BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHCV (COM) 2011/13 and 14

BETWEEN:

HUGH BROWN & ASSOCIATES (PTY) LTD

Claimant

and

KERMAS LIMITED

Defendant

AND BETWEEN:

MERLIN MINERAL RESOURCES LIMITED

Claimant

and

KERMAS LIMITED

Defendant

Appearances: Mr Stanley Brodie QC and Mr John Carrington for the Claimants
Mr Brian Doctor QC and Mr Rupert Allen for the Defendant

JUDGMENT

[2011: 14-18, 21, 26 November and 7 December]

(Contract – breach – novation – assignment)

[1] **Bannister J [ag]:** The Claimant in action BVIHC (COM) 14 of 2001 ('the Heads of Agreement ('HoA') claim', 'Merlin UK') claims damages against a BVI registered company called Kermas Limited ('Kermas') for breach of an agreement dated 3 June 2008 and made between a Hong Kong registered company called Samancor (HK) Limited ('Samancor HK'), Kermas and a South African

registered company then called Main Street 626 (Proprietary) Limited but which changed its name on 4 June 2008 to Merlin Mineral Resources (Proprietary) Limited ('Merlin SA'). The purpose of the HoA was to regulate the relationship between the parties in relation to a proposed mining project in the Republic of Burundi.

[2] The Claimant in action BVIHC (COM) 13 of 2001 ('the HB&A claim'), Hugh Brown and Associates (Pty) Limited ('HB&A')) claims damages against Kermas for breach of an agreement alleged to have obliged Kermas to retain the professional services of HB&A in the management of the mining project until roughly the end of July 2011. The principals behind HB&A, Mr Hugh Brown ('Mr Brown') and Mr Jacobus Smit ('Mr Smit') were, at the time when the HoA was entered into, also the principals behind Merlin SA. The two claims are intertwined, were tried together and it is convenient to deal with them in a single judgment.

Background

[3] Mr Brown describes himself as a South African company executive and entrepreneur with a considerable background in the power, energy and mining industries. He is in his mid-fifties. Mr Smit is a professional engineer and has impressive experience in the planning, engineering, construction and commissioning of projects in various heavy industries, including mining. Mr Brown and Mr Smit were introduced to Kermas in late 2007. They were looking for someone to finance the exploration and development of a potential mining project in the Musongati[1] area of Burundi. The Musongati had been studied as a potential nickel laterite mine since the late 1970's, originally under the auspices of the United Nations. The consensus between Dr Koncar and Mr Smit appears to be, and I find, that the Musongati cannot be commercially exploited as a conventional nickel laterite mine. Only by the application of novel and ground breaking techniques could the area and the minerals which it contained be profitably exploited. Dr Koncar, who controls, but does not legally or beneficially own, Kermas expressed interest. Dr Koncar is a Croatian by birth and is now 69 or 70. He was imprisoned by the former Yugoslavian regime for about seven years between about 1976 and 1984 on what he says were politically trumped up

[1] other areas featured, but the focus was on the Musongati

charges of dishonesty. He has a degree in electronics and a masters degree and doctorate in computer science.

[4] After an initial involvement with a consortium calling itself 'Southern Star' it was decided in about May 2008 that the project would be financed solely by Kermas. At that stage it was little more than a gleam in anyone's eye. No licence even to explore had been obtained, let alone any sort of tenure permitting the winning and working of minerals on site, but the prospects were perceived to be good, because the parties had on side, if I may put it like that, a Nigerian living in South Africa whose wife, Mrs Schola Adim was a friend of the President of Burundi. By the end of May an arrangement had been roughed out whereby the project would be conducted through Samancor HK, a Hong Kong shelf company whose issued share capital (HK$10,000) was held entirely by Kermas. Arrangements were to be made whereby Kermas would end up with 80% of the shares, the Adims, though their Cayman Islands company, Isaiah Holdings ('IH'), would have 15% and Merlin SA would have 5%.

[5] Discrete arrangements were made with the Adims, culminating in an agreement dated 11 September 2008 made between IH, Samancor HK and Kermas under which Kermas agreed to sell to IH 1,500 shares in Samancor HK in consideration of IH using its best endeavours to procure the necessary licences and concession for the project. In addition, Kermas promised to pay to IH US$1.8 million when the anticipated exploration licence had been brought into force by Presidential Decree and a further US$1.8 million upon the grant of a Mining Licence and Mining Convention (i.e. a licence to extract and export minerals from the site). The exploration licence was granted to Samancor HK on 15 September 2010, subject to confirmation by the President. That confirmation was given by Decree of 23 December 2008 and sometime after that the Adims received the first payment of US$1.8 million.

[6] The relationship between Kermas, Samancor HK and Merlin SA was provisionally governed by the HoA, to which neither the Adims nor IH was party. I say provisionally, because although the HoA was intended to be and accepted by all parties to it as a legally binding contract, it was expressed to be the intention of the parties to supersede it with a formal written shareholders agreement ('SHA') setting out the relationship between the parties, including standard minority protection and

reserved matter clauses. As will be seen, no such SHA was ever entered into, so that for the purposes of these proceedings the relationship between Kermas, Samancor HK and Merlin SA (or any successor to Merlin SA) remained governed at all material times by the HoA. It is important to bear in mind that HB&A was not a party to the HoA.

The Facts

[7] It is convenient to refer to the principal terms of the HoA at this point.

[8] Although the agreement was entered into by Merlin SA, clause 1.1.8 provided that 'MR' or 'Merlin' meant a company incorporated in the UK with an address in Sandton, South Africa, represented by Mr Brown. It is not in dispute that the 'Merlin' party to the HoA was Merlin SA, not Merlin UK, which had not been incorporated when the HoA were executed. Clause 1.4 provided that the HoA were governed by English[2] law. Clause 2 provided, as I have already mentioned, that the HoA had effect as a fully binding agreement pending execution of the anticipated SHA. Clause 3 contained what, in a better drafted agreement, would have been described as recitals, setting out the commercial landscape against which the HoA were being entered into. Clause 4 I had better set out in full:

> '4. SUBSCRIPTION
>
> The Members agree to subscribe for; and [Samancor HK] shall allot and issue to the Members the Shares at the Subscription Price in the proportions as set out in clause 4.2.
>
> 4.1 It is agreed that the Shares shall be issued as that they are held by:
>
> 4.1.1 Kermas as to 87.5% (Eighty Seven point five percent);
>
> 4.1.2 MR as to 12.5% (twelve point five percent) which shall be free and carried.
>
> And no further shares shall be issued in the capital of [Samancor HK] except those allocated to the Musongati Consortium in terms of clause

[2] the HoA, as is not unusual, refer to UK law, but the parties sensibly agreed that this must mean, in context, English law

[left blank] unless all the Members agree thereto in writing in accordance with the provisions of this Agreement.

4.2 All costs of the creation, allotment and issue of the Shares shall be paid by [Samancor HK].

4.3 The Parties hereby undertake to and in favour of each other to take all such steps and do all such things as are necessary or required to ensure that the Shares are held by the persons and in the proportions contemplated by clause 4.1 and to attend to all matters incidental thereto.

4.4 Kermas shall have first right of refusal to acquire the Musongati Consortium or the Merlin shares should any of these parties wish at any stage to sell their shares in [Samancor HK] in part or whole.'

Clause 4 must be read together with Clause 7, which referred to the negotiations then continuing between the Adims (described as the 'Musongati Consortium') and Samancor HK and which had already resulted in an initial agreement dated 28 May 2008 which had provided that Samancor HK would issue and allot 15% of its share capital to IH. Clause 7 went on to envisage that that would be dealt with by each of Kermas and Merlin SA accepting a dilution of 7.5 percentage points of their entitlements under clause 4 in order to provide the 15% which it had been agreed should be given to the Adims. In fact, as I have mentioned earlier, the agreement of 28 May 2008 was superseded by the agreement of 11 September 2008 under which Kermas agreed to transfer 1,500 of the shares which it held in Samancor HK to IH direct, but it is against the background of the agreement of 28 May 2008 that the HoA must be read.

[9] Clause 6 provided for certain payments to be made to the Government of Burundi, including the purchase of a 14 seater business jet and other transport. Clause 7 is headed 'Development Steps and Funding.' I must set it out in full:

'With effect from the Signature Date, [Samancor HK] shall, and the Parties shall procure that [Samancor HK] shall, develop the Project in the following stages:

7.1 The securing of Provisional Tenure, Final Tenure phase, being the initial stage during which [Samancor HK] shall use its reasonable endeavours to procure Final Tenure. This phase shall include the application for the Concession, and negotiation of a legally binding mining convention or Final Tenure which shall be funded by Kermas in accordance with an

estimated cost as per the estimated budget attached hereto as Annexure E part 1.

7.2 A Bankable Feasibility Study (BFS) Stage being the period during which [Samancor HK] shall undertake activities pursuant to the duly awarded Final Tenure, which are directed at the search for and evaluation of economically exploitable mineral reserves within the Concession and all evaluation work up to and including the evaluation of infrastructure, social and environmental requirements so that a fully bankable feasibility study on the extractable ores in the Concession is completed and presented paid for in full by Kermas or its partners or associates at an estimated cost as per the budget attached hereto as Annexure E part 2.'

Annexure E is very difficult to read, but it sets out a budget for the project down to, in part, the end of August 2010 and in part to the end of June 2009. HB&A figures as an item of expenditure in a part of that budget ending at end June 2009 under a line: 'Project Management HB&A (Merlin).'

[10] Clause 8 is headed 'Directors and Roles of Parties' and sets out that, among others, Mr Brown and Mr Smit are to be directors of Samancor HK. Subclauses 8.3 to 8.6 read as follows:

'8.3 Overall control of the affairs of [Samancor HK] shall vest in the Board, manifested in the roles of the parties as follows:

8.4 Kermas as project leaders, financiers, marketer and administrative managers of [Samancor HK] and the Project.

8.5 Merlin as Project designer, planner, and overall Project site and operations supervisor in association with its technical company Hugh Brown & Associates during the BFS phase and construction.

8.6 [Samancor HK] shall appoint selectively an outsourced team to assist with geological, metallurgical, mining and infrastructure work to ensure that the BFS is of the highest standard.'

Subclauses 8.7 and 9.1 are in the following terms;

'8.7 The Parties may select via a private placement, a market and or mine operator to operate the Project and undertake day to day management of the Project once the Project is at Bankable stage or beyond, or undertake an IPO and a subsequent listing.

9.0 RESTRICTIONS ON TRANSFER OF SHARES IN THE COMPANY

[Merlin SA] shall not be entitled to sell, transfer or otherwise dispose of any of their shares in [Samancor HK] without the prior written consent of the other party, which consent shall not be unreasonably withheld.

9.1 Upon completion of the Bankable Feasibility Study Stage 1 referred to in 6.2,[3] the Parties shall, in good faith, enter into and pursue a process by which they will jointly seek a potential purchaser or purchasers for part of, or the entire issued share capital of [Samancor HK] alternatively, part of, or the entire business of [Samancor HK], on reasonable and market-related terms. This will be planned mainly for securing technology, raising further funding or facilitating market access as may be required'

Clause 11, despite its heading, deals with assignment and with what in an English or BVI drafted document would be termed novation:

'11.0 ASSIGNMENT AND SALE OF SHARES

[Merlin SA] shall not be entitled, without the prior written agreement of the other Parties whose consent is not to be unreasonably withheld, to cede its rights or any part thereof or delegate its obligations or any part thereof to a third party although any party may freely cede its rights and/or delegate its obligations or any part thereof to a wholly owned subsidiary or wholly owned foreign entity of such Party.'

Clause 13 deals with default and breach:

'13.0 DEFAULT AND BREACH

The Parties shall be obliged to carry out their obligations in terms of this Agreement. Should any party breach its obligations in terms of this Agreement and remain in breach for a period of 30 (thirty) days after being called upon by any other Party, in writing, to remedy such breach, The Parties shall negotiate with one another to remedy the said breach, failing which the aggrieved Party shall have the right to terminate this agreement. In the case of a default in funding obligations, then the defaulting shareholders' shareholding shall be diluted in proportion to and in accordance with the funding shortfall in relation to clauses 5 and 6 of this agreement as of the date on which the default occurred.'

Finally, there were provisions for mediation and arbitration and an obligation upon the parties to observe the utmost good faith in their dealings with one another.

[3] this is obviously a mistake for Clause 7.2

[11] Merlin SA changed its name from Main Street 626 (Proprietary) Limited to Merlin Mineral Resources (Proprietary) Limited by special resolution of its sole shareholder and director made on 4 June 2008 and the name change was registered and took effect on 12 June 2008.

[12] On 3 July 2008 Mr Adim told a Mr Branislav ('Bane') Lazovic ('Mr Lazovic') that he wanted Mr Brown and Mr Smit off the project. Mr Lazovic is, I believe, Serbian and had become a director of Kermas in about 2004. He remained such until October 2009. He had a 5% shareholding in Kermas which Ms Danica Zagmester (the legal owner of Kermas) bought from him for US$35 million at the same time. Mr Lazovic signed many of the documents which were looked at in the proceedings, both on behalf of Kermas and on behalf of Samancor HK. There was debate about the extent of Mr Lazovic's authority to sign documents. Mr Brown accepted that Mr Lazovic could not sign documents which resulted in contracts with third parties or which committed Kermas or Samancor HK to financial obligations. But he maintained that Mr Lazovic could sign routine management documents. Dr Koncar said that Mr Lazovic could sign documents only if he, Dr Koncar, had specifically authorized him to do so. He described Mr Lazovic as a 'soldier', by which I understood him to mean that he was a person who worked well if and only if given proper instructions. On this point, as on any other where their evidence conflicts, I prefer the evidence of Dr Koncar to that of Mr Brown.

[13] Mr Lazovic did not give evidence at the trial. When invited to give evidence at the abortive arbitration proceeding which preceded the bringing of these actions, he declined, citing conflict of interest. Given the circumstances, that seems to me to have been a wholly reasonable response. Mr Brodie QC, who appeared, together with Mr John Carrington, for Merlin UK, maintained that Mr Lazovic was being prevented from giving evidence by confidentiality provisions in the contract under which he had sold his Kermas shares – in other words, that Kermas had paid him to keep his mouth shut. Mr Doctor QC, who appeared, together with Mr Rupert Allen, for Kermas, said that that contract could not be made public without an order of the Court and challenged Mr Brodie QC to apply for one, which challenge was not taken up. The upshot is that the Court does not know why Mr Lazovic has not given evidence.

[14] What Mr Adim actually said to Mr Lazovic on 3 July 2008 was that he did not want to see Mr Brown's or Mr Smit's faces again after what he described as the implementation phase. He went on to speak in highly unflattering terms of both gentlemen. This rift was never healed and flared up again, as will be seen, on Mr Adim's return to South Africa from Burundi in June 2009.

[15] On 5 August 2008 Merlin UK, the first Claimant in the HoA claim, was incorporated in England and Wales. I was told and accept that its shares are held as to 51% by Mr Brown and as to 49% by Mr Smit.

[16] On 13 September 2008 Samancor HK signed an agreement with Mineral Corporation Consultancy (Pty) Limited ('Mincorp') for the provision to Samancor HK of its (self explanatory) services in the exploration stage of the project. Mincorp was well known to Mr Brown and indeed he had been in contact with Mincorp as early as May of 2008 in relation to the project.

[17] On 15 September 2008 the Government of Burundi, by its Ministry of Water, Energy and Mines, ('the Ministry' 'the Minister') granted Samancor HK a three year exploration licence, to come into force only upon the promulgation of a Presidential Decree ratifying it. That Decree was, as I have said, made on 23 December 2008, which gave Samancor HK until December 2011 to complete all matters of exploration, including drilling, in order to produce a study which could be shown to the Government as the basis of negotiations over the grant of a mining concession and, possibly, as part of material which would enable finance to be raised or a listing to be achieved. The end product of this research and exploration is commonly known as and (as will have been seen) is referred to in the HoA as a Bankable Feasibility Study ('BFS'). Dr Koncar explained, and I accept, that the compiling of a BFS is not a necessary element for the grant of a mining licence and that even where one has been compiled, there will be many other matters, including questions of royalties and tax, that will have to be negotiated with government before a mining concession will be granted. He also pointed out that for listing on the Hong Kong or London Stock Exchanges, the critical factor is not the BFS as such but the geological reports, prepared to recognised international standards, which underpin it. A BFS containing such materials was in fact completed earlier this year by Samancor HK, which is presently in the final stages of negotiations with the Government of Burundi for the grant of a full mining concession.

[18] On 19 September 2008 Hong Kong company formation agents sent Mr Lazovic the necessary forms for appointing Mr Brown and Mr Smit to the board of Samancor HK (as had been agreed in the HoA and confirmed at a board meeting of 26 June 2008). Consents were executed by each of Mr Brown and Mr Smit to serve as directors of Samancor HK, but they were never presented because Mr Brown and Mr Smit agreed together with Mr Lazovic that if Mr Adim got wind of their appointment he, too, would wish to be appointed and that was not what Mr Lazovic (at that stage, at any rate) or Mr Brown and Mr Smit desired. Why Mr Lazovic aligned himself with Mr Brown and Mr Smit on this point was never explained. In the end the problem was got round by arranging for Samancor HK to have a so-called executive committee. After many fits and starts, a resolution was passed in late February 2009, backdated to 12 December 2008, for the formation of such an executive committee. It met for the first time in March 2009. The executive committee was, of course, a board of directors under a different name, but, in the eyes at any rate of its constituent members, without any obligation to register their identities.

[19] It will be seen, therefore, that it was of their own choosing that Mr Brown and Mr Smit did not become directors *de jure* of Samancor HK.

[20] In October 2008 Mr Brown received the relevant data which he required to enable him to commence preliminary studies on the project.

[21] On 2 October 2008 Mr Hillis, of South African attorneys Webber Wentzel ('WW'), who acted for Samancor HK, answered a query from Mr Brown by informing him that Merlin SA had been 'reserved' (under its original name of Main Street 626) for use in the abortive Southern Star venture. The purpose of Mr Brown's inquiry was to find out whether WW had a shelf company available for use as the registered owner of a Cessna light aircraft which Dr Koncar was at the time minded to (but in fact did not) purchase for use in the Musongati project. Mr Hillis was careful to ask Mr Brown if Merlin SA had performed any acts in relation to the Southern Star venture (because if it had, then it might not be suitable as a single purpose aircraft owning company). Mr Brown replied, accurately, that it had not, but appears to have overlooked the fact that it had been used to execute, and thus become party to, the HoA. In any event, Mr Brown asked Mr Hillis to

change the name of Merlin SA to N88727 Aviation (Pty) Ltd and to arrange for its shares to be held as to 90% by Kermas and 10% by Merlin UK. I shall refer to Merlin SA, when acting after its change of name, as 'N88'.

[22] A board minute of Kermas signed by Mr Lazovic and dated 2 October 2008 resolved that Kermas and 'Merlin Resources Ltd' (sic[4]) form a SA registered subsidiary company (N88) in which Kermas would hold 90% and 'Merlin Resources Ltd' 10%. Thus, it appears that Mr Lazovic was given to understand that N88 was a new off the shelf company. In another version, dated 17 January 2009, it is resolved that Kermas and 'Merlin Resources Limited' 'take up equity in a company already registered as [N88].' Dr Koncar's evidence, which I accept, is that he was unaware that N88 was Merlin SA under a different name.

[23] On 19 November 2008 a Ms Pinto, who appears to have been an employee of WW, resolved as sole shareholder and director of Merlin SA to change its name to N88 and authorised its directors to allot further shares. By a further resolution, Mr Brown and Mr Lazovic were appointed directors. Mr Lazovic consented to act on the same day and Mr Brown did so on 26 November 2008. There was a board meeting of N88 on 19 November 2008, authorising the transfer of the single share from Ms Pinto to Kermas and the issue of 89 shares to Kermas and 10 shares to Merlin UK. In evidence are two certificates dated 19 November 2008 showing Kermas as the holder of 90 shares in Merlin Mineral Resources (Proprietary) Limited (the name change was not registered until 12 December 2008). No certificate for Merlin UK is in the bundle. Although he called more than once for them to be delivered, Dr Koncar never received the certificates for Kermas' shares in N88.

[24] By 19 November 2008, therefore, Merlin SA, the signatory of the HoA, had passed out of the ultimate control (if not legal ownership) of Mr Brown and Mr Smit and, under its new name, into the control of Kermas.

[25] It will be recalled that on 23 December 2008 the Presidential Decree ratifying the exploration licence was promulgated, bringing the licence into force. When Dr Koncar saw it, he noticed that

[4] there was no evidence that a company with the name of Merlin Resources Limited had any connection with any party to these proceedings

the name of the grantee was rendered in the document as 'Samancor Ni (HK) Limited'. He was extremely upset about this blunder and accused Mr Lazovic and Mr Brown of incompetence. The method adopted to cure this difficulty was to resolve to change the name of Samancor HK to the name as rendered in the Decree. Although the resolution giving effect to the change was not actually passed until sometime around 7 February 2009, it was backdated to 12 December 2008, no doubt so that it could be claimed that that was the name of Samancor HK when the Decree was promulgated.

[26] Meanwhile, the tortuous process of agreeing a way forward for the project involved the negotiation and settling of drafts of a proposed board resolution of Samancor HK which would put things on a formally regulated footing. Drafts were prepared by Mr Brown in South Africa and sent to Dr Koncar and Mr Lazovic for consideration in London. A version prepared by Mr Brown in January 2009 provided for the 'ratification' of the exploration licence; for the ratification of the contract with Mincorp for the prefeasibility study ('PFS') phase[5]; for a budget of some US$35 million down to conclusion of the BFS phase with the object of developing a world class nickel and PGE (platinum group elements) mining project if found financially and technically viable; for an executive committee to be established consisting of Mr Lazovic, Mr Brown and Mr Smit; for a SHA to be drawn up with the help of WW in accordance with the HoA for signature by the end of 2009; and for a project management contract between Samancor HK and HB&A to be agreed for the overall management of the BFS.

[27] This draft was discussed between Dr Koncar and Mr Lazovic in London and there is in evidence a copy of it with manuscript annotations made by Mr Lazovic. Dr Koncar's evidence, which I accept, is that Mr Lazovic communicated the changes desired by Dr Koncar to Mr Brown, who produced a further draft reflecting them. Significant changes included a reduction in the overall budget to US$32 million; the inclusion of Dr Koncar on the executive committee as its Chairman and the addition of two further persons as 'technical' members;[6] and, most significantly for present purposes, the restriction of any project management agreement between Samancor HK and HB&A

[5] in essence, preliminary research, including the evaluation of existing available materials, but excluding drilling and aerial and geological studies, which would be done during the BFS stage. The difference in the 'weight' accorded to the two phases can be seen in the fact that some US$8 million was budgeted for the PFS phase whereas the BFS phase had an initial budget of approximately US$25 million

[6] Mr Dudukowski and his wife, who worked at Samancor HK's premises at Sandton

to the initial, or 'PFS' phase. A resolution containing these amendments, dated 12 December 2008, was signed off by Dr Koncar in London around 20 February 2009 and sent to Mr Brown by Mr Lazovic on 23 February 2009 together with two Kermas board minutes (including that dated 17 January 2009 relating to what had been perceived by Mr Lazovic as the acquisition of N88).

[28] Mr Brown's evidence was that the restriction of the proposed contract between Samancor HK and HB&A to the PFS phase had been done without his knowledge, the inference being that the version which he had drafted for Dr Koncar did not contain the restriction but had included work down to conclusion of the BFS phase, as his draft of January 2009 had provided. He said that he did not notice the difference until it came to preparation of this case. Given that it was common ground that all board and similar resolutions were drafted by Mr Brown, he had to explain how what he had drafted had been altered surreptitiously. His first attempt involved a palpably untrue account of how it had been handed over in Johannesburg in a paper version which had been altered elsewhere. The document relied upon for the purpose of this explanation was a draft dated 2 October 2008 which bore no relation to Mr Brown's January draft, being the draft which had been discussed between D Koncar and Mr Lazovic in London and which had resulted in the version signed by Dr Koncar in late February 2009. Mr Brown's second attempt was to maintain that the draft had been altered electronically after having been emailed to London. When it was put to him that it was not possible for the recipient of a document in PDF format to change it, he had no answer. I find that Mr Brown prepared the minute in the form in which it was signed by Dr Koncar on or about 20 February 2009, embodying a proposal for a project management contract between Samancor HK and HB&A restricted, at any rate for the time being, to the PFS phase.

[29] At around the beginning of May Dr Koncar was given by Mr Lazovic a copy of what has been described as the 'Phase 1 Report,' dated 27 April 2009 and prepared by Mincorp in association with HB&A. This document had not been copied to Dr Koncar. It contained a thorough review of earlier research carried out by parties previously interested in the Musongati, together with some new work carried out by Mincorp. If I have understood matters correctly, it was, in effect, a PFS and I shall refer to it as such. Dr Koncar also obtained a copy of a document dated April 2009, prepared by Mincorp and described as a Project Agreement for the Provision of Geotechnical and Advisory Services for the Exploration Management and Feasibility Assessment of [the Musongati]'

('the proposal'), although it had not been sent to him directly by Mincorp. This was Mincoprp's proposal for the future development of the project.

[30] Although he did not put it in these words, Dr Koncar was taken aback by the amount of decision making that was revealed by and the extent of what was being contemplated in the proposal. His reaction was a slightly cryptic email which he sent to Mr Lazovic on 10 May 2009, which only really makes sense when it is appreciated that Dr Koncar was tracking the introductory paragraphs of the proposal itself. He began by complaining about the fact that the document had not been copied to him and went on to object that the proposal gives the impression that Mincorp were taking instructions from HB&A (without, Dr Koncar implies, his knowledge and approval). He questioned what he saw as the assumption made in the proposal that Mr Lazovic was solely entitled to commit Samancor HK and said that he was surprised to learn from the report that Samancor HK was a joint venture between Kermas and an entity described in the report as 'Merlin Mining Resources Limited (sic) of the UK'. He protested that there was no such joint venture.

[31] Dr Koncar made clear in his oral evidence that in making this last objection he was not taking a point of mere nomenclature. He explained that in the highly competitive world of mining and mining exploration it is vital to know precisely who one's partners and associates really are. Hence, as he explained, the crucial importance of the restrictions upon transfer of its shares placed upon Merlin SA in the HoA. Dr Koncar had never heard of Merlin Mining Resources Limited of the UK. It might, for all he knew, have been controlled by a would be competitor.

[32] Dr Koncar also expressed surprise that he had not been copied into the Phase 1 Report.

[33] Finally, Dr Koncar took objection to the terms of introductory paragraph 1.6 of the proposal (not copied into the trial bundles), where it was apparently recited that Mr Brown and Mr Smit were directors of Samancor HK and would act jointly as project managers.

[34] Dr Koncar was obviously upset at having been kept in ignorance of such an important mass of material and about the fact that the project was being described in a manner which was contrary to his understanding. In a fit of what I think that Dr Koncar would accept was (perhaps

understandable) pique, he proceeded in his email of 10 May 2009 to announce that the relationship between Samancor HK and Mincorp would determine once the PFS had completed; that the relationship between Samancor HK and HB&A would determine immediately; and that he himself was assuming sole control of the project with immediate effect.

[35] Although Mr Brown says he did not see this email until it was disclosed in these proceedings and that he was not informed of a decision to terminate the relationship with HB&A, I find that Mr Brown and Mr Smit were informed forthwith of its terms by Mr Lazovic.

[36] Dr Koncar almost immediately repented of his decision, so far as it concerned HB&A. Mr Lazovic was, however, removed from his position as CEO on the executive committee although he remained a member of it, a fact which he confirmed to Mr Brown and Mr Smit on 13 May 2009. The result was a memorandum from Mr Brown to Dr Koncar dated 14 May 2009, in which Mr Brown proposed a slimmed down second phase with the option to move to a full scale (and extensive) BFS in the future should that prove necessary. Mr Brown sensibly called for a proper executive committee meeting at which the decisions necessary to put this slimmed down strategy in place could be considered and taken. The context in which these matters were being discussed was, as will be obvious, the economic downturn and consequent difficulties in raising funds caused by the well known events of late 2008.

[37] On 23 May 2009 Mr Brown emailed Dr Koncar, thanked him for taking part in a constructive hour long teleconference and told him that he was starting work to finalise the SHA and draw up a service agreement for HB&A.

[38] On 28 May 2009 Mr Brown circulated a revised draft SHA. In this draft Merlin SA was replaced by a Gibraltar registered company called Merlin Mineral Resources Limited ('Merlin Gib'). Mr Brown also proffered a draft services agreement, prepared by WW, which provided for Samancor HK to engage the services of HB&A at Kermas' expense. This draft was never executed.

[39] On 1 June 2009 Mr Brown emailed Dr Koncar envisaging a meeting to be held in South Africa on 8 June 2009 (in fact, a shareholders meeting of Samancor HK was held in London on that day) and

telling him that the PFS was ready for submission. He also proposed that the SHA should be executed on the same occasion. Mr Brown reminded Dr Koncar of the terms of the HoA, claiming that it provided that HB&A would be paid (at a total cost of US$1.8 million) for project management down to the end of the BFS.

[40] This last shot fired across Dr Koncar's bows must have been linked to the fact that some time before 5 June 2009 Mr Brown had instructed WW, Samancor HK's attorneys, to prepare two so-called 'breach letters' addressed to Samancor HK. In cross examination Mr Brown agreed that it was unacceptable for him, as a member of the executive committee of Samancor HK, to instruct its attorneys to prepare letters hostile to its interests. To be fair to Mr Brown, the same question might just as well have been put to WW. The first letter, which was signed off by WW on 5 June 2009, claimed that Samancor HK had entered into 'an agreement' with HB&A on about 12 December 2008 (the date, it will be recalled, of the backdated board resolution providing for HB&A's services to continue down to the end of the PFS stage). The letter went on to allege that Samancor HK was in breach of that agreement by 'frustrating' performance by HB&A of their obligations under it and called upon Samancor HK to remedy its breach within 30 days, failing which the client had indicated that 'he' (sic) would terminate and sue for damages.

[41] The second breach letter had more difficult birth pangs. In the first draft, which was based upon allegations of breach of the HoA, WW described themselves as acting for 'Merlin UK [insert full details] and Merlin Resources (Proprietary) Limited.' The second version, signed off by WW on 5 June 2009, had WW as acting for 'Merlin Mineral Resources (Proprietary) Limited and its holding company Merlin Mineral Resources UK Limited.' By this point it had clearly been recognised that there was a difficulty about proceeding in the name of Merlin SA, although how it was felt that it could be resolved by alleging, contrary to the facts, that it was a subsidiary of a UK registered company is unclear. What the letter significantly does not do is to allege that Merlin UK was an assignee, or stood in the shoes of Merlin SA in relation to the HoA. The letter complained of unidentified breaches of clauses 8.1, 8.5, and 10 of the HoA and made threats of termination and damages claims if these breaches were not remedied within 30 days.

[42] On 6 June 2009 Dr Koncar asked for Kermas' 90 shares in what had now become N88. They were not forthcoming. The request was repeated by Mr Lazovic to Mr Smit on 7 June 2009, with no better result. On 9 June 2009 Mr Smit told Mr Lazovic that he would find and collect the N88 shares. If he did so, he did not send them to Mr Lazovic.

[43] The Samancor HK shareholders meeting was held in London on 8 June 2009. It was attended by Dr Koncar, Mr Adim and Mr Brown (the latter said to be representing 'Merlin Mineral Resources Ltd'). The minutes, drafted by Mr Brown, recorded, or purported to record, that the current HoA was to be replaced with a new SHA, to be finalised in draft on the same day and that Samancor HK's books in Hong Kong were to be altered to reflect the fact that Kermas held 80% of its shares, IH 15% and 'Merlin Mineral Resources Ltd' 5%. Mr Brown admitted in cross examination that there was in fact no discussion at this meeting of the identities of the shareholders in Samancor HK. Various other matters were recorded, including the proposal to change the name of the company to Burundi Mining Corporation Limited. Mincorp's report was to be treated as a 'feasibility study' for Musongati and a prefeasibility study for the two ancillary areas covered by the exploration licence. The document was to be presented, in English and French versions, to the Minister within the next ten days. Samancor HK was to continue to use Mincorp, but only if Mincorp was selected following a tender process. Mr Brown was to close the current budget as at 14 June 2009 and prepare a new budget for review on 14 June 2009. The minutes of this meeting were signed by Dr Koncar.

[44] In cross examination Mr Brown said for the first time that there was another meeting between himself, Dr Koncar and Mr Lazovic later in the day at which he told Dr Koncar about the changes in Merlin SA, that on 1 October 2008 Merlin SA had assigned its rights under the HoA to Merlin UK 'as had been agreed in June 2008' and that their proposed vehicle for the holding of the shares in Samancor HK was to be a BVI registered company. Dr Koncar denied that any such meeting had taken place and I accept that denial. It is true that at 5.53 pm London time Mr Davies of WW emailed Mr Brown with the details of the transactions of 19 November 2008 to which I have referred in paragraph [23] above. Dr Koncar denied that he was shown this email or had its contents relayed to him. I accept that denial. Mr Brown returned from London without having delivered the breach letters prepared for him by WW.

[45] On 12 June 2009 the first meeting of the new six person executive committee was held at Sandton. On the same day a redraft of the proposed new SHA was distributed by Mr Brown. This draft of the SHA included as proposed 'Merlin' party 'Merlin Mineral Resources Ltd UK or its nominee.' For some reason which was never fully explained, Mr Brown discussed this draft privately by email with Mr Lazovic. The tone of those discussions gives the impression that he and Mr Lazovic were concerned that Dr Koncar was going to defeat Merlin's (to use a neutral term) interest by carrying out the project on his own and to the exclusion of Merlin.

[46] At 9.07 am on 17 June 2009 Mr Brown sent Mr Lazovic a document in the following form:

> 'Merlin Mineral Resources (Proprietary) Limited, registration number 2007/03262/07 ("Merlin SA") hereby cedes, assigns and transfers to Merlin Mineral Resources Limited, registration number 6664959 (incorporated in England and Wales) ("Merlin UK"):
>
> 1. all of its right, title and interest in and to any shares in Samancor Ni (HK) Limited, registration number 1196119 (incorporated in Hong Kong) ("Samancor"); and
>
> 2. all of its rights and obligations arising from the written agreement entered into on 3 June 2008 amongst Merlin SA, Samancor and Kermas Limited BVI, registration number 504889 (incorporated in the British Virgin Islands) ("Kermas"),
>
> Which cession, assignment and transfer Kermas and Samancor each hereby consent to, and Merlin UK hereby accepts.
>
> Signed at on
> for Kermas Limited BVI and
> Samancor (HK) Limited
>
> ……
>
> Signed at Sandton on September 28 2008
> for Merlin Mineral Resources
> (Proprietary) Limited
>
> [H. Brown]
> ……

duly authorized and warranting such authority'

The email to which the document was attached asks Mr Lazovic to sign the document and to initial a copy of the certificate of incorporation of Merlin UK, which was also attached. Mr Brown admitted that this document was a forgery, in the sense that it was created by him in June 2009 and given the date 28 September 2008 because, so he said, that was his best recollection at the time (June 2009) of the terms of what was later to be relied upon as a novation/assignment allegedly executed, not on 28 September 2008 but on 1 October 2008. For reasons which will appear clear in a moment, it was, in my judgment, a forgery, or attempted forgery, in every sense.

[47] According to Mr Brown, Mr Lazovic refused to sign and return this document on the grounds that he was no longer a director of Kermas (this was not in fact true – Mr Lazovic remained a director of Kermas until October 2009) but he nevertheless promised to look at his files.

[48] At 7.11 pm on 17 June 2009, Mr Brown told Dr Koncar that he wished the 'Merlin' shares to be held in the name of a BVI registered company, having the same name (Merlin Mineral Resources Limited) as Merlin UK and Merlin Gib. I shall refer to this company as Merlin BVI. At the same time, he provided Dr Koncar with the certificate of incorporation for Merlin BVI. Dr Koncar made some inquiries and says that he was content for Merlin's interest under the proposed SHA to be held by Merlin BVI.

[49] At 8.04 pm on 17 June 2009 Mr Brown emailed Mr Lazovic and asked him to send back a copy of 'the assignment of shares document you signed for us last year.' Mr Lazovic replied on 18 June 2009: 'for the time being here is the copy of the document we signed.' The following was attached:

> 'Merlin Mineral Resources (Proprietary) Limited, registration number 2007/03262/07 ("Merlin SA") hereby cedes, assigns and transfers to Merlin Mineral Resources Limited, registration number 6664959 (incorporated in England and Wales) ("Merlin UK"):
>
> 1. all of its right, title and interest in and to any shares in Samancor Ni (HK) Limited, registration number 1196119 (incorporated in Hong Kong) ("Samancor"); and

2. all of its rights and obligations arising from the written agreement entered into on 3 June 2008 amongst Merlin SA, Samancor and Kermas Limited BVI, registration number 504889 (incorporated in the British Virgin Islands) ("Kermas"),

Which cession, assignment and transfer Kermas and Samancor each hereby consent to, and Merlin UK hereby accepts.

Signed at Sandton on 1/10/2008
for Kermas Limited BVI and
Samancor (HK) Limited

[B. Lazovic]
……
duly authorized and warranting such
Authority

Signed at on

for Merlin Mineral Resources
(Proprietary) Limited

……
duly authorized and warranting such
authority

Signed at on

for Merlin Mineral Resources Limited
UK

……
duly authorized and warranting such
authority'

[50] It is now known, because Mr Brown admitted it for the first time at the outset of this hearing, that he then proceeded to sign the document purportedly for Merlin SA and Merlin UK in the spaces left blank for their authorised signatures.

[51] At trial, it was submitted for Merlin UK that all that Mr Brown was doing was creating a replica of a document which he claimed had originally been signed by Mr Lazovic and himself on 1 October

2008 but which had been lost. Why a version containing the signature of Mr Lazovic alone should, in those circumstances, have survived independently was never explained. The document bearing the two signatures of Mr Brown which he had applied on or after 18 June 2009 was relied upon during interlocutory proceedings in this matter on 2 June 2010 as an original authentic document. So was Mr Lazovic's email of 18 June 2009, but without exhibiting the attachment, which would have revealed that it bore the signature of Mr Lazovic alone. The impression thus given to the Court on that occasion was that on 18 June 2009 Mr Lazovic had emailed Mr Brown a copy document bearing his and Mr Brown's signatures, when all he had in fact sent was a document bearing only his own. This deception can only have been deliberate. Mr Brown said that he had explained all of this to his legal advisors, and because they raised no objection he had assumed that no harm was being done. I reject this evidence without hesitation. No Counsel, certainly none of those involved on behalf of Merlin UK in these proceedings, would have countenanced any such thing.

[52] The idea that there existed on 1 October 2008 a document, now lost, signed contemporaneously on behalf of all intended parties was rendered less probable with each attempt to support it. Mr Brown relied upon a page of his diary for 22 September 2008. It appears to show that he attended on WW at 10 am on that date to discuss an unrelated matter. Under the entry for that appointment is written 'assignment.' He also put forward a page from what he described as a 'chonological notebook', set up, apparently, for a meeting at WW at 10 am on 22 September 2008 but in fact recording, so Mr Brown says, a telephone advice given later as to how to word an assignment/novation – the wording is identical to that found in the document emailed to Mr Brown by Mr Lazovic on 18 June 2009.

[53] I am satisfied that these latter documents are forgeries in that they have been altered or created to suggest that WW was consulted on 22 September 2008 about the supposed assignment/novation. WW's fee notes are in evidence and even though they list every meeting end every telephone attendance in remorseless detail, they make no mention of any such consultation. Moreover, there is in evidence a resolution of Merlin SA passed on 30 October 2008 resolving to seek consent for the assignment of all the entitlement of Merlin SA to a 5% shareholding in Samancor HK. This document is not absolutely inconsistent with an assignment/novation having been executed on 1

October 2008 – the intention might have been to seek retrospective consent. But when the document (which was drafted by WW) was put to him, Mr Brown's response was to say that WW had mistakenly written 30 October 2008 for 30 September 2008. I reject that evidence. There is no material to suggest that Merlin SA made any request between 30 September 2008 and 1 October 2008 for consent to assign its entitlement to the 5% holding.

[54] It nevertheless remains the case that Mr Lazovic appears to have been in possession, on 18 June 2009, of a document which seems to have been signed by him and which contained the wording set out in paragraph [49] above. I think that the most likely explanation for this is that in October 2008 Mr Brown was indeed proposing an assignment to Merlin UK and that the 1 October 2008 document was drawn up in preparation. Sometime around 30 October 2008 it must have been appreciated that the prior written consent of Kermas and Samancor HK was required, hence the Merlin SA resolution of that date. The consent was, however, never obtained and as things turned out was never needed, because by May 2009 Mr Brown's plans had changed so that he wanted a Gibraltarian (changed in June 2009 to a BVI) company to hold the 5%. The draft bearing date 1 October 2008 languished in Mr Lazovic's files as a relic, as it were, of an anticipated transaction that never proceeded to completion.

[55] There is no evidence that the consent of either Kermas or Samancor HK was ever sought for any such assignment or novation pursuant to clause 11 of the HoA. Even on Mr Brown's case, Mr Lazovic had no authority to give that consent by himself. Nor was any such assignment or novation referred to in the 'breach' letter of 5 June 2009 prepared by WW and no document referring to any such assignment was ever mentioned until Booysen & Co Inc ('B&Co Inc') sent their letter before action on 20 July 2009. Further, an assignment to Merlin UK in October 2008 is inconsistent with Mr Brown's later requests, without any reference to the supposed prior assignment of 1 October 2008, for the 5% holding to be put into the name of, first, Merlin Gib and, subsequently, Merlin BVI. The truth, in my judgment, is that until the idea of suing Kermas under the HoA came into his mind in early June of 2009, Mr Brown was quite indifferent as to the identity of the parties to the HoA or as to the identity of the party which would hold the shares under the anticipated SHA (provided that it should be tax efficient) because he knew that the HoA was to be replaced by an SHA which would, once the company in which the 'Merlin' holding was to be taken

had been selected, make Merlin SA irrelevant. It was for that reason, in my judgment, that Mr Brown was unconcerned about using Merlin SA to hold the Cessna which never was. It was only when he conceived the intention of suing under the HoA itself that the problem emerged. Mr Brown's (second) solution was to forge the document dated 1 October 2008, by using the uncompleted draft which had been retained by Mr Lazovic. It was, of course, crucial that any assignment/novation should be dated prior to the transactions of 19 November 2008 pursuant to which Merlin SA had migrated into the control of Kermas.

[56] In my judgment, therefore, Merlin SA's rights under the HoA were never assigned to anyone. No one, whether by a process of novation or otherwise, succeeded to them. Merlin UK therefore has no title to sue in these proceedings.

[57] Apart from the supposed assignment of 1 October 2008, Mr Brodie QC also relies upon the minutes of the meeting of shareholders of Samancor HK of 8 June 2009, which, as I have said, record that Merlin Mineral Resources Limited would be given certificates representing a 5% holding in Samancor HK, as either confirming the document of 1 October 2008, or effecting, or affirming the transaction envisaged by that document. Apart from the fact that the document bearing date 1 October 2008 and signed by Mr Lazovic and Mr Brown is, for the reasons which I have given, a nullity, it is impossible to treat the minute as having anything to do with a transfer of rights under the HoA (as distinct from an intention that the shareholder representing the 'Merlin' interest under the forthcoming SHA was to be a company called Merlin Mineral Resources Limited - intended, as at 8 June 2009, to be a reference to a Gibraltarian company with the same name as Merlin UK). The notion, therefore, that the minute is, or evidences, an agreement to confer any interest under the HoA upon Merlin UK, is unsustainable.

[58] Mr Brodie QC also submits that after 1 October 2008 the parties conducted themselves as if Merlin UK had been substituted as a party to the HoA and that Kermas is accordingly stopped from denying the fact. The short answer to that point is that they did no such thing. Although it is true that a draft shareholders agreement put forward for consideration by Mr Brown on 15 June 2009 has 'Merlin Mineral Resources Ltd UK or its nominee' as a proposed party to the new SHA, that is not to say that Merlin UK was treated as if it were a party to the HoA, which the forthcoming SHA

were intended to supersede. Mr Brodie QC says that at no time after 1 October 2008 was Merlin SA treated as if it were a party to the HoA, but he omits to add that at no time after 1 October 2008 was it treated as if it were not. Subsequent references between the parties to the HoA were limited to the supposed right of HB&A under it to be engaged down to the conclusion of the BFS. The status of Merlin SA *vis-a-vis* the HoA simply never arose for consideration.

[59] Returning to the narrative, sometime between 12 and 20 June 2009 Mr Adim went to Burundi with the PFS, which he presented to the Minister. It appears that Mr Adim may have been expecting to obtain a full mining concession on the strength of it and much evidence, not relevant to the issues which I have to decide, was given about the wisdom of this idea, whether Mr Adim ever nourished it, and whether or not supposedly wiser heads had cautioned against it. Mr Adim appears to have blamed the lack of success on HB&A and on his return he appealed to Mr Lazovic to get rid of HB&A. On 21 June 2009 Mr Brown emailed Dr Koncar with HB&A's defence of the criticisms made by Mr Adim and asserted incidentally that in his view the project was going in the right direction.

[60] Dr Koncar's reaction was to fly to Burundi to find out for himself what was going on. He was disconcerted to find that the Minister was disappointed that there was no mention in the PFS of proposals for the provision of power supply or transport infrastructure. When he responded that that would come later (I paraphrase) he was surprised to be shown two letters, drafted by Mr Brown and dated respectively 6 and 24 November 2008 which appeared to the Minister to have given certain commitments, prior to the grant of the Presidential Decree on 23 December 2008, and which the Minister appeared to think that the PFS was rowing back from. Dr Koncar said that he had no difficulty with the terms of the letters themselves. He was angry, however, that he had not been told about their existence in advance. Had he been, he could have prepared himself to ensure that he would not have been wrong footed as he felt that he had been.

[61] Dr Koncar returned to Brussels on 26 June 2009 and took Mr Brown to task over what had happened. He said that Mr Brown complained on this occasion about not having been paid and asked for the 5% shareholding, which Dr Koncar says, and I accept, he agreed to provide once the change of Samancor HK's name had been effected.

[62] On Sunday 28 June 2009 there was a telephone conversation between Dr Koncar and Mr Brown. Mr Brown says that during this conversation Dr Koncar said (in short) that Kermas and, by inference, Samancor HK would refuse to comply with any of their agreements with either Merlin or HB&A. HB&A would be paid to the end of June but would not get another cent thereafter. Dr Koncar, according to Mr Brown, refused to issue any shares in Samancor HK, told Mr Brown that the services of HB&A were no longer required and that they were to leave the Sandton offices.

[63] Dr Koncar's version of this conversation is that he did not accuse HB&A of incompetence and that no decision had then been taken to terminate the relationship. He says that Mr Brown and Mr Smit left of their own volition. Curiously, on 2 July 2009 Mr Smit, using Samancor HK's email address, emailed one of the specialists assisting on the project and asked if a particular issue had been clarified 'so that we can get access.' This certainly does not look like the communication of a person who considered himself dismissed. Dr Koncar said he telephoned Mr Brown between 28 June and 7 July 2009 to ask why HB&A had left the premises, but this was not put to Mr Brown in cross examination and I place no reliance upon it.

[64] On 7 July 2009 Mr Brown emailed Dr Koncar as follows:

> 'Dear Danko
>
> I am still formulating final comments on the issues of your repudiation of our consulting agreement with HB&A and the Merlin rights in the Samancor Ni shareholders agreement. As it involves some options it will take another day or two to finalise.
>
> Thanks
> Hugh Brown'

Dr Koncar's reply was:

> French translation of pref. study???'

Dr Koncar's explanation for this message was that Samancor HK was still awaiting the French translation of the PFS which the Minister needed and which HB&A had agreed to provide. They never did and in the end Dr Koncar had to buy a copy from the translation service.

[65] There is thus a complete conflict of evidence as to what transpired on 28 June 2009 and in the days immediately following. I have to resolve it and do so partly by accepting the submission made by Mr Doctor QC that if Dr Koncar had repudiated the agreements and expelled HB&A from Samancor HK's premises, it would have been relied upon as primary evidence of breach in the letter before action sent on 20 July 2009 by ('B&Co Inc'). No such incident is even alluded to in that letter. Furthermore, Mr Brown's email of 7 July 2009 makes no mention of any telephone conversation. The reference to 'repudiation' is unspecific. I also prefer the evidence of Dr Koncar to that of Mr Brown on any issue where I have to choose between their uncorroborated statements. For these reasons I find that Dr Koncar did not repudiate the HoA or refuse to issue the 5% shareholding in the telephone conversation of 28 June 2009. I make this finding despite the fact that the incident is not relied upon as an act of repudiation in Merlin UK's pleading and only because it occupied a considerable amount of time at the hearing.

[66] B&Co Inc's letter before action of 20 July 2009 on behalf of Merlin UK and addressed to Kermas relied upon the supposed assignment of 1 October 2008, alleged that there had been breaches of the HoA as subsequently set out in the statement of claim, demanded that they be remedied within 30 days and threatened, if they were not, to cancel the HoA and claim damages. In accordance with clause 13 of the HoA, it suggested that the parties entered into negotiations in an attempt to resolve their differences. On 23 July 2009 B&Co Inc sent Kermas a letter before action on behalf of HB&A.

[67] Glyn Marais replied on behalf of Kermas to the letter before action sent on behalf of Merlin UK of 20 July 2009 on 17 August 2009 and on 12 August 2009 to the letter before action sent on behalf of HB&A. The latter stated that HB&A had downed tools before the telephone conversation of 28 June 2009. The letter sent in response to the claim by Merlin UK stated that Kermas had no contractual relationship with Merlin UK. Complaint is made by Mr Brodie QC that these are 'brush off' letters revealing no defence of substance and rejecting out of hand the suggestion of

negotiation offered by B&CoInc, but I do not think that that criticism carries matters further. Subsequently, various hostile steps were taken by Merlin UK against Kermas in South Africa and in the BVI. I do not think it is necessary for me to detail them or to set out the course which these claims have taken both before and after the end of the abortive arbitration proceedings in South Africa, beyond mentioning (a) that on 1 December 2009 Merlin UK and HB&A entered into a funding agreement with Africa Alpha Fund I LP (supplemented by a further agreement on 28 February 2011)[7] and (b) that on 22 July 2010 Kermas made an open offer to transfer 5% of Samancor HK to Merlin UK on receiving appropriate indemnities from the other candidates in play. That offer was not taken up.

[68] I can now deal with the claims in these proceedings.

The HoA claim

[69] The first breach of the HoA alleged by Merlin UK against Kermas is that Kermas failed to procure the transfer of the 5% holding to Merlin UK. Apart from the fact, as I have held, that Merlin UK is not an original and has never become a substituted party to the HoA, it seems to me that Kermas never had any obligation under the HoA to procure the transfer of any shares to anyone. The only obligation under the HoA in respect of share capital is that undertaken by Samancor HK under clause 4[8]. Samancor HK is not a party to these proceedings. Quite apart from the question of title to sue, therefore, Merlin UK fails to establish this breach.

[70] The next breach alleged is that Kermas failed to 'proceed to a BFS.' Leaving aside the fact that Merlin UK has no *locus* under the HoA, such a study has as a matter of fact been produced by Samancor HK and a copy has been disclosed to Merlin UK. The allegation of breach is founded upon the terms of clause 7.2 of the HoA.[9] Clause 7 as a whole is drafted in a hopelessly confusing manner. Under clause 7.2 the BFS is to be carried out only after the grant of Final Tenure, defined

[7] these agreements, taken together, are said by Kermas to have amounted to an assignment of such rights as Merlin UK may have had under the HoA and/or any rights which HB&A micht have against Kermas and thus to have deprived them of any title to sue. Merlin UK and HB&A say that Kermas is stopped from taking the point by the partial award of Mr Michael Kuper SC in the abortive South African arbitration, in which he held the contrary.
[8] see paragraph [8] above
[9] see paragraph [9] above

in clause 1.1.6 as the grant of a licence to mine and export. That is inherently absurd. If it was intended to operate as some sort of obligation binding upon Kermas it is, in my judgment, void for uncertainty. In any event, a route forward which did not necessitate the completion of a full-scale BFS was agreed by Mr Brown at the meeting of 8 June 2009 in London. It is inevitable in any project of this sort that only a rough outline of the way forward can be envisaged at the outset, with matters being firmed up and adjusted as the project progresses. That is what happened, with the agreement of Mr Brown, in the present case. Even if it had become party to the HoA, Merlin UK could not now be heard to complain of something in which it had plainly acquiesced.

[71] Next, it is pleaded that Kermas dismissed HB&A (and, curiously, Merlin UK) as project designers, planners and overall project site and operations supervisors. The short answer to this point is that clause 8.5 of the HoA,[10] upon which Merlin UK relies as the basis of this claim, contains words of exposition, not of obligation. In any event, neither Merlin UK nor HB&A is a party to the HoA. The same points go for the claim based upon the same subclause in relation to an alleged refusal to hand over various electromagnetic surveys and samples.

[72] Finally, it is alleged that Kermas acted in bad faith in its dealings with Merlin UK. Kermas never had any dealings with Merlin UK and no particulars are given of the alleged breaches of the duty of good faith.

[73] These alleged breaches are relied upon in the amended statement of claim in the alternative as constituting a repudiation of the HoA. It follows from what I have already said that that alternative allegation is not sustained. In the further alternative it is alleged that the Glyn Marais letter of 17 August 2009, to which I have referred in paragraph [67] above, by denying that Merlin UK had any rights under the HoA, amounted to a repudiation of it. On the facts that I have found the allegation falls away, but the mere taking of a legal position, even if it turns out to be wrong, will not of itself amount to the repudiation of another party's rights under a contract. A repudiation (or, a better word, renunciation) must amount to an expression, by words or conduct, of a settled intention not to perform a party's obligations for the future. Glyn Marais' letter did not fall within that category. No reliance is placed upon the telephone conversation of 28 June 2009 in the HoA claim.

[10] see paragraph [10] above

[74] For these reasons, the HoA claim fails.

The HB&A claim

[75] The statement of claim asserts an oral agreement entered into between HB&A, Kermas and Samancor HK in September 2008, the terms of which are said to have been the same as are contained in the draft document to which I have referred in paragraph [38] above. In the alternative HB&A rely on the terms of clauses 8.3 and 8.5 of the HoA. HB&A rely on the conversation of 28 June 2009 as repudiating the agreement and claim as damages what they would have earned if retained to the end of the BFS stage without any deduction for what they could or should have earned elsewhere during the period.

[76] There is some evidence that Kermas may have paid HB&A's monthly project management fees in the early stages of the project, but from September 2008 onwards they were paid by Samancor HK. An attempt to treat the supposed restriction of HB&A's role to the PFS stage at the meeting of 8 June 2009 as if it were a breach of contract on the part of Kermas fails because (a) Mr Brown agreed to it (see above) (b) there was never any agreement between Samancor HK and HB&A that HB&A should be engaged by Samancor HK for longer than the PFS stage and (c) in any event Samancor HK is not a party to these proceedings. It is true that there were proposals for a contract for services to be entered into between Kermas and HB&A, but they never matured into a concluded agreement. Any argument based upon the terms of the HoA fails because HB&A were not a party to that agreement.

[77] The HB&A claim fails accordingly.

[78] These conclusions make it unnecessary for me to express any opinion upon the effect of the two funding agreements or on the question of the issue estoppel said to arise out of the partial award of Mr Michael Kuper SC in the abortive South African arbitration.

Commercial Court Judge
7 December 2011