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Recent Cases Concerning Heads of Agreement

Janelle Moody*

SUMMARY

This paper discusses the recent decision of the New South Wales Supreme Court in African Minerals Ltd v Pan Palladium Ltd involving a Heads of Agreement for a proposed exploration joint venture.

The two main issues were whether the parties intended the Heads of Agreement to be legally binding pending execution of the anticipated formal Earn-In Agreement and secondly, was the agreement sufficiently complete and certain to be enforceable. In reaching its findings, the court applied general principles of contract interpretation and confirmed that the objective intention of the parties must be considered when determining whether the parties intend to enter into a binding contract. Further, to determine whether a contract was formed it is acceptable to look beyond the words to the circumstances surrounding the formation of the agreement (ie the matrix of facts), including subsequent conduct of the parties.

This paper provides a timely reminder that for there to be a legally binding agreement, all fundamental terms need to be agreed. Most importantly, those fundamental terms must be "certain" and "complete" if they are to be enforceable. Courts will not intervene to assist parties where they have failed to agree on key terms.

INTRODUCTION

Heads of Agreement are a common tool used in commercial deals, allowing the parties to set out the essential terms of the deal so they can finalise negotiations quickly. At a later date, these essential terms are usually incorporated into a more detailed agreement. When one party fails to perform its obligations, issues can arise as to whether the Heads of Agreement was intended to be legally binding on the parties pending execution of the detailed agreement or whether it was merely

* BBus (Accy) (Dist) (QUT), LLB (Hons) (QUT), Grad Dip Leg Prac (QUT); Senior Associate, McCullough Robertson Lawyers, Brisbane.

the basis on which the parties would consider negotiating a formal detailed contract.

In particular, this paper discusses the recent decision of the New South Wales Supreme Court in *African Minerals Ltd v Pan Palladium Ltd*[1] (*African Minerals* case) involving a Heads of Agreement for a proposed exploration joint venture. The issue of the legal status of Heads of Agreement was also considered by the New Zealand High Court in *Electricity Corporation of New Zealand Limited v Fletcher Challenge Energy Ltd* [2] (*Fletcher Challenge* case) and more recently by the New South Wales Court of Appeal in *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd*[3] (*LMI* case). While the African Minerals case does not refer to the Fletcher Challenge case or the LMI case it revisits many of the issues dealt with in those cases.

The two main issues were:

(a) whether the parties intended the Heads of Agreement to be legally binding on them pending execution of the anticipated formal written contract; and
(b) whether the agreement was sufficiently complete and certain to be enforceable.

In reaching its findings, the court in the *African Minerals* case applied general principles of contract interpretation and confirmed that the objective intention of the parties must be considered when determining whether the parties intend to enter into a binding contract. Further, it is acceptable to look beyond the words to the circumstances surrounding the formation of the agreement (ie the matrix of facts), including subsequent conduct of the parties, to determine whether a contract was formed.

FACTS

Background

The African Minerals case involved proceedings brought by African Minerals Limited (AML) against Pan Palladium Limited (PPD) for a declaration that the parties had entered into a legally binding agreement on or about 17 May 2002.

The agreement alleged by AML consisted of terms and conditions contained in a letter from AML to PPD dated 15 May 2002, which was subsequently signed by both parties on 17 May 2002 (refer to copy of the letter set out in the Appendix to this paper).

[1] [2003] NSWSC 268; 9 April 2003. Note that McCullough Robertson partner Tony Cotter acted for Pan Palladium Limited in this case. Any views expressed in this paper are entirely the writer's views and not those of the firm or its clients

[2] [2002] 2 NZLR 433. Refer James Willis, "Enforceability of Heads of Agreement" (2001) AMPLJ 312 and the paper by Professor McLauchlan, "The Legal Status of Heads of Agreement: Recent Developments" [2002] AMPLA Yearbook 518.

[3] [2003] NSWCA 74.

AML is a Canadian company with interests in mineral properties in South Africa. It holds interests in properties in the Northern Bushveld area within the Northern Province of South Africa. The properties have been prospected and the results show promising reserves of platinum.

PPD is an Australian listed mining company whose operations are conducted out of a head office in South Africa. Its principal assets are also in the Northern Bushveld area of South Africa and include interests under two joint ventures (held by wholly owned subsidiaries of PPD). PPD also has some other smaller and less significant interests in the Northern Bushveld area.

The joint ventures in which PPD is a participant are:

(a) a joint venture with Impala Pty Ltd pursuant to an agreement dated 19 October 2001 (Impala JVA); and
(b) a joint venture with Randgold and Exploration Company Ltd pursuant to an agreement dated March 2002 (Randgold JVA).

Under each of those joint venture agreements, PPD's subsidiaries could acquire a 75% interest in certain mineral properties in the Northern Bushveld area.

The Letter

Essentially, the letter purported to set out terms on which AML would acquire a percentage of the interest that PPD held in the Northern Bushveld projects including the interest it was currently earning under the Impala JVA and the Randgold JVA. The proposal was that AML would:

(a) take a placement of 6.5 million shares in PPD at an agreed issue price to be issued as soon as possible but not later than 24 May 2002; and
(b) acquire 50% of all interests of PPD in the Northern Bushveld area (either existing or future) including 50% of the 75% interest to be earned by PPD following completion of the Impala JVA and the Randgold JVA and after AML contributed certain levels of expenditure as set out in the letter.

The letter recited that AML intended to proceed to establish an unincorporated joint venture with PPD pursuant to the terms of one or more joint venture agreements between them which, would, unless the parties otherwise agreed, be based on the "Form 5A – Exploration, Development and Mining Operating Agreement published by the Rocky Mountain Mineral Law Foundation" (Form 5A).

Under the heading "Conditions Precedent to the Proposal" the letter provided that acceptance of the proposal was subject to the conditions listed in that paragraph being satisfied (refer to paragraph 3 of the letter in Appendix A). One of those conditions was the board of PPD agreeing to AML having a board nominee to be appointed immediately.

Although the letter expressly anticipated that a formal Earn-In Agreement to document the proposal would be prepared, and that the parties would ultimately

enter into a joint venture agreement, the letter indicated that it was "*intended to be legally binding on the parties*" once PPD had passed certain board resolutions, representatives of the PPD board had signed the letter in acknowledgement of that approval and had returned it to AML's solicitors (which steps were taken).

Both the placement of shares and the appointment of AML's nominee also took place. However, no expenditure was committed by AML pending negotiation of the formal Earn-In Agreement. Those negotiations subsequently broke down and shortly afterwards AML brought proceedings seeking a declaration that the letter of 15 May constituted a legally binding agreement between the parties.

THE ISSUES

The first issue for the court's determination was whether in the circumstances PPD's acceptance on 17 May 2002 of the offer contained in the letter constituted a legally binding agreement pending execution of a formal Earn-In Agreement. A related issue was whether the paragraph of the letter entitled "Conditions Precedent to the Proposal" constituted in whole or in part either conditions precedent:

(a) to the entry of a binding agreement (ie conditions precedent proper); or
(b) to the performance of obligations (ie conditions subsequent or performance conditions precedent).

The second issue was whether the agreement was sufficiently certain and complete to be enforceable. The fact that the parties intended to enter into a binding contract would not make it enforceable if it was too uncertain or incomplete.

To resolve these issues Einstein J set out the relevant contract law principles, including those relating to whether subsequent communications were admissible for the purpose of determining the existence or non-existence of a contract. He then applied these principles to determine the issues by having regard to the admissible evidence.

THE PRINCIPLES

Commercial Contracts

The court recognised that it was dealing with a commercial document. Therefore in endeavouring to discern the parties' intent and in construing the meaning of the words used, courts will strive to give the document a "commercial, reasonable and rational operation".[4]

[4] In support of this principle Einstein J referred to *Australian Broadcasting Commission v Australian Performing Right Association* (1972) 129 CLR 99 at 109; *Hide & Skin Trading v Oceanic Meat* (1990) 20 NSWLR 310.

Einstein J noted that there was abundant authority that "the court should be astute to adopt a construction which will preserve the validity of the contract".[5]

Further, the court will:

> "strive in dealing with a commercial contract to discern the objective intent of the business relationship or other parameters of a contract in order to give effect to that which the parties may be seen to have bargained for. But always, it is the words of the document …that the court must attend looking in that regard to the whole of the document to discern the parties' intent."[6]

The court also endeavours to follow the mechanics and provisions expressed in the contract, in particular where those mechanical provisions are intended to operate over an extended period of time by looking at the way it is expressed in the contract and how the parties saw the contract "as a working guide to the way forward".[7]

Certainty

Einstein J took the opportunity to restate a number of important principles relating to certainty in commercial contracts. In particular, he reiterated:

> "the Court will … not be in a position to in effect spell out what the parties have for themselves failed to agree upon. Nor will the Court be in a position to clarify that which is irremediably obscure. Nor will the Court accept for itself a discretion which the parties have, by their agreement, reserved to one or other of them." [8]

His Honour thought to do so would not be giving effect to the contract but would amount to changing the contract.

Reference was made by Einstein J to the following passage from *Halsbury's Laws of Australia*[9] as the proper approach:

> "Faced with a conflict between, on the one hand, the desire to avoid making such efforts to enforce an uncertain or incomplete agreement that what is enforced is something that the parties did not in fact agree to and, on the other hand, upholding the reasonable expectations of the parties who believed they had a contract and to avoid the reproach of being the destroyer of bargains, the courts give *primacy to the need to uphold agreements, particularly executed agreements and commercial arrangements, wherever possible*. However, account must always be taken of the nature of the agreement contemplated and a court will be less inclined to ignore elements of uncertainty and incompleteness where the transaction is one of

[5] Per Mason J, *Meehan v Jones* (1982) 149 CLR 571 at 529; *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130 at 132, per Kirby P.

[6] Paragraph 13, *African Minerals* case.

[7] Paragraph 14 *African Minerals* case.

[8] Paragraphs 14 and 15 *African Minerals* case with reference to *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130 at 135 and *Kofi-Sunkersette Obu v A Strauss & Co Ltd* [1951] AC 243 at 250 (PC)

[9] Volume 6, para 110-460 (emphasis added).

magnitude, particularly where terms which are usually found in an agreement of the type before the court are absent."

Four Categories of Preliminary Agreement

The court proceeded to consider the four categories into which the outcome of contractual negotiations might fall. In summary these are:

1. The parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound by the performance of those terms, but they will later restate the terms in a form which is fuller or more precise but not different in effect.

2. The parties have completely agreed upon all of the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply but have made performance of one or more of the terms conditional upon the execution of a formal document.

3. The intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract (ie the parties have merely agreed to agree).

4. The parties have made a provisional contract intending to be bound by it but assuming that in due course a further contract will be made between them containing both the agreed terms and further terms which they will both agree upon.

The first three of those categories are summaries of statements contained in the leading case of *Masters v Cameron.*[10] The first two categories lead to a binding contract. In the first category, a binding contract arises between the parties to immediately perform the agreed terms (whether the contemplated formal document comes into existence or not), and to join (if they have so agreed) in settling and executing the formal document. In the second category, a binding contract arises between the parties to join in bringing the formal contract into existence and then to carry it into execution.

The third category has no binding effect at all. Cases of the third category are fundamentally different as they are cases in which the terms of the agreement are not intended to have, and therefore do not have, any binding effect of their own.

The fourth category derives from a line of cases [11] and is now a well-accepted classification.[12]

[10] (1954) 91 CLR 353 at 360. Refer also summary by Young J in *Whitty v Fin Control Systems Pty Ltd* [2000] NSWSC 332; BC200001970 – SCNSW – 23/3/2000; see also paras 19 to 27 of the *African Minerals* case

[11] Including *Sinclair Scott Co Ltd v Naughton* (1929) 43 CLR 310 at 317, *Love & Stewart Ltd v S Instone & Co Ltd* (1917) TLD 33 TLR 475 at 476 and more recently *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd* (1986) 40 NSWLR 622 at 628.

[12] See for example the cases referred to by Einstein J at para 25 of the *African Minerals* case namely *Tern Minerals NL v Kalbara Mining NL* (1990) 3 WAR 486; *Heysham Properties Pty Ltd v Action Motor Group Pty Ltd & Anor* (1996) 14 BCL 145; *Telstra Corp Ltd v Australis Media Holdings* (1997) 24 ACSR 55; *Brunninghausen v Galvancis* (1999) 46 NSWLR 538.

In *Baulkham Hills*[13] McClelland J in considering the issue of whether there was a binding contract noted:

> "There was a binding contract, if and only if, by the exchange of letters the parties mutually communicated their respective assents to being legally bound by terms capable of having contractual effect: see the discussions in *Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd* (1979) 1 BPR 9251 at 9254ff and *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309. In the last mentioned case Mahoney JA (at 326) identified three questions which it is often useful to consider in such a context as the present, namely '….did the parties arrive at a consensus?; (if they did) was it such a consensus as was capable of forming a binding contract?; and (if it was) did the parties intend that the consensus at which they arrived should constitute a binding contract?'"

On appeal to the Court of Appeal,[14] McClelland J's decision was affirmed and the Court of Appeal held:

> "the decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in the light of the surrounding circumstances: *Godecke v Kirwan* (1973) 129 CLR 629 at 63; *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 332-4, 337. If the terms of a document indicate that *the parties intended to be bound immediately*, effect must be given to that intention, irrespective of the subject matter, magnitude or complexity of the transaction."

Muir J applied *Baulkham Hills* recently in *Rushton (Qld) Pty Ltd & Ors v Rushton (NSW) Pty Ltd*[15] where after considering the terms of a memorandum of understanding, he decided that the conduct of the parties strongly indicated that the parties intended to be immediately bound by it.

In the *African Minerals* case Einstein J noted that regardless of the classification, the principle that is now recognised is that there can be an informal contract with the expectation that other terms will be negotiated and by consent included in the formal document. In other words, if further negotiations and activity regarding other terms is still to take place that does not mean that the informal contract is not binding.

This view was previously endorsed by numerous courts including the New Zealand Court of Appeal in the Fletcher Challenge case and the majority of the Supreme Court of Western Australia in *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd.*[16] Most recently the fourth class was considered in *Graham Evans Pty Ltd v Stencraft Pty Ltd.* [17]

[13] *Baulkham Hills Private Hospital Pty Ltd v G R Securities Pty Ltd* (1986) 40 NSWLR 622 at 627.

[14] *G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 per McHugh JA as his Honour then was at 634E-F, with whom Kirby P and Glass JA agreed (emphasis added).

[15] [2003] QSC 8 (24 January 2003).

[16] (2000) 22 WAR 101 (refer Ipp J at 110 to 111).

[17] (2000) 16 BCL 335 (Full Federal Court, French, Whitlam and Dowsett JJ). The court considered *Masters v Cameron* and applied *Baulkham Hills* and held that the parties

Admissibility of Pre-contractual and Post-contractual Conduct

Einstein J referred to *Brambles Holdings Ltd v Bathurst City Council*[18] where Heydon JA set out the accepted principles of the law of contract which can be summarised as follows:

(a) pre-contractual conduct is only admissible on questions of construction if the contract is ambiguous and if the pre-contractual conduct casts light on the genesis of the contract, its objective aim, or the meaning of any descriptive term;[19]

(b) post-contractual conduct is admissible on the question of whether a contract was formed;[20]

(c) post-contractual conduct is not admissible on the question of what a contract means as distinct from the question of whether it was formed; and

(d) construction of the contract is an objective question for the court, and the subjective beliefs of the parties are generally irrelevant in the absence of any argument that a decree of rectification should be ordered or an estoppel by convention found.

Einstein J noted therefore that in determining the circumstances surrounding the formation of the agreement, the matrix of facts, it was the objective intent that was paramount (ie the intention which reasonable people would have if placed in the situation of the parties). Whether any relevant individual representative thought that an agreement existed or that it did not exist was irrelevant to the exercise unless there existed an argument concerning estoppel. In ascertaining the relevant intention, that is the intention to contract, relevant circumstances may include prior negotiation and subsequent conduct.[21]

A key question to be considered by the court was whether the conduct of AML and PPD, viewed in the light of surrounding circumstances, showed or was indicative of an agreement having come into existence.[22]

may be bound immediately by the terms, which they agree upon, whilst expecting to negotiate the terms of, and make a further contract in substitution for, the first contract.

18 (2001) 53 NSWLR 153 (Mason P, Heydon JA and Ipp AJA).

19 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 347-352.

20 *Howard Smith & Co Ltd v Varawa* (1907) 5 CLR 68 at 77; *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1908) 5 CLR 647 at 668, 669 and 672; *B Seppelt & Sons Ltd v Commissioner for Main Roads* (1975) 1 BPR [97011] at 9149 and 9154 to 9156; *Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd* (1979) 1 BPR [97023] at 9255.

21 Einstein J referred to *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1907) 5 CLR 647; *Howard Smith & Co Ltd v Varawa* (1907) 5 CLR 68; *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 548-549; *Geebung Investments Pty Ltd v Varga Group Investments (No 8) Pty Ltd* (1995) 7 BPK 14, 551; *Anaconda Nickel* op cit as authorities supporting that proposition.

22 Refer *Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Australia) Pty Ltd* (unreported NSWCA, McHugh, Mahoney and Hope JJA), 23 December 1988; *Raguz v Sullivan* (2000) 50 NSLWLR 236 at 251; *Film Bars Pty Ltd v Pacific Film Laboratories* (1979) BPR 97023; and *Pobije Agencies Pty Ltd v Vinidex Tubemakers Pty Ltd* [2000] NSWCA 105 per Mason P at para 1.

Einstein J noted that a complicating factor in the AML and PPD proceedings was ascertaining the parties' intent generally from the proper construction of the letter, but with assistance from post contractual and other materials admissible in terms of the principles described above. Understanding the nature of the transaction from the terms of the letter itself was of vital importance. Endeavouring to glean the parties' intent involved closely examining the so-called "conditions precedent to the Proposal". It raised the issue of whether when AML and PPD negotiated and signed the letter, they should be held to have entered at that stage into any and if so what contract, albeit a contract that would later be overtaken by a further more formal contract containing additional terms and conditions.

In summary, Einstein J stated that based on the authorities,[23] the admissibility issues were covered by the following propositions:

(a) evidence of prior negotiations is not admissible insofar as it consists of statements and actions of the parties which are a reflection of their actual intentions and expectations;[24]
(b) subsequent communications may have probative value depending on the light they throw on the proper interpretation of earlier communications alleged to constitute the contract;
(c) subsequent communications can legitimately be used against a party as an admission by conduct, of the existence or non-existence, as the case may be, of a subsisting contract;
(d) evidence of post-contractual conduct is not admissible on the question of what the contract means as distinct from whether it was formed; and
(e) whether the parties intended that the consensus undoubtedly recorded in the letter should constitute a binding contract is to be resolved objectively and as a matter of construction of the letter.[25]

Einstein J noted that the court must give consideration to the weight of the material and was not bound by an admission or by any other particular item of evidence where *the whole of the evidence* was required to be taken into account in determining:

(a) whether or not an immediately binding agreement was entered into upon the acceptance of the letter by PPD; and
(b) what AML and PPD are shown *on all of the admissible evidence* to have intended in that regard.

General Approach to Construction

Einstein J referred to the recent observations of the High Court in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*[26] that:

[23] Including McClelland in *Film Bars* op cit and the New South Wales Court of Appeal in *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) NSWLR 540 at 550.
[24] Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 352.
[25] At para 40 *African Minerals* case.
[26] (2002) 186 ALR 289 at 292-293.

"In Codelfa, Mason J (with whose judgment Stephen J and Wilson J agreed) referred to authorities which indicated that, even in respect of agreements under seal, it is appropriate to have regard to more than internal linguistic considerations and to consider the circumstances with reference to which the words in question were used and, from those circumstances, to discern the objective which the parties had in view. In particular, an appreciation of the commercial purpose of a contract:

> 'presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.'

Such statements exemplify the point made by Brennan J in his judgment in Codelfa:

> 'The meaning of a written contract may be illuminated by evidence of facts to which the writing refers, for the symbols of language convey meaning according to the circumstances in which they are used.'"

Similarly, Gleeson CJ, Gummow and Hayne JJ in *Maggbury Pty Ltd v Hafele Australia Pty Ltd*[27] observed that interpretation of a written contract involves the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contracting.

THE EVIDENCE IN THE AFRICAN MINERALS CASE

The following matters were not in issue:

(a) the letter which followed negotiations was drafted by solicitors for both parties;
(b) on 17 May 2002, the PPD board having resolved to do so and before the varied time required by paragraph 4.1 of the letter accepted the AML proposal;
(c) PPD's acceptance was received in Sydney having been communicated to AML care of its solicitors in Sydney;
(d) PPD's Board had passed the resolutions referred to in paragraph 3.1 (f) of the letter before the varied time for compliance with that requirement;
(e) on 20 May 2002 AML's nominee was appointed to the PPD board;
(f) on 22 May 2002, 6.5 million ordinary fully paid shares were issued to AML nominated subsidiary;
(g) no AML/PPD joint venture management committee had been constituted; and
(h) AML had not been granted a right of first refusal in the event that PPD wished to dispose of its interest in the AML/PPD joint venture, the Impala joint venture project, the Randgold joint venture project or any other interest which it either had, or may have, in the Northern Bushveld area.

[27] (2001) 76 ALJR 246 at 248 (para 11), quoting with approval Lord Hoffmann in *Investors Compensation Scheme* [1998] 1 WLR 896 at 912-913.

Einstein J then considered the background and context in which the letter was to be construed by examining the terms of the Impala JVA and Randgold JVA. He noted that these were "of course documents known to exist to both parties, and using terminology involving the same notions of exploration *earn-in* or *farm-in* participation interests in a joint venture as are found in the letter agreement".[28]

APPLYING THE PRINCIPLES

Identification of Proposal and Intention to be Bound

Einstein J noted that it was necessary to try to discern, using the permissible evidentiary materials (on the basis of the principles referred to earlier) including the above non-contentious evidentiary matters, but primarily the terms of the letter itself:

(a) what precisely the Proposal the subject of the letter was; and
(b) whether the parties intended any, and if so which, obligations thrown up by the terms of the letter to become immediately enforceable upon the happening of any, and if so, which particular events.

His Honour held that upon a close examination of the letter and of the matrix of fact (ie matters and circumstances in which the parties were placed at the time of the execution of the letter):

(a) the letter dealt with *one* Proposal;
(b) that Proposal comprised three inter-related aspects:
    (i) the issue and placement of 6.5 million shares in PPD as soon as possible but not later than 24 May 2002;
    (ii) the acquisition of a 50% interest of all interests of PPD in the Northern Bushveld area outlining the mode in which the expenditure was necessary to be made for the acquisition of the 50 or 60% participation interest; and
    (iii) the notion of entry into an unincorporated joint venture.

Further he noted that paragraph 2 of the letter in describing the proposal as the taking of the relevant shares and the acquisition of 50 % of all interests of PPD (either existing or future) contemplated not only interests which were to be earned under existing arrangements but also future interests. Einstein J held that the proper construction was either:

(a) that what was intended was a reference to property which existed at the time of the agreement or which could be earned at the time of the agreement as a result of either of the joint venture arrangements; or
(b) that what was intended was a reference to property which existed at the time of the agreement or which could be earned at the time of the agreement as a result of either of the joint venture arrangements *as well as* a reference to subsequently acquired interests in property.

[28] Paragraphs 55 to 61 of the *African Minerals* case.

In Einstein J's view the second construction was the correct one. He also noted it was possible to contract to assign future property for consideration or to grant a right of first refusal in respect of such property.

Einstein J held that upon a proper approach to the intent of the parties discernable from the letter:

(a) the parties intended the letter would be legally binding once the resolution in paragraph 3.1(f) had been passed carrying with it approval to the share issue and the letter had been signed by the representatives of the PPD board in acknowledgement of that approval;
(b) paragraph 4.2 of the letter then expressly provided for PPD's board and PPD to proceed to do all things necessary to put effect to the share placement and the proposal;
(c) paragraph 3.1(d) and (e) of the letter were conditions precedent to performance and no more. Further, they were promissory in nature (further discussion of this aspect is set out later in this paper);
(d) the letter was one transaction only, but comprised of interdependent sub-agreements each of which was inseparable from each other and which bound the parties subject to what was provided for in paragraphs 4.1 and 4.2 of the letter.

Areas of Uncertainty

PPD contended that the letter did not constitute a legally binding agreement. Among its arguments was that the letter was uncertain in a number of key respects.

One such matter was whether there was a binding obligation upon AML to proceed with establishing an unincorporated joint venture. This issue arose as paragraph 2.8 of the letter used the words "intending to proceed to establishing the unincorporated joint venture with PPD".

The issue was whether the agreement was to be construed as providing that, after the resolutions set out in paragraph 3.1 (f) had been passed and the representatives of PPD had signed the letter in acknowledgement of that approval:

(a) there was to be a binding obligation upon AML at some time (and if so, what time), to proceed to establish an unincorporated joint venture as described in paragraph 2.8; or
(b) there was simply to be a right of election in AML as to whether or not during some, and if so what period, to exercise what would, in effect, be an option to proceed to establish such an unincorporated joint venture.

His Honour held that it was an area where the court was simply "unable to resolve the uncertainty", and it was simply not possible for the court to attribute a sufficiently precise and clear meaning in order to identify the scope of the rights and obligations of the parties. It was something which was "irremediably obscure" and in fact, it was such a "critical parameter" of the deal that it could not be severed in order to rescue the balance of the agreement. Einstein J held that this was clearly an essential and fundamental part of the bargain and was not severable:

> "On anyone's terms, a critical parameter of what the parties were dealing with was whether or not, at a particular point in time, AML was to be contractually obliged to proceed to establish the unincorporated joint venture."

Even if AML was contractually obliged to proceed in establishing the joint venture a further issue was that the letter did not define or describe the period of time in which AML would be obliged to proceed to establishing the unincorporated joint venture. The question was:

(a) whether without this identification of the relevant time period that clause was so uncertain that no sensible meaning could be given to it; and
(b) whether the clause was essential to the agreement, such that it could not be severed.

His Honour was of the view that:

> "this again exposes a grave uncertainty in a failure by the parties to stipulate a matter which the Court is unable to correct. The simple fact is that one cannot spell out that which the parties have for themselves failed in agree upon in relation to the bracket of time when, even if there was a contractual obligation in AML to proceed to the establishing of an unincorporated joint venture, the letter omitted to define or to describe that period of time. It cannot be read into the letter by some form of creative judicial invention. The matter was equally fundamental to the bargain. It cannot be corrected. No question of severability arises."

A suggested alternative approach was to construe the letter as simply having obliged AML to proceed with the establishing of the unincorporated joint venture "within a reasonable time". Einstein J held that there were many cases in which the words "within a reasonable time" may be properly inferred as having been the parties' intent, but he did not see that this as one. It was not possible to precisely identify what event would have to have taken place to which the words "within a reasonable time" could be applied. Presumably this was due to the earlier finding of uncertainty regarding whether there was an obligation to proceed with establishing the joint venture. Einstein J held that the matter was "simply again one with which the parties failed to deal".

Reference to a Standard or Default Form of Agreement

Yet another area of uncertainty concerned whether paragraph 2.8 could also be said to be uncertain for the reason that the parties had expressly provided that the joint venture was to be established "pursuant to the terms of one or more joint venture agreements between the parties which, unless the parties otherwise agree, *is to be based on the Form 5A Rocky Mountain Mineral Law Foundation*".

PPD submitted that a close examination of the Form 5A made it clear that it would not be possible, without further negotiation and agreement, for the parties to be bound by the terms of that document. The submission was that important provisions in the agreement were uncertain, it amounted to no more than an

agreement to agree and, not being severable, meant that the whole of the agreement was unenforceable.

The court held after a detailed examination of the Form 5A that it was incomplete because there were too many aspects which required negotiation. In Einstein J's view the number and type of incomplete and inappropriate parts of the Form 5A provided a further ground for a holding of lack of certainty or more particularly, incompleteness. These matters included that it was inconsistent with the Impala JVA and the Randgold JVA and it did not recognise that the parties would only have 70% of the joint ventures together, it was United States specific and did not cover the South African position.

AML sought to overcome these difficulties by submitting that to the extent that the Form 5A provisions were inconsistent with what the parties had agreed as set out in the letter or was clearly irrelevant or inapplicable to the intended subject matter of the joint venture, those provisions could be read out of the joint venture agreement, or read down as necessary.[29] AML further submitted that the court should apply the general principle that courts should strain to avoid holding a commercial agreement unenforceable by reason of lack of uncertainty unless it was absolutely necessary. Einstein J rejected this submission and held the lack of completeness and uncertainty could not be resolved even using the principles set out in the authorities cited by AML.

His Honour held there were simply too many matters which would have to be negotiated and in respect of which the Form 5A was relevantly incomplete. Therefore this issue too, was fatal to the letter being held to be legally binding:

> "The Court could not infer that the parties would have intended any such radical surgery on these and other clauses where what was envisaged was some form of consensus being reached on matters of obvious structural significance to parties entering into a joint venture. The Court cannot clarify that which is irremediably obscure."

The Paragraph 3 Conditions

(*the condition precedent proper versus performance conditions precedent issue)*

Another aspect of the decision in the *African Minerals* case was the court's analysis of the terms of the letter entitled "conditions precedent" and whether these constituted conditions precedent to formation of the contract (ie conditions precedent proper), or conditions precedent to performance of the contract.

Einstein J noted that the letter left a very great deal to be desired in terms of precision as to what was intended and that the letter disclosed "*a general muddle-*

[29] AML cited various authorities including *Fitzgerald v Masters* [1956] 95 CLR at 426-427; *Godecke v Kirwan* 129 CLR 629 at 637 and *Trustees Executors & Agency Co Ltd v M* (1959) 102 CLR at 547-548 per Kitto J.

headed approach" to the concepts of conditions precedent proper and conditions precedent to performance.

If a clause is a condition precedent proper then the existence of the contract, or the obligation of one party (or both parties) to perform is subject to the specified event occurring. The intention of the parties as expressed in the contract will determine whether the failure of the event to occur means that there is *no contract*, or simply *no obligation to perform.*[30] Therefore even though a provision may appear to be expressed in the *form* of a condition precedent, upon investigation it may be seen to have been a condition precedent not to the *formation* of the contract but to the *obligation to complete* it.[31]

After referring to various authorities that indicated that the parties' intention as expressed in the contract and the effect of the condition were relevant, Einstein J referred to the following passage from Carter and Harland:[32]

> "It is important to distinguish events which must occur for the formation of a binding contract from events which merely condition a party's obligation to perform. Where there is no contract until the event in question occurs either party may resile prior to the occurrence of the event without being held liable in damages for breach of contract. And the courts generally say that it is not open to one party to overlook ('waive') the non-occurrence of the event and to claim a right to enforce the 'contract'. The 'condition' must be for that party's benefit alone and that is more likely to be the position where the event conditions the obligation of one party to perform. By contrast, where the event merely makes a party's obligation to perform contingent, neither party is entitled to withdraw from the contract until it is clear that the event will not occur, in the case of a condition precedent, or the event has actually occurred, in the case of a condition subsequent."

Applying these principles to paragraph 3.1 of the letter, Einstein J held that the sub paragraphs (a), (b) and (c) of that paragraph were conditions precedent proper and had on the evidence been satisfied. On the other hand and despite the heading of paragraph 3.1, he had difficulty in reaching the same conclusion in relation to sub-paragraphs (d) and (e) of paragraph 3.1.

In relation to paragraph 3.1 (d), he asked rhetorically "why the parties would have contemplated that there be no binding agreement between them until there was a joint venture committee comprising three members, which was clearly an event which, it seems to me, the parties are shown to have contemplated as something which was not to happen until some time in the future when the joint venture would be formed".

[30] *Total Gas v Arco British* [1998] 2 Lloyds LR 209 at 215 per Lord Slynn of Hadley.

[31] *Sandra Investments Pty Ltd v Booth* 1983 153 CLR 153 at 157 per Gibbs CJ; cf *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 543, 551, 557-558, 565; *Newmont Pty Ltd v Laverton Nickel NL* [1983] 1 NSWLR 181 at 188-189. See also *Gange v Sullivan* (1966) 116 CLR 418; *Meehan v Jones* (1982) 149 CLR 571.

[32] *Contract Law in Australia*, 4th ed, Butterworths, 2002, at para [741].

Sub-paragraph (d) did not describe an event but instead was in terms of a mutual promise. It was clearly not something that could happen nor a promise which could be fulfilled before a number of other things contemplated to happen, had happened. These included the share issue, the appointment to the board and the acquisition by AML of its participation interest and probably the execution of a more formal Earn-In Agreement. He concluded that notwithstanding the heading of paragraph 3, the parties intended and contemplated sub-paragraph (d) as being a condition precedent to performance.

Sub-paragraph (e) of paragraph 3.1 was also a promissory condition requiring PPD to grant a right of first refusal. It could be granted immediately. However, it could be granted at any time up to the point in time when PPD wished to dispose of any of its interests as described. His Honour thought it was relevant in considering this sub-paragraph to also note the terms of sub-paragraph 5.2, insofar as this obliged PPD to use all reasonable endeavours to procure the amendment of the Impala JVA and Randgold JVA "to the extent necessary to acknowledge the *interest* of AML under the Proposal if requested to do so by AML". It seemed to Einstein J that the word "interest" and sub-paragraph 5.2 generally should be read as requiring PPD, if requested to do so by AML, to seek to procure the amendment of the joint venture agreements to permit the grant of the right of first refusal which was the subject of sub-paragraph (e).

As with sub-paragraph (d), in Einstein J's view the parties, again notwithstanding the heading to paragraph 3, intended sub-paragraph 3.1 (e) to operate as a condition precedent *to performance*.

DECISION IN THE AFRICAN MINERALS CASE

Based on his findings in relation the evidence, in particular the various areas of uncertainty in the terms of the letter, the court declined to make the declaration sought by AML that the letter constituted a legally binding agreement.

In reaching its conclusion, the court applied general principles of contract interpretation ie that the objective intention of the parties must be considered when determining whether the parties intended to enter into a binding contract and that it was acceptable to look beyond the words to the circumstances surrounding the formation of the agreement (ie the matrix of facts), including subsequent conduct of the parties, to determine whether a contract was formed. This was consistent with the approach of the New Zealand Court of Appeal in the *Fletcher Challenge* case.

AML has lodged an appeal in respect of the decision in the *African Minerals* case. Regardless of the appeal's outcome, this case is an important reminder that for there to be a legally binding agreement, all fundamental terms need to be agreed. Courts will not intervene to assist parties who have failed to agree on key terms.

LMI AUSTRALASIA PTY LTD v BAULDERSTONE HORNIBROOK PTY LTD[33]

This case was an appeal from a decision of the New South Wales Supreme Court of Barrett J[34] and was handed down on 10 April 2003 (the day after the decision in the *African Minerals* case). This case involved a dispute which arose between the parties as to whether the defendants were liable to pay damages to the plaintiff for breach of contract based on a Heads of Agreement executed by LMI Australasia Pty Ltd (LMI) and Docklands Stadium Consortium Pty Ltd (Consortium). The Consortium was formed to put forward a proposal for the development of the Colonial Stadium in Melbourne. Clause 2.1 of the Heads of Agreement provided: "If any of the Bids are successful, [the Consortium] agrees that it shall appoint [LMI] as Manager of the Facility."

Recital E to the Heads of Agreement provided that: "If any of the Bids are successful the parties intend to enter into a formal Facility Management Agreement, but, in the meantime, intend this Heads of Agreement to be legally binding."

The Heads of Agreement defined "Bids" as meaning the bids to be made by the Consortium or by Baulderstone Hornibrook Pty Ltd or Baulderstone Hornibrook International Limited on behalf of the Consortium. LMI claimed it had been promised that if the defendants' bid to be the developer of the stadium was "successful", LMI would be appointed manager of the stadium. It said that the bid was "successful" but that it was not appointed manager. The defendants replied that while they obtained rights to develop the stadium, it was not because the bid in question was successful.

The defendants submitted two bids during the course of their negotiations. The arrangement, as finally concluded, was called the "Stadium Development Agreement".

While it was not disputed that the Consortium and LMI intended the Heads of Agreement to be binding, the Supreme Court noted that "Heads of Agreement" did suggest something which was preliminary. Barrett J viewed the words of recital E as evidence of the parties' contemplation of a subsequent binding contract. While Barrett J considered the fact that there were several aspects to indicate the preliminary and incomplete nature of the Heads of Agreement, his Honour held that the uncertainties and gaps were not individually or together sufficient to deprive the whole coherent contractual meaning and as such the Heads of Agreement did acquire contractual force when signed. He found that the Heads of Agreement constituted a binding contract under either the first or fourth class of preliminary or provisional agreements referred to in *Masters v Cameron*[35] and *Baulkham Hills.*[36]

[33] [2003] NSWCA 74.

[34] Refer discussion of the decision by Barrett J in the paper presented by Professor McLauchlan, "The Legal Status of Heads of Agreement: Recent Developments" [2002] AMPLA Yearbook 518.

[35] (1954) 91 CLR 353.

[36] *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd* (1986) 40 NSWLR 622.

The court then discussed the Consortium's obligation to appoint LMI as manager pursuant to cl 2.1 of the Heads of Agreement. Barrett J held that the meaning of the words "if any of the Bids are successful" must be gathered from the circumstances existing when the Heads of Agreement was concluded, requiring an examination of the facts regarding the bidding process and its outcome. Conforming and non-conforming bids were not seen as an offer capable of acceptance. They formed part of the basis upon which preferred developers would be selected, and the process of post-bid negotiations with preferred candidates envisaged by Docklands Authority was undertaken in relation to the Consortium bids.

Whilst related companies of the Consortium were successful in being appointed, Barrett J held that neither bid was successful as a result of not being translated in substance from proposal to contract, given the significant departures with respect of funding and financial structure (eg the equity injection from Channel 7) and the management of the stadium. The bids proposed LMI as manager, but his Honour held that the arrangements embodied in the Stadium Development Agreement did not adopt that proposal by leaving the choice of manager for future decision.

Barrett J held that the condition that the bid be "successful" had not been fulfilled and therefore on his Honour's view, the defendants were under no obligation to appoint LMI as manager to the stadium.

On appeal, in order to succeed against the Consortium, LMI needed to establish that the bid was "successful". However, the Court of Appeal held that the changes between the original bids and the final Stadium Development Agreement were such that the agreement could not count as one of the bids being successful. The key issue before the Court of Appeal was the extent to which the pre- and post-contractual evidence of the parties conduct was admissible. Young CJ in Eq (with whom Meagher JA and Hodgson JA agreed) applied the "Codelfa" doctrine and referred to its continued application as confirmed by the *Royal Botanic Gardens* case,[37] to hold that that ambiguity is required to be shown before evidence of the circumstances surrounding the agreement will be admitted. His Honour held that the term "successful" carried the requisite "ambiguity". However, the court's conclusion was that the evidence led by the parties was subjective, post-contractual evidence (ie conversations and negotiations between the parties after the Heads of Agreement was signed) that did not come within the principles in the *Brambles* case.[38] The court was not prepared to read the phrase "if the bids are successful" so broadly as to mean "if we win the job" or "if our consortium is successful in securing the rights to build, own and operate the stadium".

[37] *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289.

[38] *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 referred to earlier in this paper.

PRACTICAL LESSONS FOR COMMERCIAL LAWYERS

On a practical level, there are lessons to be learned from the cases including the *African Minerals* case and the *LMI* case for those involved in commercial deals who use Heads of Agreement as a preliminary agreement to finalise negotiations between the parties. These include:

(a) consideration as to what are intended to be conditions precedent proper (as opposed to conditions precedent to performance);

(b) consideration as to the precise function of the Heads of Agreement and the intention of the parties in this regard, including whether the Heads of Agreement should endeavour to create a specific negotiating relationship or merely lock out one party from negotiating with third parties. For example, in the *Fletcher Challenge* case it was held by the New Zealand Court of Appeal that the Heads of Agreement in question was not intended to be legally binding. It was in the nature of a progress report to the board and the parties simply reached an important staging post on its way to a final agreement;

(c) considering whether the parties intend the Heads of Agreement to be legally binding until replaced by an anticipated detailed formal agreement[39] (but note this is only effective if the Heads of Agreement itself is sufficiently complete and certain to be enforceable);

(d) clearly defining when actions are to be taken (preferably by inserting a date or at a minimum "within a reasonable time");

(e) if any terms in the final version of the Heads of Agreement are not agreed then they should be deleted or crossed out and initialled but not left in and marked "not agreed";[40]

(f) careful drafting of all provisions is crucial in order to minimise the risk that the courts will find promises to be illusory or vague and lacking in certainty so as to be enforceable;

(g) ensuring that any 'default' mechanisms inserted into agreements such as references to standard form agreements are reviewed to ensure they too are complete and certain as to their key terms; and

(h) an agreement stating an obligation to agree or negotiate a contract may be commercially desirable but it will not generally be enforceable unless there is a negotiation standard (eg good faith or best endeavours and a set of criteria against which the standard may be judged) and the contractual machinery for resolving disputes (for example allowing a third party to settle disputes or an arbitration clause).[41]

Drafting Heads of Agreement is a difficult task especially when lawyers are brought in at the end of the negotiations when the parties are keen to finalise their

[39] For example refer *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2003] NSWCA 74; 10 April 2003.

[40] *Fletcher Challenge* case.

[41] For example see *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1; *Telstra Corp Ltd v Australis Media Holdings* (1997) 24 ACSR 55 and the *Fletcher Challenge* case.

negotiations quickly, thus often not leaving much time to consider the drafting. However this is not limited to lawyers. As Gleeson CJ noted in *Geebung Investments Pty Ltd v Varga Group Investments (No 8) Pty Ltd*[42] even where contracts are made involving a large amount of money without the intervention of lawyers, it may be that the nature of the contract still requires resolution of certain points in which case: "failure to agree on such points cannot be ignored by a court in the supposed interests of giving effects to the expectation of the party. That would be to disregard their intentions."

CONCLUSION

This paper briefly considered the principles used by the courts in discerning whether or not the parties to a commercial document have reached a concluded agreement of a kind that the courts would enforce. In cases involving Heads of Agreement it becomes important to identify whether the parties intended to be immediately bound by the terms contained in the document, and whether those terms are sufficiently precise to be enforceable. The examination of whether Heads of Agreement and similar documents provide for certainty and/or a written contract complete in itself, will be determined on a case-by-case basis. The court will look to see whether the parties have evinced an intention to create legal relations and whether they have demonstrated sufficient consensus on all of the essential elements of a contract, to warrant a finding that a concluded agreement was reached between them.[43]

It is settled law "established by authority, both ancient and modern, that the courts will not lend their aid to the enforcement of an incomplete agreement, being no more than an agreement of the parties to agree at some time in the future".[44] The law however recognises that the parties may create an informal contract with the expectation that other terms will be negotiated (additional terms) to be included in a formal document by consent. The fact that further negotiations are to occur does not mean that the existing informal contract is not binding.[45]

[42] (1995) 7 BPR 14, 551 at 14, 553; (1995) Aust Contract R 90-059 and applied by Young J in *Whitty v Fin Control Systems Pty Ltd* [2000] NSWSC 332 (23 March 2000).

[43] For example see *Australian Broadcasting Corp v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 548.

[44] *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600 at 604.

[45] See *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* (2000) 22 WAR 101 per Ipp J at 110 to 111.

APPENDIX

Terms of the Letter

South African Northern Bushveld Project ('Northern Bushveld Project')

This letter sets out the terms and conditions on which African Minerals Ltd, or its wholly owned subsidiary nominee, ('AML'), will acquire a percentage of the interest that Pan Palladium Ltd ('PPD') has in the Northern Bushveld Projects ('Proposal') and including that interest it is currently earning under its joint venture agreement with Impala Platinum Limited ('Impala') (the 'Impala Joint Venture Agreement') and its joint venture agreement with Randgold Limited ('Randgold') (the 'Randgold Joint Venture Agreement').

1. **Background**

1.1 Pursuant to the Impala Joint Venture Agreement, PPD may acquire an interest of 75% in the farms Nonnenwerth 421KS, Volspruit 326KS and Zoetveld 294 KR by completing a bankable feasibility study within a three year period (the 'Impala Joint Venture Project').

1.2 The period for completion of the bankable feasibility study for the Impala Joint Venture Project may be extended for a further three years if prevailing market conditions allow.

1.3 There are no obligatory exploration work or expenditure commitments pursuant to the Impala Joint Venture.

1.4 On 11 April 2002, PPD announced commencement of Phase 1 of the resource drilling programme for the bankable feasibility study on the Grass Valley platinum group metal project situated on the Northern Bushveld Complex in South Africa under the Impala Joint Venture Project. Phase 1 drilling is due to complete in August 2002.

1.5 Pursuant to the Randgold Joint Venture, PPD may acquire an interest of 70% in the farms Altona, La Purcella and Kransplats by expending R7.6 million (approximately AUD1.25million) in four tranches over a five year period and completing a bankable feasibility study within a five year period (the 'Randgold Joint Venture Project').

1.6 PPD may acquire a further 5% interest in the Randgold Joint Venture Project for a consideration based on the net present value of the Randgold Joint Venture Project.

1.7 PPD has a 100% interest in other projects within the South African Northern Bushveld.

2. **Proposal**

2.1 AML proposes to:

(a) take a placement of 6.5 million ordinary shares in PPD at an issue price of AUD0.30 ('Placement') to be issued as soon as possible but not later than 24 May 2002; and

(b) acquire 50% of all interests of PPD in the Northern Bushveld area (either existing or future) including 50% of the 75% interest to be earned by PPD under the completion of the Impala Joint Venture Agreement and the Randgold Joint Venture Agreement.

2.2 For the avoidance of doubt, AML is interested in developing the Northern Bushveld area only. This Proposal does not extend to the Eastern Bushveld area.

2.3 AML proposes the following expenditure commitments:

Year	Funding by AML
Year 1	AUD 1.5 million
Year 2	AUD 2.0 million
Year 3	AUD 2.5 million

2.4 The Years set out in paragraph 2.3 are the anniversary dates from the date of approval by the board of PP as evidenced by its signature below.

2.5 AML has the right to withdraw from this Proposal at any time after spending AUD$500,000 in Year 1 (as referred to in paragraph 2.3 above).

2.6 Subsequent to Year 3 (as referred to in paragraph 2.3 above), funding will proceed on a pro rata basis between AML and PPD (i.e 50%/50%) subject to paragraph 2.7.

2.7 If PPD cannot produce sufficient funds to meet it 50% share of ongoing expenditures to continue with the bankable feasibility study for the Impala Joint Venture Project or the Randgold Joint Venture Project during 2005, AML will undertake to fund the remainder of the bankable feasibility study and will earn 60% of PPD's interest in the Impala Joint Venture Project and the Randgold Joint Venture Project.

2.8 Irrespective of the outcomes of the bankable feasibility study for the Impala Joint Venture Project or the Randgold Joint Venture Project, AML intends to proceed to establish an unincorporated joint venture with PPD of which AML will be the Manage (60%/40% or 50%/50% depending on paragraph 2.7) pursuant to the terms of one or more joint venture agreements between them which, unless the parties otherwise agree, will be based on its Form 5A-Exploration, Development and Mine Operating Agreement published by the Rocky Mountain Mineral Law Foundation ('AML/PPD Joint Venture').

2.9 Effective as of the date that the AML/PPD Joint Venture is formed, each of AML and PPD will be deemed to have made contributions to the AML/PPD Joint Venture equal to AUD$6 million provided that, if paragraph 2.7 applies, PPD's deemed contribution will be adjusted to AUD$4.8 million and AML's deemed contribution will be adjusted to AUD$7.2 million. Thereafter, the participating interest of each party will be determined, from time to time, as being equal to the product obtained by multiplying 100% by a fraction of which:

(a) the numerator is an amount equal to the sum of all contributions made or deemed to be made by such party; and

(b) the denominator is an amount equal to the sum of all contributions made or deemed to be made by both parties.

Participating interests in the AML/PPD Joint Venture will be re-calculated whenever a party fails to contribute its proportionate share of ongoing expenditure commitments provided that the other party commits to fund the resulting shortfall.

3. **Conditions Precedent to the Proposal**

3.1 Acceptance of the Proposal as outlined in paragraph 2 above is subject to the following conditions being satisfied:

(a) review by AML and Minter Ellison of the Impala Joint Venture Agreement and Randgold Joint Venture Agreement and any other agreements pertaining to the Northern Bushveld area in which PPD is earning an interest, has earned an interest or is proposed to be earning an interest;

(b) approval of the Proposal (see paragraph 2.1 and 2.2) by the boards of PPD and AML;

(c) the board of PPD will agree to AML having a board appointee (to be appointed immediately);

(d) the AML/PPD Joint Venture Management Committee will comprise 3 members appointed by AML and 3 Members appointed by PPD with the Chairman being appointed from the AML members who will have a casting vote;

(e) AML will be granted right of first refusal in the event that PPD wishes to dispose of its interest in the AML/PPD Joint Venture, the Impala Joint Venture Project, the

Randgold Joint Venture Project or any other interest PPD has, or may have in the future, in the Northern Bushveld area;

(f) the approval of all of the resolutions that will be put to the board on or before 5pm Sydney time Friday 17 May 2002 including:

(i) the approval of the Placement to AML of 6.5 million ordinary shares in PPD at an issue price of AUD0.30 to be issued as soon as possible after the board meeting but not later than 24 May 2002;

(ii) the approval of the Proposal for the AML/PPD Joint Venture; and

(iii) the appointment of an AML nominee to the board of PPD.

For the avoidance of doubt, the resolutions are interdependent. If one resolution is not approved then the proposal will be withdrawn by AML.

4. **Validity and Commitment**

4.1 All terms and conditions of this Proposal remain valid until 5.00pm Sydney time Friday 17 May 2002 by which time the PPD board must have approved the Proposal, signed this letter in acknowledgment of such approval and returned the signed letter to William Hayden, Director of AML, care of Leanne Brown at Minter Ellison Lawyers, 88 Phillip Street, Sydney NSW 2000 (Fax No. +612 9921 8238). Non-compliance with this time stipulation will result in AML withdrawing the Proposal as set out in this letter in its entirety.

4.2 Subject to the satisfaction of the conditions precedent in paragraph 3.1, this letter is intended to be legally binding on the parties once the resolutions set out in paragraph 3.1 (f) have been passed by the PPD board and this letter signed by the representatives of the PPD board in acknowledgment of that approval. The PPD board and PPD must then proceed to do all things necessary to put effect to the Placement and the Proposal.

5. **Documentation**

5.1 The parties will use all reasonable endeavours to prepare a formal Earn-In Agreement to document the Proposal and, if considered necessary, attach a draft AML/PPD Joint Venture Agreement (or heads of agreement for such AML/PPD Joint Venture) which will be entered as such time as the joint venture is entered by AML.

5.2 PPD will use all reasonable endeavours to procure the amendment of the Impala Joint Venture Agreement and Randgold Joint Venture Agreement to the extent necessary to acknowledge the interest of AML under the Proposal if requested to do so by AML.

6. **Announcements**

6.1 AML must approve any announcement to be made by PPD in regard to the Proposal.

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