarantor have agreed to enter into this Deed of Indemnity."

116. Clause 3.1 "tracks" the language of clause 12.5.1(iv) of the SPA in that clause 12.5.1(iv) requires the Sellers to agree in writing "*to indemnify the Purchasers against the full amount (if any) payable under such Third Party Claim (if adversely determined)*" in order to be entitled to take "*such action as it shall deem necessary"* to defend or contest the Third Party Claim in the name of the Purchasers and to have conduct of the related proceedings.

117. Counsel for the defendants submitted that clause 3.1 replicates the scope of clause 12.5.1(iv) of the SPA and goes no further. Counsel for the claimants submitted that under the Deed of Indemnity the defendants are liable to indemnify the claimants against the full amount payable whether or not that is the position under the SPA.

118. Counsel for the defendants submitted that by reference to the structure and elements of clause 12.5.1 there was a right to be consulted (subparagraph (i)), a right to withhold consent (subparagraph (ii)) and an obligation to comply with reasonable requests (subparagraph (iii)). Accordingly counsel for the defendants submitted that subparagraph (iv) was "just another of the rights within the suite of rights" and that it made no commercial sense to say that it "undid" the commercial allocation of risk.

119. Counsel for the claimants submitted that subparagraph (iv) was "qualitatively different" and conduct was transferred outright.

120. Counsel for the defendants further submitted that the words "*if adversely determined*" means that it gives rise to a claim against the defendants; that a claim is not adversely determined if the liability falls on the claimants but the defendants bear no responsibility.

121. Clause 2.1 of the Deed of Indemnity contains the following qualification highlighted below (which is mirrored in clause 12.5.1(iv) of the SPA):

> "The Sellers having been given notice under clause 12.5(iv) of the SPA and such notice having been received by the Purchasers, and subject to the Sellers not taking any action or conduct which could reasonably be considered to be likely to be materially prejudicial to the legitimate commercial interests of the Las Bambas Project or the Group Companies, the Sellers shall be entitled at the Sellers' own expense and in their absolute discretion, by notice in writing to the Purchasers (which the Purchasers acknowledge has been validly provided and received), to take such action as it shall deem necessary to avoid, dispute, deny, defend, resist, appeal, compromise or contest the Assumed Tax Matters (including making counterclaims or other claims against third parties) in the name of and on behalf of the Purchasers or member of the Purchasers' Group concerned and to have the conduct of any related proceedings, negotiations or appeals." [emphasis added]

Counsel for the defendants submitted that the proviso which constrains the actions which the Sellers can take, having assumed control of a claim, "presupposes" that the Purchasers may continue to have legitimate interests in the outcome of the proceedings.

Discussion

122. Following the principles of construction set out in *Wood* and discussed above, I start with the language of the clause. Clause 3.1 of the Deed of Indemnity, which tracks the language of the SPA, is an indemnity against "*the full amount payable*". The term "*Assumed Tax Matters*" is defined in recital (B) of the Deed of Indemnity as "*VAT amounts that may be assessed in relation to, or arising from the implementation of the Swap Agreement…*". In my view the language of clause 3.1 of the Deed of Indemnity appears to give a complete indemnity without temporal limit. (I deal below with the words "*if adversely determined.*")

123. In relation to the documentary context the decision in *MRI Trading* was in a different context; the question before the court was whether or not the contract was intended to create legally enforceable obligations not the language of a particular clause. However in this case in my view it is clear that the SPA is part of the factual matrix whether or not it is strictly part of the documentary context.

124. Having regard to the factual/documentary context of the SPA, clause 12.5.1 provides a framework for dealing with third-party claims. It reads (so far as material):

> "Subject to Clause 12.5.2, if the matter or circumstances that may give rise to a claim against the Sellers under this Agreement is a result of or in connection with a claim by, or action against, a third party (a "Third Party Claim") then:
>
> (i) the Purchasers shall consult with the Sellers so far as reasonably practicable in relation to the conduct of the Third

> Party Claim and shall take reasonable account of the views of the Sellers before taking any action in relation to the Third Party Claim;
>
> (ii) no admissions in relation to the Third Party Claim shall be made by or on behalf of the Purchasers… and the Third Party Claim shall not be compromised, disposed of or settled without the written consent of the Seller, such consent not to be unreasonably withheld, delayed or conditional;
>
> (iii) the Purchasers shall,… take such action as the Sellers may reasonably request to avoid, dispute, deny, defend, resist, appeal, compromise or contest the Third Party Claim;
>
> (iv) provided that the Sellers give notice to the Purchasers and agree in writing to indemnify the Purchasers against the full amount (if any) payable under such Third Party Claim (if adversely determined), the Sellers shall be entitled at their own expense and in their absolute discretion, by notice in writing to the Purchasers, to take such action as it shall deem necessary to avoid, dispute, deny, defend, resist, appeal, compromise or contest the Third Party Claim (including making counterclaims or other claims against third parties) in the name of and on behalf of the Purchasers or member of the Purchasers' Group concerned and to have the conduct of any related proceedings, negotiations or appeals, subject to the Sellers not taking any action or conduct which, could reasonably be considered to be likely to be materially prejudicial to the legitimate commercial interests of the Las Bambas Project or the Group Companies;…" [emphasis added]

125. Clause 12.5.1 thus operates as follows: firstly it applies to a claim by a third party that "*may give rise to a claim*" under the SPA for which the Sellers are liable pursuant to the terms of the SPA. It is not a requirement that there is any certainty or likelihood that there will be a claim for which the Sellers are liable in order to engage clause 12.5.1 and for the right for the defendants to assume control of claims and related proceedings to arise. There are then two alternatives under clause 12.5.1. One option is for the Purchasers to keep control of the proceedings. If the Purchasers keep control (which by virtue of the right afforded by subparagraph (iv), is in the discretion of the Sellers) the Purchasers are obliged to consult with the Sellers in relation to the conduct of the proceedings (subparagraph (i)) and they are also obliged to obtain the consent of the Sellers prior to reaching any settlement of the Third Party Claim and they are obliged to take action reasonably requested by the Sellers to defend the claim (subparagraph (iii)). The alternative is for the Sellers, if they so choose, to take control of the proceedings under subparagraph (iv).

126. Contrary to the submissions of counsel for the defendants, the words "*if adversely determined*" do not in my view refer to a claim being adversely determined against the defendants under the SPA: this is to conflate the two concepts on the language of clause 12.5.1. The opening sentence can be broken down into its component parts as follows:

i) *"if the matter or circumstances that may give rise to a claim against the Sellers under this Agreement is";* and

ii) "*a result of or in connection with a claim by, or action against, a third party (a "Third Party Claim")"*.

It is then clear from the way in which the subclauses (i) to (iv) are drafted that these subclauses are referring to the second element of the sentence, the claims brought by the third party, and not the first element, the possible claim against the Sellers: thus the language imposes an obligation to consult about the conduct of the Third Party Claim (subparagraph (i)), not to settle the Third Party Claim (subparagraph (ii)) and to take action to contest the Third Party Claim as directed (subparagraph (iii)). These sub-clauses all refer to the claim brought by the third party and not to the claim of the Purchasers against the Sellers under the SPA. Accordingly in my view, the language in subparagraph (iv) which refers to "*payable under such Third Party Claim (if adversely determined)*" should be interpreted in a way which is consistent with its use in the preceding sub-clauses and means an amount payable to the third party under their claim if that claim by the third party is adversely determined and does not refer back to a claim against the Sellers under the SPA.

127. This interpretation is supported by the language of subparagraph (iv) itself which uses the word "*under*" so that it provides an indemnity against "*the amount… payable <u>under</u> such Third Party Claim (if adversely determined)*" [emphasis added]. The use of the word "*under*" is to be contrasted with the position if the language used had referred to an amount payable "*in respect of*" or "*relating to*" the Third Party Claim which would have indicated that the language intended to refer to an amount payable by the Sellers (rather than the third party) in respect of the claim brought by the third party.

128. The defendants seek to rely on the proviso in subparagraph (iv) that the Sellers shall not take any action or conduct which could reasonably be considered to be likely to be materially prejudicial to the legitimate commercial interests of the Project or the Group Companies. That proviso is not concerned with the allocation of risk between the Sellers and the Purchasers under the SPA and the Deed of Indemnity, but, in my view, provides independent protection for the Project and the company owning the Project. Under subparagraphs (i), (ii) and (iii) of clause 12.5.1 the Purchasers remain in control of the proceedings brought by the third party and can be expected to take into account the interests of the Project and the Company. However, if the Sellers take control of the Third Party Claim and the proceedings, then the proviso restricting the Sellers from conduct which could reasonably be considered to be materially prejudicial to the legitimate commercial interests of the Project becomes relevant. The proviso does not provide protection however for the interests of the Purchasers (as distinct from the commercial interests of the Project and the operating company) and it supports the claimants' interpretation of the language on the basis that such protection is unnecessary through the proviso because this protection is afforded through the indemnity against the "full amount" of the Third Party Claim (if adversely determined).

129. Turning then to consider the commercial consequences of the rival interpretations. As described above, if a Third Party Claim is brought and the defendants "may" be liable under the SPA, they have a choice under clause 12.5.1: they may elect, in the light of their assessment of the strength of the claim by the third party or the nature of the claim, to leave conduct of the claim and the proceedings with the claimants in which case the

defendants are entitled to have a say in the conduct of the defence of the Third Party Claim; alternatively the defendants may elect to step in and take over conduct of the claim. If the defendants are correct, the commercial consequence of the latter election is that there would be no express control on the defendants' conduct of the proceedings and the defendants would be at liberty to take action which prejudices the claimants. This outcome would in my view be a surprising commercial outcome given that, where the Purchasers remain in control of the Third Party Claim, there is provision for consultation with the Sellers and protection, as for example, in the requirement for the Sellers' consent before any settlement is reached. Given that it is entirely at the Sellers' discretion whether or not to elect to take control of the third-party proceedings, it would seem to me to be an improbable commercial consequence that the language should be interpreted so that the claimants could be prejudiced by the defendants conducting the proceedings in such a way as to seek to transfer liability for the NFB VAT from the defendants to the claimants and thus avoid liability to the claimants under the SPA.

Conclusion on construction of clause 3.1 of the Deed of Indemnity

130. In my view for the reasons set out above the words "*if adversely determined*" in the Deed of Indemnity refer to a claim brought by a third party, in this case SUNAT, and the phrase "*if adversely determined*" refers to an adverse determination of the claim brought by SUNAT.

131. The words of the indemnity are then clear: giving the words their natural meaning, there is a full indemnity for any amount payable under the Third Party Claim. When this interpretation is checked against the commercial consequences, as discussed above, if the defendants' interpretation is correct, the consequences are that, where control of the Third Party Claim stays with the claimants, the defendants have rights to protect their interests, whereas if the defendants exercise their discretion under subparagraph (iv) and take control of the proceedings, the claimants are excluded. In my view the claimants' construction is consistent with business common sense and supports the objective reading of the language.

132. In balancing the competing arguments, I have regard to *Wood* at 13:

> "the extent to which each tool will assist the court… will vary… Some agreements may be successfully interpreted principally by textual analysis e.g. because of their sophistication… and because they are negotiated and prepared with the assistance of skilled professionals."

133. Both the Deed of Indemnity and the SPA were professionally drafted and with the assistance of international law firms. They are not characterised by informality or the absence of skilled assistance. The mere fact that the Deed of Indemnity is short, or put together in a matter of days, does not affect the fact that on the evidence, it was a document which was professionally drafted with the involvement of senior (and therefore I assume) experienced lawyers both internally and at the respective law firms.

134. Accordingly taking into account the wording of clause 3.1, the nature and quality of the document, the context of the SPA and having regard to the construction which in my view is more consistent with business common sense, I find that the objective meaning of the language in clause 3.1 of the Deed of Indemnity is that the defendants are obliged

to indemnify the claimants for the full amount payable by MLBSA if the claim by SUNAT is determined by the Peruvian tax court against MLBSA, irrespective of any temporal limitation in relation to the time at which the NFB VAT is found to have accrued.

The exercise of powers pursuant to the Deed of Indemnity

135. The claimants seek declarations as to the nature and purpose for which the rights have been granted under clause 12.5.1(iv) of the SPA and/or clause 2.1 of the Deed of Indemnity (set out above).

Submissions

136. For the claimants it was submitted that there are limitations on the way in which the defendants can exercise the powers conferred by these clauses: that the powers cannot be exercised for a collateral purpose and that the discretion is limited by principles of honesty and good faith and an absence of arbitrariness, capriciousness, perversity and irrationality (*Socimer v Standard Bank* [2008] EWCA Civ 116 at [66]). Counsel for the claimants submitted that by virtue of clause 12.5.2 the Purchasers can refuse to take action where the action would be unduly onerous or materially prejudicial. Accordingly counsel submitted that the purpose of the power is to reduce/avoid MLBSA's liability and there is no entitlement to exercise the power to the detriment of MLBSA. Counsel referred to the language in clause 12.5.1 giving power to take action "*in the name of and on behalf of the Purchasers*" and submitted that the Sellers have to act not just in the name of the Purchasers, but also "*in the interests*" of the Purchasers. Finally, counsel for the claimants relied on the powers of attorney, governed by Peruvian law, issued on 30 December 2014 to certain personnel of the defendants pursuant to the Deed of Indemnity. Counsel submitted that the holder of a power of attorney under Peruvian law is obliged to act in good faith and in the interests of the grantor, and the parties would not have intended the power under the Deed of Indemnity to operate in a manner which was inconsistent with the power of attorney.

137. Counsel for the defendants accepted that the Sellers' rights are not completely untrammelled and that in accordance with cases such as *Socimer* the rights must be exercised for the purposes for which they have been conferred, rather than for any collateral purpose. However counsel submitted that the rights are conferred on the Sellers because there may be a matter or circumstances that might give rise to a claim against the Sellers under the SPA. The purpose of conferring the rights (or at the very least one of the permissible purposes) is therefore to enable the Sellers to protect themselves against being exposed to such a claim. Counsel submitted that there is no assistance to be derived for the Purchasers from the proviso in clause 12.5.1(iv) as this is focused on the Project and the operating company for whom the temporal incidence of VAT is irrelevant. Counsel for the defendants submitted that Peruvian civil law is irrelevant: that for a matter to form part of the factual matrix, it has to be something that a reasonable person would consider relevant to how the contractual provision is to be understood (*BCCI v Ali* [2001] UKHL 8 at [39]) and it was "fanciful" to suppose that a reasonable person would construe clause 12.5.1 by reference to Peruvian civil law: clause 12.5.1 makes no reference to powers of attorney.

Discussion

138. The language of clause 12.5.1(iv) is broad and (apart from the express proviso) without limitation:

> "…the Sellers shall be entitled at their own expense and in their absolute discretion, by notice in writing to the Purchasers, to take such action as it shall deem necessary to avoid, dispute, deny, defend, resist, appeal, compromise or contest the Third Party Claim (including making counterclaims or other claims against third parties) in the name of and on behalf of the Purchasers or member of the Purchasers' Group concerned…" [emphasis added]

139. The language permitting the Sellers to take action "*in the name of and on behalf of*" the Purchasers is in my view referring to the procedural requirement which may arise in order for the Sellers to pursue legal proceedings by allowing them to act in the proceedings in the name of the Purchasers. There is no basis on the language to interpret this as encompassing any broader requirement for the Sellers to act "*in the interests*" of the Purchasers.

140. Considering the possible interpretations of the language in the context of the agreement, clause 12.5.2 provides:

> "Notwithstanding Clause 12.5.1, neither the Purchasers nor any member of the Purchasers' Group nor any Group Company shall be required to take any action or refrain from taking any action in relation to a Third Party Claim, if the Purchasers, or member of the Purchasers' Group concerned, in its absolute discretion considers such action or omission may be unduly onerous or materially prejudicial to it or its business." [emphasis added]

In my view this provision, which is a separate subclause, is not intended to define the scope of the power which is granted to the defendants in clause 12.5.1(iv) to control the proceedings brought by third parties. It is not expressed as a general constraint on the powers of the Sellers which would prevent the Sellers from taking any action pursuant to clause 12.5.1(iv) which may prejudice the Purchasers, but focuses on the Purchasers and affords protection to the Purchasers who could otherwise be required under the various subclauses of clause 12.5.1 to take action which would be prejudicial to their interests. Clause 12.5.2 prevents the Purchasers from being obliged to take any such action.

141. As already indicated, I find that both the SPA and the Deed of Indemnity were negotiated by sophisticated parties with the assistance of experienced lawyers and therefore given the clear wording, the weight that is given to the factual matrix is reduced. In relation to the particular issue of the Peruvian powers of attorney, I accept the submissions of counsel for the defendants that there is nothing in the language of clause 12.5 to indicate that the Peruvian powers of attorney would affect the interpretation of either the SPA or the Deed of Indemnity. There is no express reference to powers of attorney being the way in which the conduct of proceedings would be carried on and, even if the parties contemplated powers of attorney at the time of

entering into the relevant agreements, there is nothing in the agreements that would indicate that Peruvian civil law concepts were intended to inform the language used in the English law documents. For these reasons I do not regard it as necessary to consider the expert evidence which was before the court from Professor Ghersi and Mr Barboza which dealt with matters of Peruvian civil law with regard to the powers of attorney.

142. However, although no protection is to be derived from clause 12.5.2 or the powers of attorney, the Purchasers are protected by the broad language of the opening proviso to clause 12.5.1(iv):

> "…provided that the Sellers give notice to the Purchasers and agree in writing to indemnify the Purchasers against the full amount (if any) payable under such Third Party Claim (if adversely determined)…" [emphasis added]

and the corresponding broad language of clause 3.1 of the Deed of Indemnity:

> "Each of the Sellers and the Sellers' Guarantor hereby irrevocably and unconditionally undertakes, jointly and severally, to indemnify the Purchasers against the full amount (if any) payable by the Purchasers' Group under each of the Assumed Tax Matters (if adversely determined)." [emphasis added]

For the reasons discussed above in relation to the issue of the temporal limit for matters arising out of the NFB VAT, this indemnity is to be construed as providing a broad indemnity to the claimants for the full amount payable if the Third Party Claim is adversely determined.

143. As to the commercial consequences of the competing interpretations, the SPA is dealing with the allocation of risk between the Sellers and the Purchasers in certain circumstances. Where circumstances arise (a Third Party Claim) such that the Sellers may have a liability to the Purchasers under the SPA and the Deed of Indemnity, the Sellers may take steps to avoid that liability by taking control of the conduct of the Third Party Claim. As discussed above the structure of clause 12.5.1 is that the Sellers have a discretion whether to leave the claim in the control of the Purchasers, subject to the Sellers' rights to influence the proceedings as set out in clause 12.5.1(i), (ii) and (iii), or to take control themselves under 12.5.1(iv). Accordingly an interpretation that the defendants are not precluded from exercising the power in a way which seeks to reduce the defendants' liability is consistent with the broad language of the contract and the existence of the indemnity to the Purchasers under the SPA.

Conclusion on the nature and scope of powers under clause 12.5

144. Accordingly I find that the purpose of the power to assume control of a claim under clause 12.5.1(iv) is to reduce/avoid MLBSA's liability to the third party and thereby to enable the defendants to protect themselves against being exposed to a claim under the indemnity given to the claimants pursuant to the SPA and the Deed of Indemnity but, subject to the express proviso given in clause 12.5.1(iv) itself, there is no limitation, express or implied, on the exercise of those powers such that the power cannot be exercised to the detriment of MLBSA. This conclusion is consistent with the language

of the agreements and given the scope of the indemnity from the defendants to the claimants under clause 3.1 of the Deed of Indemnity (which I have held to extend to matters both pre-and post closing), consistent with commercial common sense.

The conduct complained of

145. In the light of my findings on this issue, it is not necessary for me to deal with the issue of whether the defendants in exercise of their powers under clause 12.5 committed breaches of the SPA and/or the Deed of Indemnity and, in particular, the detailed complaints concerning the defendants' conduct in this regard.

Third Party VAT – clauses 10.1.1 and 10.1.2 of the SPA

Factual Background

146. The claim in this regard arises out of the SUNAT audit of VAT payable in connection with third party supplies for the period from January to November 2014 ("Third Party VAT").

147. Peruvian VAT works in a similar way to EU VAT. It is a tax levied on the expenditure or consumption of final goods or services and it is the end consumer that ultimately pays the tax. The tax is applied to the gross amount of each transaction but the intermediate taxpayer can deduct from the amount of tax applied (the "tax debit"), the taxable amount from the acquisition of the good or service (the "tax credit"). The difference between the tax debit and the tax credit is the tax payable. If at the end of a month the tax credit exceeds the tax debit, the positive balance is added to the tax credit for the following period and deducted from the tax debit of that month. Thus if the output VAT in a particular month exceeds the input VAT, the net sum will either be offset against the cumulative VAT credit balance (if positive) or, if there is no accumulated balance, will need to be paid in cash. Certain activities (including mining) permit the taxpayer to be entitled to a refund of a positive VAT credit balance.

148. On 3 September 2015 SUNAT issued Requirement 2339 which required MLBSA to submit supporting documentation for the VAT credits which had been claimed. MLBSA submitted its response on 19 November 2015. SUNAT then issued a "Results of Requirement Notice" on 23 November 2015 which stated that insufficient documentation had been provided to substantiate MLBSA's claim for VAT credits. A further response was submitted on 2 December 2015 and this was rejected by SUNAT on 21 December 2015.

149. As explained above, on 29 January 2016 SUNAT issued the Tax Assessment in the form of Assessment Resolutions and Penalty Resolutions. In respect of the Third Party VAT, SUNAT determined that:

    i) MLBSA was not, and had not been, entitled to VAT tax credits that had been claimed in relation to certain transactions between January and July 2014 of which PEN 29,194,315 related to the period prior to closing (the "Rejected VAT Credits");

    ii) MLBSA had received refunds of VAT for services provided by third party suppliers and claimed in January, February and March 2014 to which it was not

properly entitled in the amount of PEN 18,770,336 (the "Unduly Refunded VAT Amount"); that amount therefore had to be repaid; and

iii) in the light of the foregoing, penalties and interest were to be charged.

150. SUNAT then sought to recover the amounts in respect of the Rejected VAT Credits by:

i) reducing MLBSA's accumulated VAT credit balance; and

ii) setting off against an application for unrelated VAT refunds (the "Unrefunded VAT").

151. MLBSA appealed both the decision to set off amount against the accumulated VAT credit balance and the refusal of a request for the refund. By an Intendancy Resolution of 1 December 2016 SUNAT confirmed the Tax Assessment but found that it had been wrong to offset the reduction in credit balance in the way which it had done.

152. In February 2017 MLBSA lodged an appeal before the tax court challenging the Intendancy Resolution.

153. A tax court resolution (5191 of 16 June 2017) annulled the (March 2017) resolution refusing to refund the amount.

154. As to the penalties and interest on penalties, fresh resolutions were issued in May 2017 for the same sums as in the original resolutions and appeals were lodged in July 2017. The penalties and interest on both the Unduly Refunded VAT Amount and on the Rejected VAT Credits, as referred to earlier, were paid by MLBSA to SUNAT (together with the penalties and interest on the penalties on NFB VAT) on 22 January 2018 thereby securing a 40% discount.

155. There are therefore the following amounts at issue:

i) the Rejected VAT Credits;

ii) the Unduly Refunded VAT Amount;

iii) the Unrefunded VAT; and

iv) the penalties and interest on the Third Party VAT.

Clause 10.1.1 of the SPA

156. The issue for determination is whether each of the amounts referred to above as in issue in respect of Third Party VAT is "*Tax payable*" under clause 10.1.1. (The Deed of Indemnity is not relevant to this issue as the defendants did not exercise their right to assume conduct of the claim by SUNAT in relation to the Third Party VAT.)

Claimants' Submissions

157. In relation to clause 10.1.1 the claimants' case is that the rejection of the VAT credits by SUNAT gave rise to a *'Tax payable'* to SUNAT in respect of VAT which could no longer be offset. Further counsel for the claimants submitted that SUNAT's Tax

Assessment in respect of Third Party VAT gave rise to a *'Tax payable'* consisting in the Unduly Refunded VAT Amount (which amount falls to be repaid) and the amount by which MLBSA's accumulated VAT credit balance fell to be reduced. Counsel advanced the following reasons:

i) Article 115 does not give rise to a general 'principle of non-enforceability of tax-related administrative decisions that have been challenged' (adopting the phrase used by Ms Delgado) and therefore there is nothing to prevent SUNAT once it has made an assessment resolution, determining that tax credits are not valid and deducting tax credits from the accumulated VAT credit balance;

ii) The Tax Assessment established the existence of tax debts, that is to say positive cash sums that were payable by MLBSA (i.e., all the penalties and interest and Unduly Refunded VAT Amount);

iii) There is nothing in Article 115 which prevents SUNAT from exercising its powers to offset tax debts in accordance with Articles 39 and 40 of the Tax Code;

iv) SUNAT adjusted MLBSA's accumulated VAT credit balance. As far as the offset was concerned, SUNAT determined that it was not entitled to offset the tax debts against MLBSA's refund application under Article 39(c) or Article 40(2). Counsel for the claimants submitted that SUNAT would have been entitled under Article 39(c) to take the step it did, had the relevant liabilities been detected during an audit initiated in consequence of the refund request in question. Insofar as Article 40(2) is concerned, counsel for the claimants submitted that Mr Talledo was of the view that Article 40(2) did in fact provide a proper legal basis for SUNAT to act as it did (and therefore that that Article would provide a proper basis for SUNAT to act in the same manner on another occasion);

v) Clause 1.1 of the SPA expressly defines "Tax" in very broad terms, as "all forms of taxation", including taxation "levied by reference to … added value" and further as including payments

> "on account of Tax, whenever and wherever imposed and whether chargeable directly or primarily against or attributable directly or primarily to a Group Company or any other person and all penalties and interest relating thereto".

That broad definition is plainly apt to encompass VAT levied owing to a claim for VAT credits being denied; and

vi) The penalties and interest assessed to be payable by SUNAT in respect of the Third Party VAT liability fall within clause 10.1.1, being penalties and interest relating to VAT which are 'payable' by MLBSA to SUNAT.

Defendants' submissions

158. Counsel for the defendants submitted that clause 10.1.1 is concerned with the situation where tax is owed by MLBSA prior to closing but the tax has not been discharged or paid by MLBSA prior to closing and so falls to be paid after closing. It is not concerned with the situation where SUNAT denies tax credits or refunds that had been claimed by MLBSA pre-closing. The denial of the tax credit or refund does not result in a taxpayer having to pay tax but may involve a reduction in the sum standing to the credit of its VAT balance. That situation is governed by clause 10.1.2.

Discussion

159. Counsel for the defendants submitted that clause 10.1.1 is concerned with the situation where Tax is owed by MLBSA prior to closing but the Tax has not been discharged or paid by MLBSA prior to closing. Accordingly counsel submitted that the denial of a tax credit or refund does not amount to tax which "*has not been discharged or paid*" prior to closing. I do not accept this proposition: on the language of clause 10.1.1, the question is not whether the tax was "owed" or "to be paid" prior to closing, the question is whether the tax relates to a period prior to closing, is now payable and was not paid prior to closing. The material part of clause 10.1.1 reads:

> "The Sellers shall indemnify the Purchasers in relation to, and covenant to pay the Purchasers an equal amount to:
>
> 10.1.1 the amount of any Tax payable **[e.g. a VAT liability arising by reason of the reduction in the accumulated credit balance]** by a Group Company to the extent the Tax has not been discharged or paid **[i.e. that VAT liability has not been paid]** on or prior to the Effective Time and it:
>
> (i) relates to any period, or part period, up to and including Closing; …" [emphasis added]

The Rejected VAT Credits relate to a period prior to closing. The issue therefore is whether the amounts amount to tax which is "*payable*" within the meaning of clause 10.1.1.

160. Counsel for the claimants submitted that the rejection of the VAT credits by SUNAT gave rise to a 'Tax payable' to SUNAT in respect of VAT which could no longer be offset; in other words that tax became "payable" because the amount of VAT due was increased by the loss of the tax credits.

161. I accept the submission that the definition of "Tax" is broad enough to encompass VAT levied owing to a claim for VAT credits being denied. However, in so far as tax credits are concerned, the experts are agreed (at paragraph 39 of the Joint Statement) that a tax credit is not a monetary credit. Ms Delgado expresses it as a right of the taxpayer to make deductions from taxes it would be required to pay on its sales.

162. The experts are also agreed that an adjustment or offset of the tax credit increases the tax payable by the taxpayer (paragraph 40 of the Joint Statement). Mr Talledo by way of explanation states that this is because the adjustment/offset increases the tax payable

in each month and reduces the credit balance carried over to the following month or subject to refund which constitutes what he described as a "*loss of assets*" to the taxpayer.

163. Ms Delgado says that if the adjustment/offset of the tax credit is confirmed by the tax court, it will increase the VAT payable. However if the company has a carryover tax credit to absorb this there will be no tax to pay (paragraph 40 of the Joint Statement).

164. In my view the "*loss of assets*" identified by Mr Talledo arising out of the reduction in the credit balance carried over to the following months or subject to refund does not amount to tax which is "*payable*" within the meaning of clause 10.1.1. The clause does not indemnify the Purchasers against any loss suffered arising out of tax adjustments but only against tax which is payable. Thus if the Rejected VAT Credits and the adjustment/offset of the tax credit is confirmed by the tax court, it will reduce the accumulated credit balance and increase the VAT payable. However if the company has a carryover tax credit to absorb this increase, there will be no tax to pay.

Conclusion on clause 10.1.1

165. Accordingly I find that the Rejected VAT Credits (if upheld by the tax court) do not amount to "*tax payable*" under clause 10.1.1 and that if the adjustment/offset to the accumulated credit balance is confirmed by the tax court, it will only amount to tax "payable" if it results in the output tax exceeding the input tax such that there is a resulting tax debt for the relevant period, and that amount relates to a period pre-closing.

166. My conclusion is not dependent on resolving the dispute between the experts as to whether SUNAT could effect a valid offset under article 39 or article 40 since, for the reasons set out above, the indemnity in clause 10.1.1 will only operate where the reduction in the accumulated credit balance results in a tax debt for the relevant period

167. As to the Unrefunded VAT, Mr Talledo states that an adjustment/offset to the tax credit generates a "*financial loss*" to the taxpayer as it reduces the amount available by way of refund (paragraph 42 of the Joint Statement). However the indemnification is against "*tax payable*" and again, whilst the indemnity could have been written to extend to any loss arising out of tax adjustments, the right to a refund is not a liability and the denial of, or reduction in, a refund does not in my view amount to tax "payable" within the meaning of clause 10.1.1; the tax credits remain available to be offset against tax debits and no tax has become "payable" within clause 10.1.1. (It is accordingly not necessary for me to resolve the dispute between the parties as to whether or not a refund can currently be claimed pursuant to the terms of the relevant resolution.)

168. In relation to the Unduly Refunded VAT Amount, the payment which is due from MLBSA is within the definition of "Tax":

> "Taxation" or "Tax" means all forms of taxation (other than deferred tax) and statutory, governmental, state, provincial, local governmental or municipal impositions, duties, contributions and levies, in each case in the nature of tax, whether levied by reference to income, profits, gains, net wealth, asset values, turnover, added value or otherwise and shall further include payments to a Tax Authority on account of Tax, whenever and

> wherever imposed and whether chargeable directly or primarily against or attributable directly or primarily to a Group Company or any other person and all penalties and interest relating thereto" [emphasis added].

The payment due from MLBSA relates to repayment of a refund which it has previously received, rather than a payment of tax, but in my view this will amount to a payment "*on account of*" Tax and is thus within the definition of "*Tax*".

169. The Unduly Refunded VAT Amount remains unpaid by MLBSA pending determination of the appeal. For the same reasons discussed in relation to NFB VAT above, in my view this is an actual liability but pending the outcome of the appeal and determination by the tax court, it is not currently "*payable*" within the meaning of clause 10.1.1. However should the tax court ultimately determine that the Unduly Refunded VAT Amount is payable to SUNAT then in my view at the point that the tax becomes coercively enforceable, this will constitute "*Tax payable*" within the meaning of clause 10.1.1.

170. In relation to the penalties and interest on penalties on the Unduly Refunded VAT and on the Rejected VAT Credits, the claimants say that the penalties and interest are "*payable*" within clause 10.1.1. In my view the payment of the penalties was in order to avail of the 40% discount in case the appeal failed. This does not mean that the sum was "*payable*" within 10.1.1 for the reasons stated above in relation to the NFB VAT.

171. The claimants argue that the parties cannot have intended that there would have been a continuing tax liability from the time pre-closing in respect of which the defendants did not bear liability. However as was recognised in *Wood*:

> "where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause …and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest." [emphasis added]

In a sophisticated and professionally drafted agreement the parties used the term "*Tax payable*". In my view for the reasons stated above, this phrase is not apt to cover the Rejected VAT Credits or a reduction in the accumulated credit balance, unless such rejection and consequent reduction in the accumulated credit balance leads to a result where the VAT tax debits exceed the accumulated credit balance for the relevant period and thus there is a tax liability which would then be "*payable"* under clause 10.1.1 (on the assumption that it is coercively enforceable).

172. For the reasons set out above and subject to the qualifications set out above, I find that:

i) The Rejected VAT Credits (including the reduction in the accumulated credit balance and the Unrefunded VAT) are not "*payable*" within the meaning of clause 10.1.1 of the SPA;

ii) The Unduly Refunded VAT Amount, if determined by the tax court to be due from MLBSA to SUNAT, will, when coercively enforceable, be "*payable*" within the meaning of clause 10.1.1 of the SPA; and

iii) The penalties and interest in respect of the Third Party VAT, if determined by the tax court to be due from MLBSA to SUNAT, will, when coercively enforceable, be "*payable*" within the meaning of clause 10.1.1 of the SPA.

Accordingly it is not necessary for me to determine the issue of whether MLBSA has liability as a matter of Peruvian law as this will be determined by the tax court.

Clause 10.1.2 of the SPA

173. Clause 10.1.2 of the SPA reads:

> "The Sellers shall indemnify the Purchasers in relation to, and covenant to pay the Purchasers an equal amount to:
>
> 10.1.1…
>
> 10.1.2 to the extent that any Indemnified VAT Receivable or any ITAN Receivable is found to be cancelled, lost or unavailable as a result of the breach of any Sellers' Warranty set out in paragraphs 13.1.1(i), 13.1.2 and 13.1.3 of Schedule 2 (as if given at the date of this Agreement and at Closing), the amount of the repayment of VAT or ITAN which would otherwise have been obtained…"

174. In relation to the Third Party VAT the claimants rely primarily on the indemnity in clause 10.1.1 but in the alternative on clause 10.1.2 of the SPA. In the alternative therefore to their case under clause 10.1.1, the claimants submit that the Third Party VAT liability is triggered under clause 10.1.2 because the Rejected VAT Credits amount constituted an "*Indemnified VAT Receivable*" covered by that clause.

175. The issues that arise in relation to clause 10.1.2 are as follows:

i) Does the Third Party VAT fall within the scope of the definition of an "*Indemnified VAT Receivable*"?

ii) If so, was the Indemnified VAT Receivable "*cancelled, lost or unavailable"*?

iii) Was there a breach of any Sellers' Warranty set out in paragraphs 13.1.1(i) or 13.1.2 of Schedule 2 of the SPA?

iv) If there was a breach, did the breach of such warranty result in the cancellation/loss or unavailability of the Indemnified VAT Receivable?

Does the Third Party VAT fall within the scope of the definition of an "Indemnified VAT Receivable"?

176. "*Indemnified VAT Receivable*" is defined in the SPA as:

> "a right to repayment of VAT to the extent that such right to the repayment has been taken into account in the Completion Statement"

177. Counsel for the claimants submitted that the accumulated credit balance carried forward amounts to a "*right to repayment*".

178. Counsel for the defendants submitted that the Rejected VAT Credits may give rise to a "*right to repayment*" which arises as a result of the availability of the VAT Early Refund Scheme but tax credits in general represent an entitlement to offset the credited sums against a tax liability and so are not a "*right to repayment*" within the meaning of the definition. Further the Unduly Refunded VAT Amount does not amount to a "*right to repayment*" because the payment of the refund has already been made.

179. In relation to the Rejected VAT Credits, in my view these do not constitute a "*right to repayment"*. As the experts agreed (at paragraph 39 of the Joint Statement) a tax credit is not a monetary credit. It is a right of the taxpayer to apply the credits to make deductions from taxes it would be required to pay on its sales.

180. However in so far as there is a right to seek refunds of accumulated credits, I accept (as does counsel for the defendants) that this does fall within the meaning of a "*right to repayment*" as, although the credit itself is not a right to repayment, the entitlement to a refund is a right to repayment and therefore the Unrefunded VAT is within the definition of "*Indemnified VAT Receivable"*.

181. In relation to the Unduly Refunded VAT Amount, it is accepted that, of the Unduly Refunded VAT Amount PEN 9,223,322 was referable to January and February 2014 and was refunded to MLBSA prior to closing. It would appear from the evidence of Mr Heng (paragraph 65 of his first witness statement) that it was not included as a "receivable" in the completion statement although his evidence is that the sums were taken account of in the completion statement and reflected in the purchase price which the claimants ultimately paid. In relation to the balance of the Unduly Refunded VAT Amount, it is accepted in the Defence (paragraph 49(2)(b)) that this balance of the Unduly Refunded VAT Amount was included in the completion statement and formed part of the fixing of the share consideration.

182. The definition of "*Indemnified VAT Receivable"* has two elements:

i) a receivable defined as a "*right to repayment*"; and

ii) a right to repayment of VAT which has been taken into account in the Completion Statement.

Contrary to the submission of counsel for the defendants, the definition does not require a "subsisting" right to repayment. In other words the definition does not require that the receivable is a receivable "at the time of completion" but rather that it is a receivable which is "taken into account" at completion. Accordingly in my view the Unduly Refunded VAT Amount was a "*right to repayment*" and on the evidence, this amount was taken into account at completion. Accordingly I find that the Unduly Refunded VAT Amount is within the definition of "*Indemnified VAT Receivable*".

Was the Indemnified VAT Receivable "cancelled, lost or unavailable"?

183. In my view, for the reasons set out above, the entitlement to a refund of VAT credits is a "*right to repayment*". Counsel for the defendants submitted that the right to repayment has not been "*cancelled, lost or unavailable*" since the refusal to pay the Unrefunded VAT has been nullified. The parties dispute whether SUNAT can currently be required to pay the Unrefunded VAT: even if the claimants are right and (as they assert) they are not currently entitled to receive payment of the refund, pending the determination of the tax court, in my view, it cannot be said that the right to payment has been "*cancelled, lost or unavailable*" whilst it remains under challenge. In my view the addition of the words "*found to be*" cancelled, lost or unavailable lead to an inference that it was intended that the determination should be a definitive finding. Were this not the intention then it seems to me that the phrase "*cancelled, lost or unavailable*" would have made sense without the additional words and the additional words must be given some meaning. For these reasons I find that the Unrefunded VAT has not been found to be "*cancelled, lost or unavailable*" within the meaning of clause 10.1.2.

184. In relation to the Unduly Refunded VAT Amount, MLBSA has received the money and is challenging the requirement to repay it. It is not therefore currently a right which has been found to be cancelled, lost or unavailable. However, should the tax court find that MLBSA is required to repay the Unduly Refunded VAT Amount, then at that point it will fall within the definition of an "*Indemnified VAT Receivable*" which has been "*found to be cancelled, lost or unavailable"*.

Was there a breach of warranty set out in paragraphs 13.1.1(i) and/or 13.1.2 of Schedule 2 of the SPA?

185. The issue then arises whether, if the Unrefunded VAT and the Unduly Refunded VAT Amount, for the reasons set out above, are capable of falling within the scope of clause 10.1.2 following the determination of the tax court, the claimants have established a breach of warranty.

186. The claimants assert that there was a breach of paragraph 13.1.2 or 13.1.1 which read as follows:

> "13 Tax
>
> 13.1 Returns and Information
>
> 13.1.1 All returns, computations, notices and information which are or have been required to be made or given by each Group Company for any Taxation purpose:
>
> (i) have been made or given within the requisite periods and on a proper basis and are up-to-date and correct; and
>
> (ii) none of them is, or, so far as the Sellers are aware, is likely to be, the subject of any dispute with or investigation by any Tax Authority.

> 13.1.2 Each Group Company is in possession of sufficient information or has reasonable access to sufficient information to enable it and/or its officers, employees or representatives to compute its liability to Taxation insofar as it depends on any Transaction occurring on or before Closing, and to meet any other legal obligation relating to Taxation or accounting matters." [emphasis added]

187. The claimants' case is that, in breach of the warranty in paragraph 13.1.1(i), the monthly VAT returns submitted for the months January to July 2014 were not made or given "*on a proper basis*" and/or were not in fact "*correct*" as is demonstrated by the Tax Assessment itself.

188. The claimants also allege a breach of the warranty in paragraph 13.1.2 that MLBSA was not either "*in possession of*" sufficient information and/or did not have "*reasonable access*" to sufficient information in order to enable it to compute its liability to taxation in respect of the VAT credits and/or refunds and/or to meet the obligation to retain the requisite evidence to enable it to demonstrate its entitlement to VAT credits and/or refunds.

189. In particular, the claimants assert that, on a proper construction of the warranty at paragraph 13.1.2, "*in possession*" means "*physically possessing documentation or information in a manner which allows, with the exercise of reasonable efforts, the location and recovery of such documentation in a cost-effective and timely manner*", and "*reasonable access*" means "*access which allows, with the exercise of reasonable efforts, the location and recovery of such documentation or information in a cost-effective and timely manner*".

190. The evidence established that "basic" information was stored with the Project's third party storage company, Ransa. It was necessary to look at the Ransa documentation in order to match up the invoice data in SUNAT's spreadsheet with the underlying purchase orders and having completed that task, contract managers and third parties (especially Bechtel, the procurement manager) could be contacted.

191. To the extent that evidence was stored in multiple locations, including at the project site, in a remote mountainous area over 1000 miles from Lima, this does not, in my view, establish that the information was not "*in the possession of*" the Sellers. There is no basis, it seems to me, for reading into the words "*in possession*" the qualification for which the claimants contend, namely that it should be:

> "in a manner which allows, with the exercise of reasonable efforts, the location and recovery of such documentation in a cost-effective and timely manner".

If this is what the Purchasers intended, then it would have been open to them to have included this qualification expressly in the warranty. In the absence of express language, the requirement for possession is satisfied even if the documents are stored in multiple locations including the project site.

192. In the light of the evidence, the essential issue is therefore whether or not there was "*reasonable access*" to the information. Although it was accepted in evidence that it

was envisaged that the company would be the subject of audits, I do not accept that as a result it was incumbent on the Sellers to ensure that the company had access to adequate documentation to provide in any audit, no matter how "granular". The warranty is not unqualified in terms of providing access to sufficient documentation but is limited to "*reasonable access*" and this has to be interpreted against the factual context that the level of detail required might vary between audits.

193. Counsel for the claimants submitted that there is no evidence that the process of obtaining documentation described by Mr Shimamoto of going out to contract managers and third party suppliers was at any time communicated to the Purchasers. Counsel submitted that the Purchasers "*quite fairly assumed*" that the Project held the information it needed. Whatever assumptions the Purchasers may have made, this does not affect the interpretation of the warranty. Again it was open to the Purchasers to have negotiated something which was limited to possession but they did not. Counsel also submitted that the document management system bequeathed by the Sellers "should have been capable" of dealing with this "entirely anticipateable situation". Again should the Purchasers have wanted an unqualified assurance in relation to the Sellers' systems, it was open to them to have sought such warranty.

194. The claimants assert that they were relying on the "goodwill" of third parties and that this was unsatisfactory. Counsel for the claimants submitted that Mr Shimamoto was defensive on this point in cross examination.

195. The claimants complained that it was "*unsatisfactory*" to need to rely on third parties. However these were suppliers and as such not merely "third parties". The warranty required either possession of the documents in question or "*access*" and it is thus expressly stated that the Sellers were not warranting that they had possession of all the documents and by including reference to "access" as an alternative (and not for example, expressed as a fallback) it is evident that recourse was required to third parties. For the same reason it is not open to the claimants to assert that the Sellers should have gathered in documents from third party suppliers prior to receiving a request from SUNAT. The warranty did not confirm or require that documents be in the possession of the Sellers; the warranty expressly provided the alternative of giving access to the relevant documents.

196. On the evidence the contract managers and the suppliers responded to requests for information. Bechtel, when contacted on 21 September 2015, responded on the same day and Mr Ossio accepted that Bechtel were responsive to his request. Although one of the contract managers, when asked to provide information, responded that he was not sure that the information requested could be gathered by the date specified, it is noteworthy that he had been asked to provide the information within a week and this appears to have coloured his response. Whilst it is clear from Bechtel's response to the detailed requests (as marked on the schedule sent to them and returned with their comments) that the volume of paper was considerable, it does not establish that the Purchasers did not have "*reasonable*" access to the required documentation.

197. To the extent that the phrase "*reasonable access*" should be interpreted to mean "*in a cost-effective and timely manner*", the evidence does not establish that it could not have been obtained in a manner which would satisfy SUNAT. Mr Ossio accepted that due to pressure of work his team did not (at least initially when the request was received from SUNAT) prioritise the need to obtain this particular information and his evidence was

that SUNAT was content notwithstanding the fact the documentation was not received by the initial October deadline on the basis that some documentation had been provided and they were continuing to work to provide it. Mr Ossio's evidence was that one of the suppliers, GyM, took two months to provide the information. However they were not contacted until December 2015 over three months after the requirement had been received from SUNAT.

198. In conclusion, I find on the evidence, that there was no breach of the warranty to provide "*reasonable access*" to the documents. MLBSA had access to both contract managers and suppliers. On the evidence MLBSA was able to request documents from the relevant third parties and there was no warranty that all documents would be held by MLBSA or gathered in by MLBSA in advance. Accordingly, for the reasons discussed above, I find that there was no breach of warranty in this regard.

199. In the light of my finding it is not necessary for me to determine whether or not there would have been a defence to the breach of warranty or whether, had a breach been established, it would have been causative.

200. As to the alleged breach of paragraph 13.1.1(i), the claimants' case (paragraph 34.4 of the Reply) is that the returns were not given on a "*proper basis*" since they were not made or given on a basis which could be could be sufficiently evidenced. The claimants accept that the costs and expenses in respect of which MLBSA claimed VAT credits were costs and expenses for services which had in fact been provided by the third party suppliers.

201. I accept the submission of counsel for the defendants that the warranty in paragraph 13.1.1(i) is concerned with the "intrinsic correctness" of the returns, not with whether that correctness can be evidenced. Since their intrinsic correctness is accepted by the claimants, I find that no breach of the warranty in paragraph 13.1.1(i) has been made out.

Defences

Alleged failure by MLBSA to produce the documents in time

202. Insofar as there is "*tax payable*" under clause 10.1.1 in respect of the Third Party VAT, the defendants assert that any liability is precluded by virtue of clause 11.8.2 or clause 11.12 of the SPA. Clause 11.8.2 excludes liability of the Sellers in respect of any matter:

> "to the extent that the same would not have occurred but for… any act, omission or transaction of either of the Purchasers… after Closing"

203. Clause 11.12 obliges the Purchasers to procure that:

> "all reasonable steps are taken… to avoid or mitigate any Losses which in the absence of mitigation might give rise to a liability in respect of any claim under this Agreement."

204. Counsel for the defendants submitted that MLBSA's failure to produce the documents in time was the cause of any disallowed VAT credits.

205. If the Unduly Refunded VAT Amount is ultimately held by the tax court to be payable and thus the disallowance of the VAT Credits is upheld (in whole or in part), this will not be the result of any failure to produce the documents "in time". If there was any delay in producing documents to SUNAT this might have affected the resolutions that were issued by SUNAT but does not affect the decision of the tax court on the substantive issue. If the Rejected VAT Credits are reversed, then there can be no tax payable and even if disallowed in part, any liability will not be due to a failure to produce documents "in time".

206. Accordingly this defence asserted by the defendants does not succeed: for the reason stated above, the defendants have not established pursuant to clause 11.8 that the liability to pay the Unduly Refunded VAT Amount or any liability arising out of the Rejected VAT Credits would not have occurred but for the act or omission of the claimants. For the same reason the defendants have also not established that the claimants have failed to take reasonable steps, in the absence of which, a liability might arise under clause 10.1.1.

Failure by MLBSA to avail itself of the 60% discount

207. Counsel for the defendants also submitted that MLBSA's failure to avail itself of the 60% discount in relation to early payment of the penalties means that amounts which the claimants may otherwise be entitled to recover for penalties, on amounts found to be "*payable*" in respect of the Third Party VAT, should be reduced pursuant to clause 11.8.2 and/or 11.12 to reflect the loss of the 60% discount. (This defence does not appear to be pursued in relation to any liability in respect of NFB VAT: the defendants took control of the claim in respect of the NFB VAT and directed the payment of penalties to secure the 40% discount as discussed above.)

208. The experts are agreed that the 60% discount was available if the taxpayer paid the tax liability together with the penalty prior to the expiration of the period for filing a claim (paragraph 72 of the Joint Statement). The 60% discount is not available after the filing of the claim.

209. Clause 11.12 obliges the Purchasers to procure that "*all reasonable steps are taken*" to mitigate. The evidence of Mr Ossio to the court in cross examination was that MLBSA was advised that the discount was not available at that point and that MLBSA were of the view that it was more likely than not that the tax court would overturn SUNAT's determination in relation to Third Party VAT. Even though the advice which Mr Ossio received appears, according to the experts, to be erroneous, it cannot be said that the claimants failed to take reasonable steps, given their belief that they would be successful before the tax court.

210. Clause 11.8.2 excludes liability of the Sellers in respect of any matter:

> "to the extent that the same would not have occurred but for…
> any act, omission or transaction of either of the Purchasers…
> after Closing"

There is no limitation or qualification by reference to whether or not the claimants acted "*reasonably*". On the wording of clause 11.8.2, the issue is whether the loss would not have occurred but for the act of the Purchasers. To the extent therefore that any of the

amounts in respect of Third Party VAT is determined by the tax court to be payable and (subject to the matters discussed above) falls within the scope of the indemnity clause 10.1.1, I find that the defendants will not be liable for the difference between the 60% and 40% discount, on the basis that the claimants took a decision not to pay the penalties and avail themselves of the 60% discount and accordingly the additional cost would not have occurred but for the decision of the claimants not to pay the penalties at that point.

Remedies

211. In the light of the findings in this judgment, I would hope that the parties will be able to agree the form of order. Any outstanding matters in relation to the form of order can be dealt with at a consequential hearing following hand down of the judgment.