SUPREME COURT OF QUEENSLAND

CITATION:	*AGL Sales (Qld) P/L v Dawson Sales P/L & Ors* [2009] QCA 262
PARTIES:	**AGL SALES (QUEENSLAND) PTY LIMITED** ACN 121 177 740 (plaintiff/respondent) **v** **DAWSON SALES PTY LTD** ACN 087 886 913 (first defendant/first appellant) **ANGLO COAL (DAWSON) LIMITED** ACN 100 155 342 (second defendant/second appellant) **MITSUI MOURA INVESTMENT PTY LTD** ACN 088 091 356 (third defendant/third appellant)
FILE NO/S:	Appeal No 2520 of 2009 Appeal No 4390 of 2009 SC No 10731 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	5 August 2009; 6 August 2009
JUDGES:	Muir, Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed with costs.** **2. Appeal against the costs orders is dismissed.**
CATCHWORDS:	CONTRACT LAW – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where agreement between appellants and respondent whereby appellants to provide specified quantities of coal seam gas to the respondent – where appellants were unable to provide the specified quantity due to the productivity of some wells being lower than expected – where the appellants consequently attempted to reduce the amount it was required to provide under clause 14 of the agreement – whether the situation relied upon by the appellants falls within the definition of a

'Force Majeure Event' in Schedule 1 – whether a valid curtailment notice was given under clause 14.1 of the agreement – whether the appellants failed to discharge their onus of proof under clause 14.8 of the agreement

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES – FAILURE IN PORTION OF A CASE – where respondent was awarded costs at trial – where appellants were given leave by trial judge under s 253 Supreme Court Act 1995 (Qld) to appeal the costs order – where appellants argue that respondent was unsuccessful at trial in relation to a large portion of its argument and should only receive part of its costs – whether respondent acted reasonably in the way it framed its case regarding the interpretation of the relevant agreement – whether respondent acted reasonably in not applying for summary judgment – whether the respondent should only have been awarded a portion of its costs at trial

Supreme Court Act 1995 (Qld), s 253

Andre & Cie. S.A. v ETS. Michel Blanc & Fils [1977] 2 Lloyd's Rep 166, distinguished
Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99; [1973] HCA 36, cited
BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2) [2009] QSC 64, considered
Bremer Handelsgesellschaft Schaft m.B.H. v Vanden Avenne Izegem P.V.B.A. [1978] 2 Lloyd's Rep 109, considered
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, applied
Di Carlo v Dubois & Ors [2004] QSC 041, applied
Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors [2003] QSC 484, applied
Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) [2004] 1 AC 715; [2003] UKHL 12, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, cited
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, cited
Re Golden Casket Art Union Office [1995] 2 Qd R 346; [1994] QCA 480, cited
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418; [1950] HCA 35, applied
Thorpe Nominees Pty Ltd v Henderson & Lahey [1988] 2 Qd R 216, cited
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, applied

V. Berg & Son Ltd v Vanden Avenne-Izegem PVBA [1977] 1 Lloyd's Rep 499, distinguished
Waterman v Gerling Australia Insurance Co Pty Ltd (No 2) [2005] NSWSC 1111, cited

COUNSEL: G A Thompson SC, with S R R Cooper, for the appellants
P L O'Shea SC, with S E Brown, for the respondent

SOLICITORS: Mallesons Stephen Jaques for the appellants
Brian Bartley & Associates, as town agents for Gilbert & Tobin Lawyers, for the respondent

[1] **MUIR JA:** The central questions for determination in this appeal concern the proper construction of the force majeure provisions in a gas supply agreement dated 28 February 2003 between Energex Retail Pty Ltd, as purchaser, and Moura Sales Pty Ltd, as supplier, acting as agent for Anglo Coal (Moura) Ltd and Mitsui Moura Investment Pty Ltd, which companies owned and operated the Moura mine. Moura Sales Pty Ltd changed its name to Dawson Sales Pty Ltd ("Dawson") and is the first appellant in these proceedings. The second and third appellants, Anglo Coal (Dawson) Ltd and Mitsui Moura Investment Pty Ltd, are the present mine owners. The respondent, AGL Sales (Qld) Pty Ltd, ("AGL") replaced Energex Retail Pty Ltd, as a party to the Agreement, in December 2006.[1]

[2] Recital "C" to the Agreement provided:

> "The Parties acknowledge that this Agreement is based on the Coal Mine Owners' further development of the Gas production and gathering systems that access the Gas Field in order to generate a consistent production profile, and the ongoing assessment of remaining Gas Field reserves and future deliverability, and the provision of development and production information in accordance with this Agreement are fundamental and essential terms of this Agreement."

[3] I gratefully adopt the statement of facts in Chesterman JA's reasons. I will give reasons in respect of only three of the issues for determination on the appeal: the construction of paragraph (h) in the definition of "Force Majeure Event"; whether a valid notice was given under Clause 14.1 of the Agreement and whether the appellants failed to discharge their onus of proof under Clause 14.8 of the Agreement. Counsel for the appellants properly conceded that failure on any one of these issues would result in the failure of the appeal.

[4] It is also useful to repeat the following passage from the reasons dealing with the factual background to the Agreement and matters giving rise to the present dispute[2]:

> "When the Agreement was made in 2003, Dawson was extracting gas from a parcel of land within the Moura mining lease called Hillview. But wells have a limited life, at least because there is only so much gas which can be extracted from any one location. And having regard to the increasing MDQ during the life of the

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1 By notice given pursuant to the *Energy Assets Restructuring and Disposal Act* 2006 (Qld), published in the Gazette on 1 December 2006.

2 *AGL Sales (Qld) Pty Limited v Dawson Sales Pty Ltd & Ors* [2009] QSC 8 at [30] - [31].

Agreement, Dawson well knew that it would have to drill wells beyond Hillview in order to meet its commitments.

The land called Ridgedale is alongside Hillview. Dawson commenced exploratory work on Ridgedale at the end of 2004. The first of the production wells on Ridgedale was drilled by 13 June 2005 and began to produce gas from December 2005. Dawson attempted to drill 15 production wells in Ridgedale. Two of them, being the wells numbered RG (Ridgedale) 3 and RG 13, did not produce any gas. … five of them produced some gas but their production had ceased by the time of the Curtailment Notice in July 2007. The other wells were still producing then, although in each case the production had been less than Dawson had expected. So each of these 15 wells was either never productive or was less productive than Dawson had forecast. In each case the problem is said to have been the difficult and unforeseen geological conditions which were encountered."

Consideration of paragraph (h) in the definition of Force Majeure Event

[5] It is convenient to set out the relevant parts of Clause 14 of the Agreement and the definition of "Force Majeure Event".

[6] Clause 14 of the Agreement relevantly provided:

"**14 CURTAILMENT**

14.1 Curtailment by Moura Sales for Force Majeure

14.1.1 Moura Sales may Curtail provision of Services if, because of a direct Force Majeure Event, it cannot do, absolutely or in part, something it has to do under this Agreement (the '**Affected Obligation**'), when it has to do it. If a Force Majeure Event occurs, Moura Sales must without delay issue a Notice to ENERGEX setting out:

a) what the Affected Obligation is;

particulars of the event (to the extent Moura Sales knows them);

b) its estimate of the reduction in Service capacity, in particular amending the MDQ under this Agreement over the Suspension Period; AND

c) its estimate of the duration of its inability to perform the Affected Obligation.

14.1.2 The Affected Obligation is suspended from the date the Notice is given until Moura Sales is able, after the exercise of all reasonable diligence, Good Engineering and Operating Practice and the employment of all reasonable means to remedy or abate the Force Majeure event as expeditiously as

possible, to perform the Affected Obligation (this period is the '**Suspension Period**').

14.1.3 A Force Majeure Event or circumstances affecting the performance under this Agreement by Moura Sales shall not relieve Moura Sales of liability in the event, and to the extent, that the negligence or failure to use Good Engineering and Operating Practice by Moura Sales or the Coal Mine Owners caused or contributed to its failure to perform under this Agreement or in the event of its failure to use all reasonable endeavours including the expenditure of reasonable sums of money and the application of proven technology to remedy the situation and to remove the event or circumstances giving rise to the Force Majeure Event in an adequate manner with all reasonable despatch.

14.2 Suspension for Third Party Force Majeure

…

14.3 Curtailment by Moura Sales due to Off-Specification Gas

…

14.4 Curtailment by Moura Sales due to Maintenance

…

14.5 Notice when the Suspension Period ends

Upon completion of Maintenance activities under clause 14.3, or as soon as the Suspension Period under clause 14.1 ends, Moura Sales must, as soon as reasonably practicable, issue a Notice to ENERGEX. The Suspension Period ends when Moura Sales, making reasonable efforts, is able to perform the obligation again, not when it gives the Notice.

14.6 Service Charges during Curtailment

So long as Service is Curtailed under clauses 14.1, 14.3 or 14.4, Service charges will be calculated on the basis of the quantities of Gas actually delivered to ENERGEX on a Day.

14.7 Affected Party must rectify the situation if possible

During the Suspension Period Moura Sales must make reasonable efforts to place itself in a position to perform the Affected Obligation (but Moura Sales is not obliged to settle any strike, lock out, boycott, work ban or other labour dispute or difficulty).

14.8 Termination

If the Suspension Period lasts for more than 3 months, neither Party can terminate this Agreement, but either Party

> may, upon the expiry of that 3 months period, by Notice in writing to the other Party reduce the MDQ by the average quantity of Gas unable to be delivered or utilised on a Day over the Suspension Period and the Parties respective obligations under this Agreement will apply to that reduced MDQ for the remainder of the Term, effective immediately on Notification. The Authorised Officers of both Parties shall implement any necessary changes to MDQ pursuant to this clause by endorsing a variation to Schedule 2."

[7] The term 'Force Majeure Event' is defined in Schedule 1 of the Agreement as follows:

> " '**Force Majeure Event**' means any event or circumstance, or combination of events or circumstances, not within the control of a Party, and which by the exercise of Good Engineering and Operating Practice, and seeking in good faith to comply with its contractual and other obligations by the expenditure of reasonable sums of money and the application of proven technology widely known to and generally available for use by persons in the gas industry, that Party is not able to prevent or (for the time being) overcome, including, without limiting the generality of the foregoing:
>
> (a) an act of God including, but not limited to, landslide, earthquake, flood, wash-out, lightning, storm and action of the elements;
>
> (b) strike, lock-out, ban or other industrial disturbance;
>
> (c) act of a public enemy, terrorism, war, sabotage, blockade or insurrection, riot or civil disturbance, arrests and restraints of rulers and peoples;
>
> (d) fire or explosion including radio-active and toxic explosion;
>
> (e) epidemic or quarantine;
>
> (f) order of any court or tribunal or the order, act or omission or failure to act of any government or Government Agency having jurisdiction;
>
> (g) failure to obtain or retain any necessary consent or approval of a Government Agency (despite timely and reasonable endeavours to obtain same);
>
> (h) unpredicted, sudden and material deterioration in productivity of more than one well or failure of wells, equipment or plant breakdown or failure that causes full or partial interruption of the delivery of Gas by Moura Sales under this Agreement;
>
> (i) the total or partial inability of a Party to receive or have quantities of Gas which are available for supply or delivery transmitted through the Queensland Gas Pipeline

or the Moura Mine Pipeline because of an event of Force Majeure excusing non-performance by the owners or operators of the Queensland Gas Pipeline or the Moura Mine Pipeline, as the case may be under a clause in a relevant gas transportation agreement;

(j) shortages of labour or essential materials, failure to secure contractors and delays of contractors;

(k) any breach of contract by, or an event of Force Majeure affecting a person contracting with ENERGEX ('Third Party Contractor'), which prevents ENERGEX doing something that it has to do under this Agreement where ENERGEX has taken all necessary, reasonable and practical action within a reasonable time to obtain performance of the Third Party Contractor's relevant obligation whether by the Third Party Contractor or another person; or

(l) any order, direction, or requirement under laws relating to Aboriginal heritage or native title;

but does not include:

(a) full or partial interruption of the delivery of Gas by Moura Sales due to failure or unpredicted and sudden deterioration in productivity of a single well, or the failure or breakdown of a single piece of equipment or plant, including compressors, pumps, Gas measurement equipment, and gathering lines;

(b) full or partial interruption of the delivery of Gas by Moura Sales due to failure or unpredicted and sudden deterioration in productivity of a single dehydration unit if such failure or unpredicted and sudden deterioration could have been prevented by the exercise of Good Engineering and Operating Practice;

(c) ENERGEX's loss of customers, loss of market share or reduction in demand for Gas;

(d) a Party's lack of funds or inability to obtain or use funds; or

(e) changes in market conditions relevant to the transportation and/or the purchase and sale of Gas."

[8] Paragraph (h) is not without obscurity. It is not clear why the words "unpredicted, sudden and material deterioration" qualify "productivity of more than one well" and not "failure of wells, equipment or plant breakdown."[3] Nor is the meaning of "failure" and "full or partial interruption" immediately obvious. Take "failure of wells". The words, in their everyday meaning, are capable of encompassing the exhaustion of winnable gas in the wells as well as the breakdown or collapse of the structure of wells or their otherwise becoming inoperable. It is not suggested that "failure" has a particular meaning in the relevant industry.

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3 A construction accepted by the parties.

[9] In order to come within paragraph (h) any "deterioration in productivity" of wells must be "unpredicted, sudden and material." It is thus apparent that mere "deterioration in productivity" of wells does not constitute "failure of wells". Nor can the inability of wells to ever produce sufficient quantities of gas to warrant their use as producing wells constitute "failure". Paragraph (h) is concerned with something happening to or in respect of supplying wells, other than "deterioration in productivity," which interrupts the flow of gas.

[10] To "interrupt" something which is occurring is normally to stop it temporarily. The *Compact Oxford Dictionary* new edition defines "interrupt" as, inter alia, "to break in upon; to break the continuity (of something) in time; to break off; to hinder the course or continuity of, cause to cease or stop." Here the words "full or partial" before "interruption of the delivery of Gas" suggest that an "interruption" of delivery may be a complete suspension or merely a reduction of supply, albeit a temporary one. However, the word "interruption", even when prefaced by "partial" is not apt to describe any diminution in supply, however slight. The context also makes that conclusion apparent. The parties had in mind an event or circumstance which would interrupt supply to such an extent that the operation of Clause 14.1 would be triggered.

[11] The object of contractual construction is to "ascertain and give effect to the intentions of the contracting parties".[4] The meaning of contractual terms "is to be determined by what a reasonable person would have understood them to mean".[5] The words under consideration take colour not merely from the remainder of paragraph (h) but from the context in which they are found. As Gibbs J explained in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*:[6]

> "It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another."

[12] As events within paragraph (h) are Force Majeure Events and activate the operation of Clause 14.1, it is necessary to consider what light, if any, the provisions of Clause 14 throw on the meaning of paragraph (h).

[13] The appellants contend that Clause 14.1.1 should not be construed as requiring the issuing of a notice before the event of force majeure relied on actually interrupts the delivery of gas under the Agreement. The reason advanced was that it is only when interruption of delivery occurs that Dawson could not do "absolutely or in part, something it has to do under this Agreement (the 'Affected Obligation')". It was submitted that as the effect of the Notice is that the Affected Obligation is suspended "from the date the Notice is given (Clause 14.1.2), it would make no commercial sense if the Affected Obligation was suspended before there was any interruption of the delivery of gas under the Agreement. Additionally, it was submitted that the fact that some of the particulars required to be included in the

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4 *Homburg Houtimport B.V. v Agrosin Private Ltd (The "Starsin")* [2004] 1 AC 715 at 737.

5 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40].

6 (1973) 129 CLR 99 at 109.

Notice could not be given if no obligation of Dawson's had been affected at the date of the Notice shows that there is no necessary link between the happening of a Force Majeure Event and the requirement to give notice.

[14] The submissions ignore the language of Clause 14.1 which directs that "If a Force Majeure Event occurs, Dawson must *without delay* issue a Notice" to the respondent. The Notice must: set out the "Affected Obligation" i.e. what it is that Dawson is obliged to do under the Agreement but cannot do; estimate the reduction in the gas able to be supplied, where gas supply is affected; and, in such a case, estimate the duration of its inability to supply the full amount of gas required. The particulars assume the existence of an "Affected Obligation", as does Clause 14.1.2. Under Clause 14.1.2 the "Affected Obligation" is suspended from the giving of the notice until Dawson is able to resume supply "after the exercise of all reasonable diligence … and the employment of all reasonable means to remedy or abate the Force Majeure Event as expeditiously as possible …"

[15] The obligation on Dawson under Clause 14.7 to "make reasonable efforts to place itself in a position to perform the Affected Obligation" is imposed "During the Suspension Period" which commences on the date the Notice is given. Clause 14.8 also applies by reference to the Suspension Period. Clauses 14.1.1, 14.1.2, 14.7 and 14.8 assume that a notice will not be given under Clause 14.1.1 unless a "direct Force Majeure Event" has resulted in an "Affected Obligation".

[16] Consequently, matters relied on to constitute a relevant "failure of wells" must be such that the gas able to be delivered in consequence of the alleged failure becomes less than the volume required to be delivered under the Agreement. Where the amount able to be delivered before the failure is already less than that which Dawson is contractually bound to deliver, the alleged failure must result in a further reduction in the gas able to be supplied.

[17] The word "interrupts", particularly when regard is had to Clause 14.1, suggests that there must be a direct temporal and causative connection between the alleged failure and the interruption. Dawson can avail itself of its rights under Clause 14.1 only in respect of a "direct Force Majeure Event."

[18] The appellants argued that because of the words "combination of events or circumstances" in the definition of Force Majeure Event, paragraph (h) applies where there are separate well failures at different times which combine to cause a "full or partial interruption" in gas supply. The contention cannot be accepted. It ignores the operation of the second paragraph (a) in the definition and the considerations which support the existence of a temporal connection. Also, as the respondent submits, paragraph (h) is an example of an event or circumstance, or combination of events or circumstances, which comes within the definition. The consequence of this is that the introductory words of the definition just quoted do not apply to expand the operation of paragraph (h). This is not to say that the balance of the introductory words, which impose qualifications on the events or circumstances which meet the definition, do not apply. Although attracted to the view that the words do apply so that their requirements must be met before Dawson can have the benefit of an event within paragraph (h), I do not find it necessary to decide the point.

[19] It is difficult to see how if, as the appellants contend, the words "any event or circumstance, or a combination of events or circumstances" apply to paragraph (h) the other introductory words of the definition do not also apply. If the introductory

words of the definition apply, it is accepted by the appellants that they have not satisfied their onus of proof and the appeal must fail.

[20] It was also argued on behalf of the appellants that there is "no necessary temporal connection required by cl 14.1.1 between the relevant deterioration or failure of the wells and Dawson being unable to do, absolutely or in part, something it has to do under the Agreement." The word 'because' in the phrase 'because of a direct Force Majeure Event' in Clause 14.1.1, it was submitted, requires only a causal connection. That argument, it is said, is assisted because the events listed in subparagraphs (f), (g), (l) and (j) are not events which would necessarily have an immediate effect on the ability of Dawson to supply gas under the Agreement. This argument fails to have sufficient regard to the provisions of Clause 14 which have been explained in some detail earlier. It also fails to focus sufficiently on the language of paragraph (h).

[21] Another argument put forward was that the Agreement did not require Dawson to "curtail provision of Services" by invoking Clause 14.1.1 and the Agreement provided for the payment of a Remedy amount in the event that there was a shortfall in delivery of gas under the Agreement. The primary judge dealt with this argument as follows:[7]

> "However, on any view of the Agreement, the effect of a Force Majeure Event must be disabling: it must have the result that Dawson cannot, absolutely or in part, perform the Affected Obligation, i.e. the obligation to supply gas. There is no choice which Dawson is given to reduce or not to reduce the gas supply. This is because cl 14 is engaged only where the agreed quantity cannot be supplied. The words "[Dawson] may Curtail provision of Services" are not a reference to alternative courses open to Dawson, but instead mean that Dawson is permitted to not supply that which it cannot supply because of the Force Majeure Event. The absence of such a discretion is confirmed by the mandatory terms of the second sentence of cl 14.1.1, whereby Dawson *must* without delay issue a notice if a Force Majeure Event occurs."

I am in respectful agreement with those views.

[22] It is now necessary to consider the facts alleged by the appellants to invoke the operation of paragraph (h). In their pleadings, the appellants relied on the facts and circumstances set out in their notice under Clause 14.1.1. The Notice, couched in vague terms, was as follows:[8]

> **'Gas Sales Agreement – Curtailment Notice**
>
> Moura Sales Pty Limited ABN 97 087 886 913 (**Moura Sales**)hereby gives notice of Curtailment pursuant to clause 14.1.1 of the Agreement dated 28 February 2003 originally entered between Moura Sales and Energex Retail Pty Limited ABN 97 078 848 579 (**Energex**) as agent for Allgas Energy Ltd ABN 54 009 656 446 (the **Agreement**).
>
> In accordance with clause 14 of the Agreement, Moura Sales advises:

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7 *AGL Sales (Qld) Pty Limited v Dawson Sales Pty Ltd & Ors* [2009] QSC 8 at [38].

8 *AGL Sales (Qld) Pty Limited v Dawson Sales Pty Ltd & Ors* [2009] QSC 8 at [24].

Affected Obligation

The Affected Obligations are the obligations of Moura Sales under clause 5.4, clause 9.1.1, clause 9.3 and clause 10.

Particulars of the event

The particulars of the event, to the extent Moura Sales knows them, are:

- In developing 15 new wells at Ridgedale, Moura Sales has encountered unpredicted and substantial geological problems;
- The geological problems are most prominently severe structuring and faulting of lateral drill holes at various levels;
- Structuring and faulting problems has caused both drilling difficulties and closing of lateral drill holes at Ridgedale;
- Of 15 wells drilled at Ridgedale, 2 have been abandoned due to the extent of the difficulties encountered with the loss of the considerable cost of development of these wells;
- Due to the drilling difficulties and closing of lateral drill holes, recovery of Gas from the Ridgedale wells has been materially less than was forecast prior to the commencement of development of these wells;
- Attempts to resolve the impacts of structuring and faulting problems in accordance with obligations under the Agreement, have been ongoing but not successful to date and on current analysis may not be successful;
- Wells which have failed to produce to date may well have to be abandoned depending on the outcome of ongoing measures to remedy within the terms of the Agreement;
- The Ridgedale wells were developed following analysis of the Gas field and particularly the Hillview wells;
- The Ridgedale wells were planned to come into production to meet projected contractual obligations;
- The problems encountered in developing the Ridgedale wells were unexpected and unpredicted, particularly having regard to the geological information available to Moura Sales at the time;
- Moura Sales has undertaken all stages of investigation and development of the Ridgedale wells in accordance with proven technology and practice as widely known to and generally available for use in the gas industry;
- Moura Sales has expended approximately $15,000,000.00 in developing the Ridgedale wells;
- For developed wells at Hillview, the Gas available for recovery is less than initially predicted due to unexpected difficulties in production;

- Without limiting the above, the circumstances are such that there has been an unpredicted, sudden and material deterioration in productivity of more than one well and a failure of wells;
- Moura Sales has exercised Good Engineering and Operating Practice at all times;
- Moura Sales has sought to act in good faith to comply with its contractual and other obligations by the expenditure of reasonable sums of money and the application of proven technology widely known to and generally available for use by persons in the gas industry.

The events and circumstances are beyond the control of Moura Sales.

Moura Sales has not been able to overcome these events notwithstanding the exercise of Good Engineering and Operating Practice and seeking in good faith to comply with its contractual and other obligations by the expenditure of reasonable sums of money and the application of proven technology widely known to and generally available for use by persons in the gas industry.

Estimate of reduction in service capacity

Moura Sales estimates the reduction in Service capacity of 8,000 Gj per Day and in particular amends the MDQ to 10,000 Gj per Day over the Suspension Period.

Estimate of duration

Moura Sales estimates the duration of its inability to perform the Affected Obligations as 14 months from the date of this notice.

We reserve all other rights, remedies and claims under the Agreement and this notice is in addition to and without prejudice to any such rights, remedies or claims."

[23] The Notice described difficulties encountered with the wells developed in the Ridgedale Field and, although it did not say so expressly, it implied that the inability to supply arose because less than the predicted quantities of gas were able to be produced from the Ridgedale wells. It was asserted, somewhat obscurely, that:

> "For developed wells at Hillview, the Gas available for recovery is less than initially predicted due to unexpected difficulties in production."

There was then the assertion: "Without limiting the above, the circumstances are such that there has been an unpredicted, sudden and material deterioration in productivity of more than one well and a failure of wells."

[24] The fact that Dawson was unable to meet its gas supply obligations because the Ridgedale wells never produced gas in quantities sufficient to enable it to do so, does not give rise to an event within paragraph (h). Although the introductory words of the Force Majeure Event definition may apply in such circumstances, it could not be said that a general and prolonged failure of this kind "interrupted" the delivery of gas.

[25] The primary judge observed of the Notice:[9]

> "The generality of this Curtailment Notice, and of the defendants' submissions as to what constitutes the Force Majeure Event, results from these flaws in their case. They have failed to identify a certain occurrence, in the sense of an event or circumstance, or events or circumstances acting in combination, having an immediate consequence upon Dawson's performance at that point in time."

[26] It was noted that in their pleadings that the appellants did not specify what it was that constituted the Force Majeure Event and that in their final submissions the appellants put the matter in the following terms:

> "76. The Defendants' primary submission is that the failure of more than one well (subparagraph (h)) was a sufficient event or circumstance to satisfy the definition of a Force Majeure Event.
>
> 77. Alternatively, the definition of Force Majeure Event is satisfied by:
>
> (i) the failure of more than one well and/or the unpredicted, sudden and material deterioration in productivity of more than one well;
>
> (ii) the presence of low angle thrust faulting, shearing of the coal within the seams and/or the presence of coal fines within the seams, either alone or in combination with the events and circumstances described above; or
>
> (iii) encountering low angle thrust faulting, shearing of the coal within the seams and/or the presence of coal fines within the seams, either alone or in combination with the events and circumstances above."

[27] The primary judge further explained the case presented by the appellants at first instance as follows:[10]

> "In their case, the defendants have not attempted to identify an occasion which represents an interruption in the delivery of gas. Nor have they sought to prove the extent of the diminution in Dawson's capacity from, in aggregate, the failures of certain wells; other than perhaps by reference to Dawson's forecasts of production. Even then, these alleged failures would not account for the 8 TJ/day by which the MDQ was purportedly reduced by the Curtailment Notice …"

[28] Another difficulty with the appellants' case, identified by the primary judge, was that the "deterioration in productivity" of the wells in the Ridgedale Field was based on a comparison of actual production against forecast production. The primary judge pointed out that "deterioration in productivity in paragraph (h) required a comparison of actual productivity at two points in time, not a comparison of forecast productivity with actual productivity". Counsel for the appellants made a last ditch attempt, on the hearing of the appeal, to establish that on the trial the appellants had proved an "unpredicted, sudden and material deterioration in

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9 *AGL Sales (Qld) Pty Limited v Dawson Sales Pty Ltd & Ors* [2009] QSC 8 at [43] – [44].

10 *AGL Sales (Qld) Pty Limited v Dawson Sales Pty Ltd & Ors* [2009] QSC 8 at [44].

productivity of more than one well". This was done by reference to the deterioration in production of wells RG1, RG8, RG10, RG12 and RG14 over different selected periods.

The following table shows the periods selected, well production at the commencement and conclusion of each period and the percentage by which production declined over the selected periods:

1. No	2. Date sudden deterioration Commenced and production	3. Production at 9 July 2007	4. Production before deterioration commenced	5. Production after deterioration commenced	6. % decline 5./6.
RG1	29 June 2007 0.3 TJ/day	0.15 TJ/day	10 days to and including 29 June 2009 totalled 1.844TJ.	10 days from 30 June 2007 to 9 July 2007 totalled 1.3815TJ.	25.1%
RG8	*See below				
RG10 [57]	18 May 2007 0.17575 TJ/day	0.1147TJ/day	24 March 2007 to and including 19 May 2007 [50 days] total 5.120TJ	20 May 2007 to 9 July 2007 (50 days) total 0.76164 TJ	85.12%
RG12 [58]	28 May 2007 0.4292 TJ/day	0.222 TJ/day.	16 April 2007 to 28 May 2007 [42 days] total 13.52TJ.	28 May 2007 to 9 July 2007 [42 days] total 1.708 TJ	**87.36%**
RG14 [59]	15 June 2007 0.29045 TJ/day.	0.1924TJ/day	22 May 2007 to 15 June 2007 [24 days] total 4.313 TJ	16 June 2007 to 9 July 2007 [24 days] total 3.65 TJ.	**15.37%**

[29] The period selected for RG8 was the 20 day period from 19 June 2007 to 9 July 2007 and the preceding 20 day period from 29 May 2007 to 19 June 2007. There was no material deterioration in production in the later period compared with the earlier. Reliance was placed, however, on a 27 per cent decline in daily average production between 1 January 2007 to 19 June 2007. No evidence was pointed to with a view to establishing that this decline was unpredicted. Nor could the decline be regarded as "sudden". Reference to RG8 thus does not assist the appellants' case, even if it was permissible to look at this one well in isolation.

[30] The decline in production of RG14, like all of the other declines, was not established to be "unpredicted" and the figures produced do not establish that the decline in production relied on was either "sudden" or "material". The well produced 0.1924 TJ on 9 July. It had produced between 0.1 and 0.2 TJ per day in April 2007. The figures for this and the other wells must be considered in light of

the evidence that production from wells was capable of fluctuating significantly and could be expected to diminish over time.

[31] The reasons note that production from RG1 gradually declined after March/April 2006 and that production continued to decline in 2007 "at least until the end of June 2007". The primary judge pointed out also that there was no evidence of its output from 9 to 24 July 2007. The primary judge was unable to be satisfied that there was any sudden and material decrease which interrupted, in part, the delivery of gas in the sense of paragraph (h). None of the evidence referred to by counsel for the appellants falsified this conclusion.

[32] The reasons point out there was no evidence of production from RG10 in June 2007 or for RG12 from 3 to 8 July 2007. Both wells were in production on 9 July 2007. As the primary judge noted, the July production figures for RG10 "were generally higher than they had been for most of its life." The primary judge traced the production history of RG12 and concluded that production had declined from 20 November 2006 "but not suddenly". On the date of the Notice, RG12 produced 0.222 TJ and this was after cessation of production for five days. Again, the evidence relied on by counsel for the appellants does not demonstrate any error in the primary judge's findings that no sudden deterioration in productivity was established for RG10 and RG12.

[33] The appellants therefore failed to demonstrate that the primary judge should have found an "unpredicted, sudden and material deterioration in productivity of more than one well." The appellants have thus failed to establish an "unpredicted, sudden and material deterioration in productivity of more than one well." They failed also to show any relevant "failure of wells". There is another reason why the ground under consideration cannot succeed. The arguments just considered were not part of the case advanced before the primary judge which the respondents were called on to meet. Senior counsel for the respondent submitted, and I accept, that had such a case been advanced, there were matters which the respondent would have wished to investigate and in respect of which it may have adduced further evidence. The appellants cannot now be permitted to change the course of their argument so substantially.

Was there a valid or effective Force Majeure Notice?

[34] The primary judge held that Dawson did not give the Notice without delay but found it unnecessary to decide whether the delay rendered the Notice ineffective. Whether delay in issuing a notice under Clause 14.1 after the occurrence of a Force Majeure Event renders the Notice ineffectual depends on the proper construction of that clause. Considerations which support the conclusion that delay in issuing a notice does not have an invalidating effect are:

(a) Clause 14.1.2, which provides for the suspension of the "Affected Obligation", is not expressed to be conditional upon the giving of the Notice "without delay".

(b) "The generality of the words 'without delay' tells against [the respondent's] contention: if a condition were intended a definite time limit would be more likely to be set."[11]

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[11] See *Bremer Handelsgesellschaft Schaft M.B.H. v Vanden Avenne Izegem P.V.B.A.* [1978] 2 Lloyd's Rep 109 per Lord Wilberforce at 113.

[35] The matters which support the contrary conclusion are:

(a) The "Affected Obligation" is suspended from the date the Notice is given, not from the date of the Force Majeure Event (Clause 14.1.2);

(b) The suspension continues to operate until Dawson, exercising reasonable diligence and employing all reasonable means to remedy or abate the Force Majeure Event as expeditiously as possible, is able, "after the exercise of all reasonable diligence, Good Engineering and Operating Practice", to perform the Affected Obligation.[12]

(c) Dawson's obligation under Clause 14.7, to "make reasonable efforts to place itself in a position to perform the Affected Obligation" only exists during the "Suspension Period";

(d) The right to terminate given by Clause 14.8 is exercisable only by reference to the term of the suspension period;

(e) The requirement in Clause 14.1.1 that the Notice must set out the Affected Obligation; particulars of the Force Majeure Event; an estimate for the reduction in Service capacity, in particular amending the MDQ … over the Suspension Period; and estimate the duration of the inability to perform the Affected Obligation.

[36] An obvious purpose of the particulars required to be specified in the Notice is to inform the respondent promptly of the likely extent and duration of the interruption to the supply of gas under the Agreement to enable it to take whatever steps might be available to it to minimise the damage, if any, likely to be caused by the interruption. Other such purposes are to enable the Notice to provide a timely basis for co-operation between the parties in minimising the adverse consequences of the shortfall and to provide a basis upon which the respondent can act in order to assess whether Dawson is complying with its obligations under Clause 14.1.2, or in determining whether there may be cause to consider the application of Clause 14.1.3.

[37] If the obligation to issue a notice without delay is not a requirement of a valid notice and failure to comply merely gives rise to a claim for damages for breach of contract, the purpose of the Notice and of the particulars will be substantially defeated. Not only that, but by being free to select the timing of the Notice, Dawson would have the ability to determine when it was to assume obligations under Clauses 14.1.2 and 14.7. Dawson would also have the potential to select the three month period specified in Clause 14.8 so as to influence the reduction in MDQ which best suited its interests. It is surely unlikely that, having regard to the considerations just discussed, the contractual intention would have been that a notice not given in a timely way would nevertheless be effective. In my view the Notice was of no legal effect.

[38] Another argument advanced by the respondent was that the Notice was defective for want of particularity. Again, the primary judge found it unnecessary to determine this question. It is unnecessary for this Court to decide the question and in view of my conclusion that the Notice was ineffective, nothing will be served by a consideration of a further ground of invalidity.

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12 *Gas Sales Agreement* Cl 14.1.2.

Did the appellants discharge their onus of proof under Clause 14.8?

[39] The appellants challenged the primary judge's conclusion that the appellants failed to prove "the average quantity of Gas unable to be delivered" within the meaning of Clause 14.8 of the Agreement. The appellants argued at first instance and on appeal that where a Force Majeure Event occurred, Dawson was relieved of any liability for the entire shortfall in its supply rather than, as the primary judge held, the shortfall constituted by the gas which could not be delivered because of the Force Majeure Event. The construction favoured by the appellants could not conceivably accord with the contractual intention of the parties: it would be capable of producing bizarre results quite unconnected with the conventional operation of a Force Majeure provision. If, for example, Dawson had consistently been supplying only one-half of the gas required to be supplied under the contract prior to a Force Majeure Event which reduced the quantity able to be supplied by Dawson by a further one-tenth of the contracted volume, Dawson may be entitled under Clause 14.8 to reduce the MDQ by 60 per cent. That would be so even if Dawson's inability to deliver the one-half was caused by matters which did not attract the operation of the Force Majeure provisions. The primary judge's conclusion in this respect was plainly right.

Conclusion

[40] For the above reasons, I agree that the appeal should be dismissed with costs. I also agree that, for the reasons given by Fraser JA, Dawson's appeal against the costs orders should be dismissed.

[41] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Muir JA and Chesterman JA concerning the substantive appeal (CA 2520 of 2009). I gratefully accept and will not repeat their Honours' expositions of the factual background, material contractual provisions, and issues at trial and in the appeal.

[42] I agree with Muir JA's reasons for the conclusion that the substantive appeal should be dismissed with costs. I also agree with Chesterman JA's conclusion that a further ground on which this appeal should be dismissed is that, on the proper construction of the Gas Supply Agreement, the general requirements in the introductory words of the definition of "Force Majeure Event" must be satisfied if any of the things described in paragraph (h) of that definition is to qualify as such an event. (The appellants accepted that their appeal must fail if that construction were adopted.) My principal reasons for preferring that construction are that it is the natural and literal meaning of the contractual text and it makes commercial sense (a topic upon which Chesterman JA has elaborated), but I also record my specific agreement with paragraphs 72-76 and 81-89 of Chesterman JA's reasons.

[43] The substantive appeal was brought by the defendants against a judgment in favour of the plaintiff after a 20 day trial.[13] The trial judge subsequently heard argument about costs and on 7 April 2009 ordered that the defendants pay the plaintiff's costs of the proceedings, including any reserved costs to be assessed.[14] On the same day, the trial judge granted an application by the defendants for leave to appeal against that costs order pursuant to s 253 of the *Supreme Court Act* (Qld) 1995. What follows are my reasons for concluding that this costs appeal should be dismissed.

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13 *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd & Ors* [2009] QSC 8.

14 *AGL Sales (Qld) P/L v Dawson Sales P/L & Ors (No 2)* [2009] QSC 75.

[44] The defendants' contention before the trial judge was that the plaintiff should have no more than 20 per cent of its costs assessed on the standard basis. The defendants argued that most of the trial was unnecessarily taken up with factual issues relating to "Good Engineering and Operating Practice" (the expression in the Gas Supply Agreement, in the introductory, general words of the definition of "Force Majeure Event" and in cl 14.13) and that the plaintiff was unsuccessful in much of that contest.

[45] I will summarise the trial judge's reasons for rejecting that argument:

(a) First, the trial judge concluded that the plaintiff was not unreasonable in presenting a case which was wider than was necessary for the interpretation of the Gas Sales Agreement upon which the plaintiff succeeded. The trial judge's reasons for that conclusion were as follows:

(i) Whilst the plaintiff succeeded on the basis of an interpretation of the contract which made the factual enquiry about Good Engineering and Operating Practice unnecessary, had the defendants' arguments as to the interpretation of cl 14 and the definition of "Force Majeure Event" been upheld, the plaintiff would have had to advance the case that it was the defendants' fault that they could not supply gas in accordance with the contract requirements.

(ii) Although the plaintiff failed on many components of its case about Good Engineering and Operating Practice, the plaintiff succeeded on what was probably its principal argument, which was that the defendants had failed to undertake proper exploration at Ridgedale. Depending upon who bore the onus of proof that might have been sufficient for the plaintiff to succeed (had it failed on its interpretation argument). On the trial judge's findings,[15] the incidence of the burden of proof depended not only upon the proper interpretation of the definition of Good Engineering and Operating Practice, but also upon whether the alleged force majeure event was within the general words of the definition and not within the specific inclusion of paragraph (h). Accordingly, the factual enquiry might have been decisive in the plaintiffs' failure even if the plaintiff was not able to prove that the defendants' failures to employ good practice were a cause of its inability to supply gas.

(iii) As to the components of the plaintiff's case about Good Engineering and Operating Practice upon which the plaintiff failed, there was no suggestion that they were advanced in bad faith or that they were so irrelevant to the real issues as to warrant some special order as to costs.

(b) Secondly, the trial judge concluded that the plaintiff was not unreasonable in failing to apply for summary judgment upon the basis of its propounded interpretation of the Gas Supply Agreement.

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15 [2009] QSC 8 at [73].

The trial judge reasoned that it was not unreasonable for the plaintiff instead to proceed to trial because:

(i) The plaintiff would have had considerable difficulties in seeking summary judgment at an early stage of the proceedings because it then did not know much of the relevant facts, including which were the wells involved in the force majeure event asserted by the defendants, what had been the history, and whether there had been any simultaneous failure of wells.

(ii) Whilst it is possible that a late application for summary judgment might have been made after disclosure, the trial judge might or might not have been persuaded to hear a late summary judgment application, given that it might have taken more than a day to hear and it might have delayed the ultimate determination of the proceeding by the prospect of an appeal.

[46] The trial judge applied the principle which his Honour had earlier formulated in *BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2),*[16] that ordinarily the fact that a successful plaintiff fails on particular issues does not mean that the plaintiff should be deprived of some of its costs, although it may be appropriate to award costs of a particular question or part of a proceeding where that matter is definable and severable and has occupied a significant part of the trial.[17] The trial judge observed that the plaintiffs' arguments about good engineering and operating practice were analogous to a common law claim in negligence, in which a plaintiff usually does not lose some of its costs where it succeeds in proving negligence in some but not all respects: as McHugh J explained in *Oshlack v Richmond River Council*:[18]:

> "The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did."

[47] The correctness of the principle applied by the trial judge is not in issue in this appeal. The defendants do not contend that the trial judge misapprehended the correct principle: indeed, in their written outline of submissions they endorse the principle in the terms in which the trial judge expressed it.

[48] Rather, the grounds specified in the notice of appeal are simply that the trial judge erred in reaching the two conclusions I have mentioned, that the plaintiff was not unreasonable in presenting a case wider than was necessary to interpret the Gas Sales Agreement and that the plaintiff was not unreasonable in failing to apply for summary judgment. The notice of appeal goes on to assert that the trial judge erred in concluding that there was no demonstrated basis for departing from the ordinary rule as to costs, but that adds nothing to the two earlier grounds, which are themselves pitched at such a high level of generality as to be of no real assistance in identifying the particular error for which the defendants contend.

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16 [2009] QSC 64.

17 [2009] QSC 64 at [8], adopting the words of Brereton J in *Waterman v Gerling Australia Insurance Co Pty Ltd (No 2)* [2005] NSWSC 1111 at [10].

18 (1998) 193 CLR 72 at 97.

[49] Ordinarily, the questions to be agitated in an appeal brought by leave against a discretionary costs order would be identified in the primary judge's reasons for the grant of leave. The Court does not have the benefit of a transcript of the trial judge's reasons for granting leave, but it was asserted both in the amended notice of appeal and in oral submissions that the trial judge accepted the defendants' argument that it was appropriate for leave to be given because of the defendants' appeal against the substantive judgement.

[50] It appears then that this was not an appropriate case for the grant of leave to appeal. After reviewing the relevant authorities, Chesterman J observed in *Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors*[19] that:

> ". . . the cases make it clear that leave should not be given unless there is an arguable case that, applying the principles of *House v The King* the discretion will be overturned on appeal. That means there must be an arguable case that the judge committed an error of law, or misapprehended the facts or that the result is inexplicably inconsistent with the facts."

[51] The mere fact of an appeal against a substantive order is not a ground for the grant of leave to appeal against a discretionary costs order which was made consequentially upon the substantive order. Where an appeal against a substantive order succeeds leave is not required for this Court to exercise its own discretion as to any appropriate, consequential revision of the costs order, but such leave is required where the substantive appeal fails.[20] The rationale for the usual requirements for the grant of leave to appeal is as applicable in the latter case as it is where there is no appeal against the substantive order. Mackenzie J pointed this out in *Di Carlo v Dubois*[21]:

> "[4] Although there will be occasional cases where leave to appeal becomes otiose because the appeal against the substantive judgment succeeds, with consequent setting aside or varying of the order for costs, the requirement that leave be obtained in case the substantive appeal fails is logically based. The appeal in a case where consequential setting aside or varying of the costs order occurs is conceptually different from an appeal against an exercise of discretion. Once the appellant must establish grounds for setting aside a discretionary judgment, there is no reason to distinguish between a case where the issue becomes of that kind because a substantive appeal is dismissed and one where no issue is taken with the substantive judgment but it is alleged that the costs order is erroneous in principle.
>
> [5] The requirement that leave be obtained implies, firstly, that leave is not given merely for the asking. By analogy with other instances where leave to appeal is necessary, a plausible basis for arguing that there are some prospects of

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19 [2003] QSC 484 at [41].

20 *Thorpe Nominees Pty Ltd v Henderson & Lahey* [1998] 2 Qd R 216; *Re Golden Casket Art Union Office* [1995] 2 Qd R 346.

21 [2004] QSC 041 at [4]-[5].

> success must be demonstrated. Secondly, because the judgment as to costs is a discretionary judgment it would be necessary to identify some prospect of success on an argument that there was a demonstrable error in principle, or on an argument that the order was so unreasonable that it could not have been properly made."

[52] The grant of leave to appeal against the costs order did not relieve the defendants of the burden of establishing, not merely that the judges of the Court of Appeal might have formed a different view from that of the trial judge, but that the trial judge made an error in the exercise of the discretion of the kind described in *House v The King*.[22] The defendants have failed even to identify, much less to establish, an error of that character. The defendants' written outline of argument, which was not elaborated upon orally, merely asserted that the trial judge erred in the manner described in the broad grounds of appeal. The argument did not identify any asserted error of principle or which, if any, aspect of the trial judge's reasons for the challenged conclusions were said to be wrong or why. Nor did the defendants argue that the result was so unreasonable as to justify the conclusion that the discretion must have miscarried. In short, the defendants have not demonstrated any arguable error in the trial judge's reasons for concluding that the costs order was a proper application of the principles stated by his Honour and the validity of which the defendants accept. There is thus no reasonable basis for a conclusion that the discretion miscarried.

[53] I would dismiss the defendants' appeal against the costs orders (CA 4390 of 2009).

[54] **CHESTERMAN JA:** The appellants (collectively "Dawson") were the defendants in an action heard in the Commercial List. The respondent ("AGL") was the plaintiff which obtained a declaration that:

> "The matters set out in the letter from (Dawson) to (AGL) dated 9 July 2007 do not constitute a Force Majeure Event as defined under the Gas Sale Agreement ... and do not entitle (Dawson) to curtail the supply of gas (in whole or in part) under clause 14 of that Agreement."

[55] The facts out of which the dispute arose were succinctly identified by the trial judge:

> "[1] The plaintiff ("AGL") purchases coal seam gas from the first defendant ("Dawson"). The gas is extracted from the Moura Coal Mine and is supplied to AGL under a written contract made in February 2003. Dawson contracted to supply the gas on behalf of the owners of the mine who are the second and third defendants.
>
> [2] The parties are in dispute as to the amount of gas which must be supplied under the Agreement. It provides for the supply of certain quantities, but it also provides that in some circumstances, described as a "Force Majeure Event", Dawson may supply less gas.
>
> [3] Dawson says that it has encountered unforeseen difficulties in extracting gas at Moura, due to the particular geology of part of

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22 (1936) 55 CLR 499.

its field, and that the relevant events and circumstances constitute a Force Majeure Event. In July 2007 Dawson purported to temporarily reduce its supplies pursuant to the force majeure provisions of the Agreement. In December 2007 it purported to permanently reduce its supplies.

[4] AGL says that for several reasons, these provisions have no operation in the circumstances which have occurred and that Dawson is in breach of the Agreement by failing to supply the quantities originally agreed. It claims that there has been no Force Majeure Event, that Dawson did not follow the requirements of the Agreement in giving its notices reducing its supplies and that in any case, by reason of the terms of the force majeure provisions, Dawson is precluded from relying upon the suggested Force Majeure Event because, in effect, it is Dawson's fault that it has been unable to extract sufficient gas. That last matter has resulted in an extensive factual inquiry within this trial. Otherwise the questions are ones of the proper interpretation of the Agreement for which the relevant facts are largely undisputed."

[56] His Honour then identified the relevant terms of the gas sale agreement ("Agreement") and explained their significance:

"[5] The Agreement was made in February 2003 between Energex Retail Pty Ltd as buyer and Dawson, then called Moura Sales Pty Limited, as seller. In 2006, AGL was substituted as the buyer.

[6] The Agreement was for an initial term expiring on 1 January 2008, with options to the buyer to extend for a further five years and then a further two years. AGL has extended the term so that at present, it is to expire on 1 January 2013.

[7] The quantity of gas to be delivered is to be no more than the "Maximum Daily Quantity" (or "MDQ"), as specified in a schedule to the Agreement. The agreed MDQ was initially 3,000 gigajoules per day, gradually rising to 11,000 per day in the 2006 calendar year, 16,000 per day in the next 16 months and from 1 May 2007, 18,000 gigajoules per day.

[8] Within those upper limits, the quantity of the gas to be delivered is according to what is "nominated" by the buyer. Clause 10.1 provides that the buyer may nominate any quantity of gas for delivery on any day, provided that the seller is not obliged to deliver more than the MDQ. The buyer is to submit various forecasts (monthly, weekly and daily forecasts) of its requirements. The daily forecast, described as the "Daily Nomination", is a notification of the buyer's required amount of gas to be delivered on the following day. Dawson is permitted to deliver day by day a quantity within a certain range of the Daily Nomination. However, each month it must supply the sum of the Daily Nominations for that month. By cl 5.1.2, Dawson is not required to supply gas other than from that area

defined as the "Gas Field". Accordingly, it was not obliged to make up any shortfall by buying gas from other fields.

[9] Regardless of what is nominated by the buyer, it is obliged to pay for a certain minimum quantity. In effect, the buyer has to pay for at least 80 percent of the aggregate of the MDQs for that month.

[10] As it was likely that the buyer would require at least the quantity for which it was in any event obliged to pay, in practical terms Dawson knew that it had to supply, over time, at least 80 percent of the MDQ and that it had to be prepared to supply, if required, the whole MDQ. That affected, or should have affected, Dawson's program for the exploration and extraction of this gas. The adequacy of that program and its implementation was a matter of considerable evidence and debate, to which I will return."

[57] Clause 14 of the Gas Sale Agreement ("Agreement") is of particular importance. It provided:

"**14. CURTAILMENT**

14.1 Curtailment by Moura Sales for Force Majeure

14.1.1 (Dawson) may Curtail provision of Services if, because of a direct Force Majeure Event, it cannot do, absolutely or in part, something it has to do under this Agreement (the "**Affected Obligation**"), when it has to do it. If a Force Majeure Event occurs, (Dawson) must without delay issue a Notice to (AGL) setting out:

a) what the Affected Obligation is;

particulars of the event (to the extent (Dawson) knows them);

b) its estimate of the reduction in Service capacity, in particular amending the MDQ under this Agreement over the Suspension Period; AND

c) its estimate of the duration of its inability to perform the Affected Obligation.

14.1.2 The Affected Obligation is suspended from the date the Notice is given until (Dawson) is able, after the exercise of all reasonable diligence, Good Engineering and Operating Practice and the employment of all reasonable means to remedy or abate the Force Majeure Event as expeditiously as possible, to perform the Affected Obligation (this period is the "**Suspension Period**").

14.1.3 A Force Majeure Event or circumstances affecting the performance under this Agreement by (Dawson)

shall not relieve (Dawson) of liability in the event, and to the extent, that the negligence or failure to use Good Engineering and Operating Practice by (Dawson) or the Coal Mine Owners caused or contributed to its failure to perform under this Agreement or in the event of its failure to use all reasonable endeavours including the expenditure of reasonable sums of money and the application of proven technology to remedy the situation and to remove the event or circumstances giving rise to the Force Majeure Event in an adequate manner with all reasonable despatch.

...

14.5 Notice when the Suspension Period ends

Upon completion of Maintenance activities under clause 14.3, or as soon as the Suspension Period under clause 14.1 ends, (Dawson) must, as soon as reasonably practicable, issue a Notice to (AGL). The Suspension Period ends when (Dawson), making reasonable efforts, is able to perform the obligation again, not when it gives the Notice.

...

14.7 Affected Party must rectify the situation if possible

During the Suspension Period (Dawson) must make reasonable efforts to place itself in a position to perform the Affected Obligation (but (Dawson) is not obliged to settle any strike, lock out, boycott, work ban or other labour dispute or difficulty).

14.8 Termination

If the Suspension Period lasts for more than 3 months, neither Party can terminate this Agreement, but either Party may, upon the expiry of that 3 months period, by Notice in writing to the other Party reduce the MDQ by the average quantity of Gas unable to be delivered or utilised on a Day over the Suspension Period and the Parties respective obligations under this Agreement will apply to that reduced MDQ for the remainder of the Term, effective immediately on Notification. The Authorised Officers of both Parties shall implement any necessary changes to MDQ pursuant to this clause by endorsing a variation to Schedule 2."

[58] Force Majeure Events are defined in a schedule to the Agreement. The definition is:

""**Force Majeure Event**" means any event or circumstance, or combination of events or circumstances, not within the control of a Party, and which by the exercise of Good Engineering and Operating Practice, and seeking in good faith to comply with its contractual and other obligations by the expenditure of reasonable sums of money

and the application of proven technology widely known to and generally available for use by persons in the gas industry, that Party is not able to prevent or (for the time being) overcome, including, without limiting the generality of the foregoing:

(a) an act of God including, but not limited to, landslide, earthquake, flood, wash-out, lightning, storm and action of the elements;

(b) strike, lock-out, ban or other industrial disturbance;

(c) act of a public enemy, terrorism, war, sabotage, blockade or insurrection, riot or civil disturbance, arrests and restraints of rulers and peoples;

(d) fire or explosion including radio-active and toxic explosion;

(e) epidemic or quarantine;

(f) order of any court or tribunal or the order, act or omission or failure to act of any government or Government Agency having jurisdiction;

(g) failure to obtain or retain any necessary consent or approval of a Government Agency (despite timely and reasonable endeavours to obtain same);

(h) unpredicted, sudden and material deterioration in productivity of more than one well or failure of wells, equipment or plant breakdown or failure that causes full or partial interruption of the delivery of Gas by (Dawson) under this Agreement;

(i) the total or partial inability of a Party to receive or have quantities of Gas which are available for supply or delivery transmitted through the Queensland Gas Pipeline or the Moura Mine Pipeline because of an event of Force Majeure excusing non-performance by the owners or operators of the Queensland Gas Pipeline or the Moura Mine Pipeline, as the case may be, under a clause in a relevant gas transportation agreement;

(j) shortages of labour or essential materials, failure to secure contractors and delays of contractors;

(k) any breach of contract by, or an event of Force Majeure affecting a person contracting with (AGL) ('Third Party Contractor'), which prevents (AGL) doing something that it has to do under this Agreement where (AGL) has taken all necessary, reasonable and practical action within a reasonable time to obtain performance of the Third Party Contractor's relevant obligation whether by the Third Party Contractor or another person; OR

(l) any order, direction, or requirement under laws relating to Aboriginal heritage or native title;

but does not include:

(a) full or partial interruption of the delivery of Gas by (Dawson) due to failure or unpredicted and sudden deterioration in productivity of a single well, or the failure or breakdown of a single piece of equipment or plant, including compressors, pumps, Gas measurement equipment, and gathering lines;

(b) full or partial interruption of the delivery of Gas by (Dawson) due to failure or unpredicted and sudden deterioration in productivity of a single dehydration unit if such failure or unpredicted and sudden deterioration could have been prevented by the exercise of Good Engineering and Operating Practice;

(c) (AGL's) loss of customers, loss of market share or reduction in demand for Gas;

(d) a Party's lack of funds or inability to obtain or use funds; OR

(e) changes in market conditions relevant to the transportation and/or the purchase and sale of Gas."

[59] The trial judge noted these further facts:

> "[30] When the Agreement was made in 2003 Dawson was extracting gas from a parcel of land ... called Hillview. ... wells have a limited life ... And having regard to the increasing MDQ during the life of the Agreement, Dawson well knew that it would have to drill wells beyond Hillview in order to meet its commitments.
>
> [31] ... Ridgedale is alongside Hillview. Dawson commenced exploratory work on Ridgedale at the end of 2004. The first of the production wells on Ridgedale was drilled by 13 June 2005 and began to produce gas from December 2005. Dawson attempted to drill 15 production wells in Ridgedale. Two ... did not produce any gas. ... five ... produced some gas but their production had ceased by the time of the Curtailment Notice in July 2007. The other wells were still producing then, although in each case ... production had been less than ... expected. So each of these 15 wells was either never productive or was less productive than ... forecast. In each case the problem is said to have been the difficult and unforeseen geological conditions ... encountered."

[60] Dawson contends that the difficulties it encountered in extracting gas from the Ridgedale wells constituted an FM Event as defined and that it was accordingly entitled to curtail the supply of gas required under the Agreement. It gave a Curtailment Notice to AGL by letter dated 9 July 2007, which read:

> "**Gas Sales Agreement – Curtailment Notice**
>
> (Dawson) hereby gives notice of Curtailment pursuant to clause 14.1.1 of the Agreement dated 28 February 2003 originally entered between (Dawson) and (AGL) ... (the **Agreement**).

In accordance with clause 14 of the Agreement, (Dawson) advises:

Affected Obligation

The Affected Obligations are the obligations of (Dawson) under clause 5.4, clause 91.1.1, clause 9.3 and clause 10.

Particulars of the event

The particulars of the event, to the extent (Dawson) knows them, are:

- In developing 15 new wells at Ridgedale, (Dawson) has encountered unpredicted and substantial geological problems;
- The geological problems are most prominently severe structuring and faulting of lateral drill holes at various levels;
- Structuring and faulting problems has caused both drilling difficulties and closing of lateral drill holes at Ridgedale;
- Of 15 wells drilled at Ridgedale, 2 have been abandoned due to the extent of the difficulties encountered with the loss of the considerable cost of development of these wells;
- Due to the drilling difficulties and closing of lateral drill holes, recovery of Gas from the Ridgedale wells has been materially less than was forecast prior to the commencement of development of these wells;
- Attempts to resolve the impacts of structuring and faulting problems in accordance with obligations under the Agreement, have been ongoing but not successful to date and on current analysis may not be successful;
- Wells which have failed to produce to date may well have to be abandoned depending on the outcome of ongoing measures to remedy within the terms of the Agreement;
- The Ridgedale wells were developed following analysis of the Gas field and particularly the Hillview wells;
- The Ridgedale wells were planned to come into production to meet projected contractual obligations;
- The problems encountered in developing the Ridgedale wells were unexpected and unpredicted, particularly having regard to the geological information available to (Dawson) at the time;
- (Dawson) has undertaken all stages of investigation and development of the Ridgedale wells in accordance with proven technology and practice as widely known to and generally available for use in the gas industry;
- (Dawson) has expended approximately $15,000,000.00 in developing the Ridgedale wells;

- For developed wells at Hillview, the Gas available for recovery is less than initially predicted due to unexpected difficulties in production;
- Without limiting the above, the circumstances are such that there has been an unpredicted, sudden and material deterioration in productivity of more than one well and a failure of wells;
- (Dawson) has exercised Good Engineering and Operating Practice at all times;
- (Dawson) has sought to act in good faith to comply with its contractual and other obligations by the expenditure of reasonable sums of money and the application of proven technology widely known to and generally available for use by persons in the gas industry.

The events and circumstances are beyond the control of (Dawson).

(Dawson) has not been able to overcome these events notwithstanding the exercise of Good Engineering and Operating Practice and seeking in good faith to comply with its contractual and other obligations by the expenditure of reasonable sums of money and the application of proven technology widely known to and generally available for use by persons in the gas industry.

Estimate of reduction in service capacity

(Dawson) estimates the reduction in Service capacity of 8,000 Gj per Day and in particular amends the MDQ to 10,000 Gj per Day over the Suspension Period.

Estimate of duration

(Dawson) estimates the duration of its inability to perform the Affected Obligations as 14 months form the date of this notice.

We reserve all other rights, remedies and claims under the Agreement and this notice is in addition to and without prejudice to any such rights, remedies or claims."

[61] The particular events or circumstances with which the litigation was concerned were said to be within subparagraph (h) of the definition of Force Majeure Events:

> "Unpredicted, sudden and material deterioration in productivity of more than one well or failure of wells, equipment or plant breakdown or failure that causes full or partial interruption of the delivery of Gas by (Dawson) under this Agreement."

Dawson submitted that the poor gas flow from the Ridgedale wells fell within the designation "unpredicted, sudden and material deterioration in productivity of more than one well or failure of wells".

[62] The trial judge found, and gave substantial reasons for finding, that the inadequate productivity of the Ridgedale gasfield exploited by Dawson to supply gas under the Agreement was not an FM Event as described in subparagraph (h).

[63] One notes that the definition of FM Event in the Agreement contained what might be called a general description of such an event followed by 12 examples or illustrations which are said to be "included" in the definition, "without limiting its generality". The trial judge did not consider whether the general description of an FM Event found in the introductory part of the definition had been satisfied. Dawson submitted that example (h) was a stand-alone definition and that whether or not the low productivity of the gas field was an FM Event was to be determined by reference to the terms of subparagraph (h) only. The trial judge expressed the tentative view that this was the correct approach but that it was "unnecessary to resolve this question ... because of (his) conclusions that for other reasons there was no Force Majeure Event."

[64] By notice of contention AGL submits the general description of an FM Event must be satisfied where a party to the Agreement relies, as Dawson does, on any of the described circumstances in subparagraphs (a) to (l). It submitted more particularly that Dawson had to establish not only that there had been a failure of wells, or unpredicted sudden material deterioration of productivity in wells, but that as well the failure or deterioration was:

(a) not within Dawson's control;

(b) not one which Dawson was able to prevent or (for the time being) overcome:

(i) by the exercise of good engineering and operating practice, and

(ii) seeking in good faith to comply with its contractual and other obligations by

A. the expenditure of reasonable sums of money, and

B. the application of proven, or widely known, generally available, technology.

[65] Dawson's submission was that:

> "Where the event relied upon to curtail the supply of gas under the Agreement is one of those identified in subparagraphs (a) to (l) of the definition of FM Event it is unnecessary to establish the general requirements found in the beginning of the definition."

The submission continued:

> "The first part of the definition is a general provision defining what will constitute a sufficient event or circumstance ... to constitute an FM Event. It is cast widely to extend to *any* event or circumstance which has the further characteristics described ...
>
> The definition then recognises a number of specific events and circumstances which are accepted for the purposes of the Agreement as being FM Events. ...
>
> ... The events and circumstances identified in subparagraphs (a) to (l) are specific events that the parties have agreed are to be taken to be events or circumstances which are '*not within the control of a party* ... .'

> The general words are taken to have been satisfied once one of the specific events has been established."

[66] The relevant facts have been found by the trial judge and are not now in contest. The appeal turns on the proper construction of the Agreement. It may be shortly determined if AGL's submissions are accepted because it was found that Dawson had not exercised good engineering and operating practice in its attempt to exploit the Ridgedale gasfield so that it could not satisfy the definition of an FM Event if what was called "the general requirements" of the definition applied to subparagraph (h).

[67] A brief examination of subparagraph (h) is enough to show that it describes or contains three categories of events, any one of which may qualify as an FM Event. They are:

1. Unpredicted, sudden and material deterioration in productivity of more than one well;

2. Failure of wells;

3. Breakdown or failure of plant or equipment.

Each must cause full or partial interruption to the delivery of gas under the Agreement. The effect of exclusion (a) is that the breakdown of plant must effect more than one item, unless it be a dehydration unit and the terms of exclusion (b) are satisfied. The appeal is not concerned with a breakdown of plant.

[68] If Dawson's submissions are accepted any breakdown or failure in plant or equipment, and any failure of wells, which causes an interruption to the delivery of gas, will be an FM Event. This is so regardless of the cause of the failure or breakdown. An act of deliberate sabotage by Dawson's employees would qualify as an FM Event as would the failure of critical plant because of gross neglect in the maintenance of the plant.

[69] Such a construction gives an absurdly wide ambit to the meaning of an FM Event. The absurdity disappears if one requires the general description of an FM Event to apply to the events or circumstances described in (h). On this basis a failure of wells, or breakdown or failure of equipment or plant, or the unpredicted, sudden and material deterioration in productivity of wells will be FM Events (assuming they caused interruption to gas delivery) only if they were not within Dawson's control, could not have been prevented by the exercise of good engineering practice by Dawson acting in good faith to comply with its contractual obligations by the expenditure of reasonable amounts of money and the application of proven technology.

[70] Other examples would share the absurdity if Dawson's construction were accepted. Example (g) is:

> "Failure to obtain or retain any necessary consent or approval of a Government agency (despite timely and reasonable endeavours to obtain same)".

The proviso applies only to obtaining consents, not retaining them.

If the introductory words of the definition did not apply then the failure of a contracting party, perhaps the deliberate failure, to comply with the conditions of a

consent or approval so that it lapsed or was cancelled would be an FM Event. If, however, the failure to retain the consent or approval must be beyond the control of the party exercising good practice and acting in good faith to comply with its contractual obligations to qualify as an FM Event the clause will have a sensible operation.

[71] The events described in (j) provide another example. Shortages of labour, materials or contractors are, on Dawson's construction, FM Events even though it was within Dawson's control to prevent them, by hiring staff or buying materials. The curiosity that a party may by its own default, perhaps wilful default, bring about an FM Event is avoided by requiring the described events to satisfy the general requirements.

[72] Dawson's answer to these objections is to point to clause 14.1.3 of the Agreement which is said to prevent it taking advantage of its own inactivity or wrongdoing. The clause provides that an FM Event affecting Dawson's performance under the Agreement shall not relieve it of liability:

> "... in the event and to the extent that the negligence or failure to use good engineering and operating practice ... caused or contributed to its failure to perform or in the event of its failure to use all reasonable endeavours ... to remedy the situation ... with all reasonable despatch."

[73] The answer is inadequate for three reasons. The first is that clause 14.1.3 is not concerned with defining what is, or is not, an FM Event but with limiting the contractual consequences of an FM Event. Should an FM Event occur Dawson is not relieved from its obligation to perform the Agreement to the extent that, and in the event that, it did not use appropriate practice to prevent the occurrence of the FM Event, or to overcome it once it occurred. One must look beyond clause 14.1.3 itself, to the definition, to see whether there has been an FM Event.

[74] The second reason is that, according to Dawson's submission, the onus on proving that it did not use good practice etc, and so caused or contributed to the occurrence of the FM Event, or delayed overcoming the effect of the FM Event by negligent inaction, is on AGL, the party remote from the gas field and its operation and thus in a poor position to know what caused the event and what Dawson did in response to it.

[75] AGL did not accept that clause 14.1.3 cast an onus on it to prove whether Dawson's negligence or failure to use good practice caused or contributed to its failure to perform the Agreement or the extent to which it could not perform it because of its negligence or failure. It submitted that Dawson should prove the negative. The point of construction is fairly arguable both ways. It is not necessary to resolve the question. Assuming Dawson's submission to be correct, the operation of clause 14.1.3 when combined with Dawson's preferred definition of an FM Event, would make the Agreement work lopsidedly in favour of Dawson. Any failure of wells, or of plant or equipment, (having the described result) however caused and no matter how preventable would be an FM Event unless AGL, a stranger to Dawson's operations, could prove that it had been negligent or failed to exercise good engineering and operating practice.

[76] This construction is likely to lead to unsatisfactory and inconvenient results. I cannot accept it.

[77] The third reason is that if the general requirements of the definition did not apply to the particular examples given, there would be no obligation upon a party seeking to rely upon an FM Event to have acted in good faith to comply with its contractual obligations. Dawson could by acting in bad faith bring about a failure of plant and equipment (example (h)); or fail to hire contractors or dismiss staff (example (j)); or breach the conditions of a consent or approval to bring about its cancellation (example (g)); and in each case rely on the consequences as an FM Event.

[78] In this regard clause 14.1.3 will not assist. It makes no mention of good faith. Once an FM Event (however defined) occurs Dawson is not relieved from its contractual obligations "in the event and to the extent" that its negligence or failure to use good practice caused or contributed to its lack of performance or in the event that it did not use all reasonable endeavours to remedy the situation and remove the event or circumstances giving rise to it "with all reasonable despatch." The clause does not apply to a situation in which the event has been caused or continued by bad faith.

[79] Dawson seeks to avoid this consequence by arguing that the Court would imply an obligation to act in good faith into clause 14.1.3 of the Agreement. The answer is unsatisfactory. It requires ignoring an express obligation to act in good faith found in the opening words of the definition and then supplying the want by implying such a term.

[80] The parties cannot have intended that Dawson's obligation to deliver gas should abate in circumstances where its bad faith caused it to be unable to make the deliveries. The absurdity is removed if one requires the general requirements of the condition to be satisfied as well as the particular description of FM Events found in the examples (a) to (l).

[81] The trial judge expressed the tentative opinion that the terms of subparagraph (k) and the exclusion (b) indicated that the general requirements did not apply because, if they did, parts of those subparagraphs would be unnecessary.

[82] The point is that subparagraph (k) provides that any breach of contract by, or an FM Event affecting, a third party contracting with AGL which prevented AGL performing its part of the Agreement is itself an FM Event if AGL had:

> "... taken all necessary reasonable and practical action within a reasonable time to obtain performance of the third party contractor's ... obligation".

Exclusion (b) is the failure or unpredicted and sudden deterioration in productivity of a single dehydration plant:

> "... if such failure or ... deterioration could have been prevented by the exercise of good engineering and operating practice."

[83] There is substantial though not complete overlap, between these qualifications and the terms of the general requirements that an FM Event occurs only where the party seeking to rely upon it had exercised good engineering and operating practice, acted in good faith and spent reasonable amounts of money applying proven technology. The repetition of the similar qualification would be unnecessary if the general requirements applied to these examples.

[84] AGL argues that the inclusion of the repetitious condition does not indicate the general requirements were meant to be excluded. It argues there is something

peculiar to the subject matter of subparagraph (k) and exclusion (b) so as to make it appropriate to include a special qualifying circumstance similar though not identical to part of the general requirements.

[85] I do not find the submission particularly persuasive. There is, with respect, substance in the trial judge's observation but it does not outweigh the considerable indications I have described which, in my opinion, make it clear that the general requirements of the definition must apply to the particular illustrations found in the subparagraphs, (a) to (l).

[86] In my opinion the general words of the definition, the general requirements as they were called, must be satisfied if an event which leads to a failure to supply contractual amounts of gas is to qualify as an FM Event entitling Dawson to give a Curtailment Notice.

[87] The trial judge found that Dawson had not used good engineering and operating practice in its exploration and development of the Ridgedale gas field. His Honour said:

> "If these general words of the definition apply, the onus would be upon (Dawson) to prove that by the use of seismic exploration ... (it) would not have been able to prevent the relevant occurrence. In effect (Dawson) must prove that seismic exploration would not have revealed sufficient information to make the drilling of these wells so risky that it would not have occurred. Because the extent of the problems which would have been revealed remains a matter of speculation, it cannot be said that more probably than not the seismic exploration would not have made a difference to what Dawson did or ought to have done at Ridgedale."

[88] The finding was not challenged on appeal: Dawson expressly accepted it and the consequence that if the general requirements applied it had failed to prove that the events or circumstances which it contended were an FM Event was not preventable by the exercise of good engineering and operating practice by the expenditure of reasonable sums of money and the application of proven, widely-known, generally available technology.

[89] The appeal should be dismissed on this ground.

[90] The trial judge noted that the:

> "... Curtailment Notice described the FM Event in several ways and in broad terms, rather than identifying anything which was said to be a single occurrence. (Dawson's pleading does) not specify what it was which constituted the FM Event. In their final submissions (Dawson) put the matter in these terms:
>
> > "The ... primary submission is that the failure of more than one well ... was a sufficient event or circumstance to satisfy the definition of an FM Event.
> >
> > Alternatively, the definition ... is satisfied by:
> >
> > (i) the failure of more than one well and/or the unpredicted, sudden and material deterioration in productivity of more than one well;

(ii) the presence of low angle thrust faulting, shearing of the coal within the seams and/or the presence of coal fines within the seams ...

(iii) ..."

[91] The reference to thrust faulting, shearing and coal fines is to geological conditions encountered in the Ridgedale gas field which reduced or prevented the extraction of gas from the coal seams.

[92] The trial judge pointed out that Dawson gave only one Curtailment Notice:

> "... according to which the FM Event was constituted by many occurrences at different times over a period which, on any view, extended for more than a year. ... (Dawson's) case ... relies upon the entirety on what happened at Ridgedale throughout that period."

[93] The trial judge also found:

> "[67] ... Because of the way in which (Dawson) put (its) case, the date of occurrence of the FM Event for which they contended is not easy to identify. If the failures of wells were regarded as, in total, the FM Event then the last ... failed on 23 May 2007. Even the period between then and 9 July 2007 would ... constitute a delay. Alternatively, if there was an FM Event in ... encountering ... geological conditions, then ... this had occurred at least by ... June and July of 2005 ... . the giving of the Curtailment Notice did not coincide with any particular event ... . On any view ... if there was an FM Event Dawson did not give the Curtailment Notice without delay".

[94] The facts summarised in these observations give rise to a point which was not decided at first instance but which was the subject of submissions on appeal. It is that the Curtailment Notice, not having been given "without delay" as clause 14.1.1 requires was invalid. The giving of a prompt notice was said to be a necessary condition for a valid notice.

[95] Whether clause 14.1.1 takes effect as a condition precedent so that the lack of notice given without delay precludes Dawson from relying upon the failure of Ridgedale gas field as an FM Event depends, obviously, on what the parties intended to be the effect of the clause. It is a question of construction to be answered in the orthodox manner: by examination of the language of the clause and its commercial purpose both to be assessed against the background facts known to both parties when the Agreement was made. See *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179.

[96] The language of clause 14 bespeaks urgency. Dawson "may curtail ... services if ... it cannot do ... something it has to do ... when it has to do it". If an FM Event occurs, "Dawson must without delay issue a notice" setting out what it cannot do; the extent of its incapacity; the length of incapacity.

[97] By clause 14.1.2 the obligation which Dawson cannot perform is suspended from the giving of the notice but only until Dawson can, after exercising all reasonable

diligence, good practice and all reasonable means "as expeditiously as possible", overcome or abate the FM Event.

[98] The effect of the provisions is that when Dawson cannot perform one or more of its obligations under the Agreement because of the occurrence of an FM Event it must without delay give notice of its inability and then employ all reasonable diligence and good practice and take all reasonable means to recover its ability to perform the Agreement, as expeditiously as possible. The Notice of Curtailment has two effects: it suspends Dawson's obligation to perform the Agreement and obliges it to do everything it reasonably can as quickly as possible to put itself in a position where it can perform the Agreement.

[99] In this scheme a notice issued a substantial period after the occurrence of the FM Event would be incongruous. To be efficacious to commence the suspension period and initiate Dawson's obligations to remedy or abate the FM Event as expeditiously as possible the notice must be issued "without delay", which I would take to mean as soon as it becomes obvious that the FM Event has prevented, or will prevent, performance.

[100] The commercial purpose for giving the Curtailment Notice would seem to be to allow AGL to assess whether the event was in fact an FM Event and whether if it were it had been brought about by Dawson's negligence or failure to use good practice (clause 14.1.3) and so judge the extent to which Dawson was relieved of its obligation to supply gas.

[101] The gas which AGL bought from Dawson was on-sold by it to consumers and other suppliers. Its contracts with its buyers would be at risk if the supply of gas to it from Dawson were curtailed. It may, in that event, be obliged to buy gas from other suppliers. The giving of notice without delay of an interruption to supply would permit AGL promptly to assess the situation and make arrangements to honour its contracts to sell gas to its buyers.

[102] The commercial purposes of the notice could be seriously affected if Dawson were not obliged to give it promptly after an FM Event. AGL would not know whether and to what extent the FM Event (of which it would remain ignorant) had affected Dawson's capacity to sell gas to it and its need to obtain alternative supplies of gas.

[103] Dawson's submissions treat the words "without delay" as superfluous. It regards clause 14.1.1 as allowing the giving of a Curtailment Notice any time after an FM Event prevented its performance of the Agreement. This overlooks the imperative mood "must without delay issue a notice" and makes nonsense of the obligation to overcome the FM Event as quickly as possible.

[104] Both the text of clause 14 and the commercial context of the Agreement lead to the conclusion that a Curtailment Notice will not be valid unless issued without delay after the occurrence of an FM Event.

[105] I would construe clause 14 as meaning that unless a Curtailment Notice be given without delay it is not a notice for the purposes of the clause and does not have the effect of suspending Dawson's obligation to deliver gas.

[106] Although the construction of contractual terms is in every case to be essayed by an examination of the particular contractual text and context, authorities on similar clauses may assist. They may show an approach to a certain type of clause. In *Bremer Handelsgesellschaft Schaft M.B.H. v Vanden Avenne Izegem P.V.B.A.*

[1978] 2 Lloyd's Rep 109 the House of Lords considered *inter alia* a contract for the sale of soya bean meal. The relevant clause provided that the sellers should not be responsible for delay in shipment of the goods occasioned by specified "Force Majeure" events with the qualification:

> "If delay in shipment is likely to occur for any of the above reasons, shippers shall give notice to their buyers by telegram, telex or teleprinter or by similar advice within seven consecutive days of the occurrence or not less than 21 consecutive days before the commencement of the contract period whichever is later. If after ... such notice an extension to the period ... is required shippers shall give further notice not later than 2 days after the contract period of shipment ..."

[107] Lord Wilberforce, with whom Lord Keith agreed, said (116):

> "If the force majeure notice was defective ... and any defect was not waived ... then the question arises whether the sellers are entitled to the protection of the clause. The existing authorities ... support the view that they are not, on the ground that cl 22 is a complete regulatory code in the matter of force majeure, and that accurate compliance with this stipulation is essential to avoid commercial confusion in view of the possibility of there being long strings of buyers and sellers. I agree with these decisions."

[108] Lord Salmon said (125):

> "Before leaving cl 22 I should make it plain that, in my view, the condition as to the time in which notice had to be served was a condition precedent to the efficacy of this notice. I cannot agree with the argument on behalf of the sellers that the breach of this condition would entitle the buyers only (a) to recover any damages caused by the breach or (b) to treat the notice as a nullity, if they could prove that they had suffered serious prejudice by the notice having been out of time."

[109] One of the authorities to which Lord Wilberforce referred was *V. Berg & Son Ltd v Vanden Avenne-Izegem P.V.B.A.* [1977] 1 Lloyd's Rep 499. The case involved the same Force Majeure clause. The contract in question was for the sale of sweet potato slices. Loading was delayed because of torrential rain in Shanghai. The sellers did not give notice within the time stipulated for in the Force Majeure clause. The Court of Appeal held this to be fatal to the seller's attempt to avoid liability for late delivery. Lord Denning MR said (503):

> "It is sufficient, in my view, that the sellers did not do what was necessary to be able to avail themselves of the force majeure clause. Their notices were not sufficient to satisfy it. ... The answer to the question ... is that the sellers are liable."

Roskill LJ said (504):

> "I rest my decision ... on the view that there has not been any proper compliance with the provisions of what has become known as the fourth sentence in the force majeure clause ... . The fourth sentence

> ... requires the shippers to give their further notice not later than two days after the last day of the contract period of shipment ...".

[110] Another authority cited was *Andre & Cie S.A. v ETS. Michel Blanc & Fils* [1977] 2 Lloyd's Rep 166. Ackner J said (177):

> "Traders attach great importance to the giving of the correct notices stipulated by (the Force Majeure clause) including the notices which have to be given when shipment is delayed or prevented, because failure to observe the rules prescribing notices jeopardises the viability of string transactions."

[111] That concern that timeous notice be given to protect parties in a "string" of sales is not, perhaps, relevant to the Agreement, though AGL had on-sold gas. Lord Wilberforce's description of the Force Majeure clause relevant to those cases as "a complete regulatory code in the matter of Force Majeure, and that accurate compliance ... is essential to avoid commercial confusion" is, I think, apposite. More generally, contractual notices which one party may give another unilaterally altering the rights of the parties to the contract must comply strictly with the terms which govern the giving of notice. An example is *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749. The principle just stated is expressed by Lord Steyn at 773. See also Lord Goff (who dissented) at 755. The case concerned a break clause in a lease but "such notices belong to the general class of unilateral notices served under contractual rights" (per Lord Steyn at 768).

[112] Clause 14 sets out the circumstances in which Dawson will be relieved from its contractual obligations. The suspension of those obligations is a matter of considerable importance to AGL and those who buy gas from it. The right conferred on Dawson to give a curtailment notice affects AGL's rights to buy gas and may expose it to liability. The Agreement is to run for a long time and the amounts of gas and money which change hands pursuant to its terms are considerable. The parties are to be taken to have intended that the alteration of obligations in such a contract which may have such consequences should be permitted only in the precise circumstances the parties themselves specified. Relevantly that means that unless a Curtailment Notice be given without delay it will be invalid.

[113] I would therefore construe clause 14.1.1 as requiring a Curtailment Notice to be given without delay if it is to bring about the consequences described in the succeeding subclauses. Such a construction accords with the "Force Majeure" cases, and the general principal that contractual rights may only be altered unilaterally in the precise manner provided for in the contract. The Notice was not given without delay. It did not therefore have the effect of suspending Dawson's obligations to supply the amounts of gas nominated by AGL.

[114] On this ground too, the appeal should be dismissed.

[115] There remains to consider the ground on which the trial judge found against Dawson, i.e. that it had not demonstrated that the deficiency in production of gas from Ridgedale fell within the description of an FM Event found in subparagraph (h) of the definition. It is not necessary for the outcome of the appeal to discuss the point but because it was the subject of extensive argument and founded the basis for the judgment in the Trial Division, I should address it.

[116] The trial judge reasoned:

"[35] (Dawson's) case, like the Curtailment Notice, does not attempt to identify any point in time when there was this occurrence of an FM Event. Rather their case is that by the time of the ... Notice, an FM Event had occurred by a combination of events and circumstances over a period. On their case, no distinct occurrence must be demonstrated, because an FM Event might be constituted by considering together a sequence of distinct happenings. ...

[36] A further element of the ... argument is that cl 14 does not require the FM Event to have an immediate impact on the delivery of gas. ...

[37] In my view, what is relied upon as an FM Event must be something with an immediate effect upon Dawson's capacity to supply and thereby upon its then performance. Clause 14.1.1 provides that 'if an FM Event occurs (Dawson) must without delay issue a (Curtailment) Notice'. Contrary to (Dawson's) argument this could mean only that the notice is to be issued without delay from the occurrence which is said to constitute the FM Event. ...

[38] ...the effect of an FM Event must be disabling: it must have the result that Dawson cannot, absolutely or in part, perform the ... obligation of supplying gas. ... This is because cl 14 is engaged only where the agreed quantity cannot be supplied. ...

[39] This requirement of an immediate effect of the FM Event is illustrated by para (h) ... which refers to the deterioration in productivity of more than one well or the failure of wells causing 'full or partial *interruption* of the delivery of Gas. …

…

[42] ...this argument involves a misinterpretation of ... para (h). What is referred to ... is the *failure* of wells rather than the failures of wells. ... to fall within the specific inclusion ... what must occur for several wells, by a failure or an unpredicted, sudden and material deterioration in productivity, are events which operate in combination to cause a certain interruption of the delivery of gas.

[43] The generality of this Curtailment Notice and of (Dawson's) submissions as to what constitutes the FM Event results from these flaws in their case. They have failed to identify a certain occurrence in the sense of an event or circumstance, or events or circumstances acting in combination, having an immediate consequence upon Dawson's performance at that point in time. ...

[44] ...(Dawson has) not attempted to identify an occasion which represents an interruption in the delivery of gas. Nor (has it) sought to prove the extent of the diminution in Dawson's capacity from ... the failures of certain wells; other than ... by reference to Dawson's forecasts of production.

…

> [46] ...The 'deterioration in productivity' ... involves a comparison of ... actual productivity at two points in time. It does not involve a comparison of ... *forecast* productivity with ... actual productivity."

[117] Dawson took issue with these reasons. It argued that "the opening words of the definition of FM Event comprehend that (it) may be a combination of events or circumstances. The words 'failure of wells' are apt to describe separate failures of wells brought about by different events. There is no indication that the words 'unpredicted sudden and material deterioration in productivity of more than one well' should be confined to a deterioration resulting from a single occurrence or event or that the failure of one well must necessarily coincide in time with another". The submission continued that the trial judge's focus on the requirement for there to be an interruption in the flow of gas did not give effect to the words of subparagraph (h) which did not require that the failure of wells cause an interruption in the flow of gas from particular wells. Nor was it necessary that wells should first come to production before they could fail. It was a mistake to read "failure" where it appears in the subparagraph as requiring a singular event: the word should be taken to include the plural form, failures.

[118] Dawson complains that the construction favoured by the trial judge imposes extremely limited operation on subparagraph (h). It submits that production wells may fail progressively and to exclude progressive failure of wells unduly restricts the operation of subparagraph (h) to a failure of wells caused by a single event effecting several wells at the same time.

[119] Dawson also submits that the trial judge was wrong to conclude that an FM Event must necessarily have an immediate effect upon its capacity to supply gas. It points to the illustrations of FM Events found in subparagraphs (f), (g), (j) and (l) as being circumstances where the effect of the event may be delayed.

[120] This last submission overlooks the language of clause 14 which I mentioned when dealing with the efficacy of the Curtailment Notice. The notice must be issued without delay upon the occurrence of an FM Event; the suspension of obligations occurs immediately upon the giving of notice; Dawson must work "as expeditiously as possible" to overcome the effect of the FM Event and must act "with all reasonable despatch". These provisions are incompatible with the notion that there may be a substantial lapse of time between an FM Event, inability to supply gas, and the giving of notice suspending the obligation to do so.

[121] Dawson also challenges the trial judge's conclusion that an FM Event must be disabling. Dawson submitted that the Agreement did not require it to curtail the supply of gas should an FM Event occur by invoking the procedure set out in clause 14. It was said to follow that there might be non-disabling FM Events. It is no doubt true that Dawson did not have to give a notice after an FM Event occurred. It may have continued on in breach of contract or supplied gas from alternative sources. If, however, it did invoke clause 14 it could only be on the basis of an FM Event which made it impossible for it to supply the contracted amounts of gas.

[122] Dawson criticises the trial judge's reliance on the need for the FM Event defined in subparagraph (h) to bring about an interruption to the supply of gas. His Honour thought this connoted an immediate effect of the FM Event. Dawson submits that "there is no necessary temporal connection between (the event) and the interruption

of ... the delivery of gas. The connection is a causal one. The interruption may occur after the FM Event."

[123] In my opinion the natural meaning of the words support the trial judge's conclusion. The FM Event must interrupt the supply of gas. That does suggest immediacy. There is a flow of gas which is interrupted, broken off, which ceases. The word to my mind does suggest a close connection in time between the event and the interruption.

[124] It is conspicuously noteworthy that in its attempt to bring the insufficient supply of gas from Ridgedale within the definition of an FM Event, Dawson was obliged to import the introductory words of the general requirement into subparagraph (h). This is the main thrust of its submission as I summarised it in paragraph [63]. Dawson was obliged to argue that the unpredicted, sudden and material deterioration in productivity of more than one well, or the failure of wells, could be constituted by a combination of events or circumstances so that a failure of wells may in fact be the separate failures of a number of wells brought about by different events at different times, and the unpredicted, sudden and material deterioration in productivity of more than one well may occur by the separate decline in productivity in a number of wells from different geological causes at different times.

[125] Reliance on that part of the general definition of an FM Event is essential because Dawson's case was, as its submissions confirm, that the underperformance of all of the wells at Ridgedale over a year or so is the FM Event. There was no *failure* of wells or *one* occasion on which there was a sudden etc. deterioration in productivity of wells which had an immediate impact upon Dawson's capacity to deliver the nominated quantities of gas.

[126] Dawson's need to apply part of the general requirements of the definition of an FM Event shows how completely untenable its construction of subparagraph (h) is. It imports that part of the general requirements which it needs but steadfastly objects to the application of the whole of the general requirements to subparagraph (h). That is Dawson contends that an FM Event is:

> "Any ... combination of events or circumstances, including
>
> > 'unpredicted, sudden and material deterioration in productivity of more than one well or failure of wells, ...that causes full or partial interruption of the delivery of gas'"

but also contends that the events or circumstances, may have been within the control of Dawson and might have been prevented by the exercise of good practice etc.

[127] It is neither possible nor sensible to pick and choose between parts of the general definition of FM Event. Either the whole applies to the examples given in subparagraph (l) (as I have concluded) or each must be taken as self-contained.

[128] If self-contained the appeal fails because subparagraph (h) will not apply without the aggregation of events and circumstances to constitute the failure or deterioration in productivity of wells. If the general requirements of the definition apply to (h) the appeal fails because Dawson, as the trial judge found, did not exercise good engineering and operating practice.

[129] I do not accept Dawson's complaint that this construction of the Agreement unduly restricts the operation of clause 14. Coupled with the definition of FM Event the clause has wide scope. Any event or circumstance or combination thereof which was beyond Dawson's control and could not have been prevented by good engineering practice in the honest endeavour to perform the Agreement by the expenditure of reasonable amounts of money applying established technology which prevents Dawson from supplying gas, will relieve it of the contractual obligation to do so.

[130] The problem for Dawson, as found by the trial judge, is not that the Agreement is unfairly restrictive but that Ridgedale was inadequately investigated and none of the production wells yielded the expected quantities of gas. The entire field was a failure which became apparent over several years as unproductive wells were drilled. To have succeeded in the action, and to succeed on appeal, Dawson must fit these facts into the contractual definition of an FM Event. For the reasons given by the trial judge it is an impossible task.

[131] Dawson very belatedly sought to meet this objection to its case by producing, for the first time on appeal, schedules drawn from the evidence which purport to show a substantial reduction in the average daily production of gas from the Ridgedale wells in the month or so prior to the Notice of Curtailment and, separately, in the six months prior to the notice. The purpose of the schedules was to show that there had been a sudden (if six months or even one month be sudden) deterioration in production of more than one well at about the same time (January to July 2007). AGL objected to the receipt of the schedules because they raised a different factual case to that argued at trial. Because the new case was one which might have been met by evidence which was not adduced or examined at trial because Dawson's case had not been framed in that way, the point cannot be raised now. See *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 439; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8).

[132] For these many and manifold reasons the appeal should be dismissed with costs. There was a second appeal, brought pursuant to leave given by the trial judge, against the orders for costs made at the conclusion of the trial. That appeal should be dismissed for the reasons given by Fraser JA.