Neutral Citation Number: [2012] EWHC 2856 (Comm) Case No 2011Folio1548

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Bristol Crown Court
Small Street
Date: 19/10/2012

Before :

MR JUSTICE FIELD

Between :

Pathfinder Minerals plc **IM Minerals Limited** **International Mercantile Group Limited**	**Claimants**
- and -	
General Jacinto Soares Veloso **Diogo Jose Henriques Cavaco** **J. V. Consultores Internacionais Limitida**	**Defendants**
and	
General Jacinto Soares Velso **Diogo Jose Henriques Cavaco** **J. V. Consultores Internacionais Limitada**	**Part 20 Claimants**
and	
Pathfinder Minerals plc **IM Minerals Limited** **International Mercantile Group Limited**	**Part 20 Defendants**

Craig Orr QC and Oliver Butler (instructed by **Travers Smith LLP**) for the **Claimants**
The Defendants did not appear and were not represented
Hearing date: 18 September 2012

Approved Judgment

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

MR JUSTICE FIELD

Mr Justice Field :

Introduction

1. This is the Claimants' application for judgment. By an Order dated 6 July 2012 Christopher Clarke J directed that the Defendants' Defence and Counterclaim be struck out and a hearing fixed on an expedited basis for the final disposal of the Claimants' contract claims. That hearing took place before me on 18 September 2012.

2. These proceedings were commenced on 19 December 2011. On the same date, the Claimants applied for and obtained injunctive and associated relief on a without notice basis from Blair J ("the Interim Injunction").

3. The 1st Defendant ("General Veloso") and the 3rd Defendant ("JVC") were formally served in Mozambique on 27 December 2011, and the 2nd Defendant ("Mr Cavaco") was formally served on 4 January 2012.

4. By letter dated 2 February 2012, the Defendants' solicitors, Smithfield Partners ("Smithfield"), indicated that their clients intended to challenge both the jurisdiction of the English court and the continuation of the Interim Injunction and on 14 March 2012 the Defendants issued an application (out of time) challenging the English court's jurisdiction in respect of the Claimants' contract claims. However, at the eleventh hour before the hearing due to take place on 19 March 2012, they agreed to the dismissal of their jurisdiction challenge and to give undertakings to the Court in substantially the same terms as the Interim Injunction.

5. The trial of the contract claims was fixed to commence on 29 October 2012 and on 20 March 2012 the Defendants filed an Acknowledgment of Service in which they indicated an intention to defend the claim. As a result, pursuant to CPR 11(8), they were to be treated as having accepted that the English court had jurisdiction to try the claim.

6. Notwithstanding their submission to the English jurisdiction, the Defendants applied on 19 March 2012, without notice to the Claimants, to the First Division of the Commercial Court of Maputo City (the "Maputo Court") for an interdict preventing the 2nd Claimant ("IMM") from continuing this action in England. It is to be noted that this application was made the day after the Defendants had abandoned their challenge to the jurisdiction of the English court and on the very same day that they confirmed to the English Court that they consented to dismissal of their jurisdiction challenge and concurred in the making of directions for the future conduct of this action in England. In their application to the Maputo Court the Defendants did not reveal that they had voluntarily submitted to the jurisdiction of the English Court

7. Without hearing from IMM, Judge Monjane of the First Division of the Commercial Court of Maputo City granted the Defendants an anti-suit interdict (the "Interdict") on 13 April 2012 ordering IMM to refrain from taking any action before the English Courts under the jurisdiction clauses contained in two agreements that will be referred to below, the Share Option Agreement and Novation Agreement, in relation to share options relating to Companhia Mineira de Naburi SA ("CMDN"), until a ruling has been issued by the Mozambican Courts and has acquired the force of res judicata.

8. At a hearing in Maputo on 3 May 2012, Judge Monjane confirmed that the Interdict did not apply to the proceedings then on foot in London and only applied to new actions, not yet commenced. She confirmed that she was unaware of the English proceedings when she granted the Interdict and had no intention of interfering with proceedings which were already underway in London and had been the subject of orders for directions by the English Court.

9. On the morning of the hearing on 3 May 2012, the Defendants filed a further written submission with the Maputo Court seeking to extend the Maputo Interdict so that it covered (a) Pathfinder and IMG as well as IMM, and (b) the current as well as any future proceedings.

10. On 15 May 2012, the Claimants applied for (and obtained) *ex parte* an anti-suit injunction from Hamblen J restraining the Defendants from bringing or

pursuing any application or proceedings before the Maputo Court or taking any other steps in the Mozambique Courts seeking to restrain the Claimants from pursuing this action in England and requiring the Defendants forthwith to withdraw any such application or proceedings.

11. At the first return hearing on the anti-suit injunction on 18 May 2012, the Defendants were ordered to notify the Maputo Court in writing of the anti-suit injunction forthwith, and to request the Maputo Court that no ruling be made on their anti-suit proceedings in the Maputo Court until after the English court had ruled on the continuation of the anti-suit injunction on the adjourned hearing of the return date. However, the Defendants failed to comply with this Order.

12. Further, the Defendants failed to serve their evidence in support of their challenge to the continuation of the anti-suit injunction by 4.00 pm on 24 May 2012 (as they had been directed to do) and on 25 May 2012, their solicitors informed the Claimants' solicitors, Travers Smith, that the Defendants intended to take no further part in the English proceedings and that Smithfield were no longer instructed.

13. On 30 May 2012, Teare J ordered the anti-suit injunction to be continued until trial or further order.

14. The Defendants defaulted on their obligation to exchange lists of documents by 4.00 pm on 25 May 2012 as directed by Court and thus it was that on 6 July 2012 Christopher Clarke J ordered that the Defendants' Defence and Counterclaim be struck out and a hearing be fixed on an expedited basis for the final disposal of the Claimants' claims. The Defendants were further ordered to pay the Claimants' costs of the application on the indemnity basis. In making this order, Christopher Clarke J said:

> "*The defendants have flagrantly refused to comply with the anti-suit orders made by this court. They have also failed to comply with other orders of this court; and they have made misleading statements to the court in Maputo as to the position in this country...*"

The Claimants' witnesses

15. The principal witness for the Claimants is Mr Nicholas Trew, the CEO of the 1st Claimant ("Pathfinder") and a director of IMM and of the 3rd Claimant ("IMG"). Mr Trew has had a long career in the field of insurance broking.

16. The other factual witnesses for the Claimants are Mr James Normand, Mr John McKeon, Mr Timothy Baldwin and Mr Gordon Dickie. Mr Normand is a qualified chartered accountant. He was appointed to the board of Pathfinder in December 2009. Mr McKeon's background is in stockbroking, corporate finance, property and project finance. He became a director of IMM on 8 September 2009, and Chairman of Pathfinder on 9 February 2011. Mr Dickie's background is in engineering. He was appointed a director of IMM on 4 July 2008, and a director of CMDN on 8 October 2009. He was a director of Pathfinder between February 2011 and September 2011. Mr Baldwin is a corporate financier with substantial experience in the mining sector. He is a director of IMM, and was a non-executive director of Pathfinder between February 2011 and June 2011.

17. The Claimants have also served: (i) a witness statement from Ms Edwards of Travers Smith (solicitors for the Claimants) explaining the provenance of the CMDN Share Registry Book; and (ii) an expert report from Mr Jose Caldeira on certain issues Mozambique law. Mr Caldeira is Managing Partner and Head of the Corporate and Litigation Department of SAL & Caldeira Advogados, Lda. He is an attorney qualified to practice law in Mozambique with 30 years' experience.

18. The Claimants' witnesses have confirmed the truth of their witness statements on oath and I accept the truth of their testimony. Where their evidence conflicts with evidence served by the Defendants, I prefer the former rather than the latter. The Claimants' witnesses all attended at the hearing of this application to make themselves available for questioning by the Defendants and the Court. In the event, the Defendants did not appear and the Court was of the view that it was unnecessary to question the Claimants' witnesses.

The Defendants

19. General Veloso is a Mozambican citizen and is domiciled there. He is the Managing Director of JVC, of which company he appears to be sole beneficial owner. He was a non-executive director of Pathfinder from June 2011 until his resignation in November 2011. He was also a director of CMDN until his removal on 17 January 2012.

20. Mr Cavaco is a Portuguese citizen and is believed to be domiciled in Portugal. He is a lawyer and has considerable experience as a manager of civil engineering, construction and public works projects.

21. JVC is a company incorporated in Mozambique. It is believed to be beneficially owned and controlled solely by General Veloso

The Defendants' witnesses

22. The Defendants have not served any evidence for the purpose of the trial of the Claimants' contract claims but on 17 February 2012 they served witness statements from Mr Cavaco and Mr Timothy Horlick in support of the challenge to the jurisdiction of the English court which they subsequently abandoned. Mr Horlick is a former shareholder in IMM and Pathfinder. He has performed the role of an adviser to the Defendants and has been acting in concert with them since at least early September 2011.

The approach of the court to this application

23. Notwithstanding that the Defendants' Defence and Counterclaim have been struck out, I have proceeded on the basis that: (1) the Claimants must prove their case on the evidence available to the Court, including the witness statements of Messrs Cavaco and Horlick, and having regard to the allegations made in the Defence that carries a declaration of truth; and (2) the Claimants must establish their case in law having regard, inter alia, to the defences pleaded in the Defendants' Defence.

The Court's findings as to the relevant factual background

24. In 2005, Mr Cavaco told Mr Trew and Mr Dickie that he and General Veloso wished to exploit a mining licence in Mozambique ("the Naburi Licence") but lacked the necessary resources to do so. The licence was held by JVC but it was going to be transferred to CMDN. Following a number of discussions and conversations, it was agreed between Mr Trew, Mr Dickie, Mr Cavaco and General Veloso that IMG would attempt to secure the necessary resources to exploit the licence.

25. Mr Cavaco explained that he and General Veloso wanted to exploit the site covered by the Naburi Licence, but were not in a position to do so. Mr Cavaco asked if IMG would be able to assist. Mr Cavaco explained to Mr Trew and Mr Dickie that he and General Veloso hoped to secure equity investment in the business from a third party funder.

26. In November 2005 IMG, acting by Mr Dickie, JVC, acting by General Veloso and Mr Cavaco on his own behalf executed a Memorandum of Understanding (the "MOU").

27. The MOU recorded that *'[IMG] has been retained to arrange the development and construction of the above project to exploit an identified ore deposit in Mozambique'.....The programme of works will be supported by the financial arrangements that are summarised below'*.

28. The financial arrangements envisaged by the MOU were:

> (1) Equity funding, referred to in the MOU as *'Owner's equity'*, of US$15,000,000 which was to be provided by a third party funder over the construction period of the mine, with an initial cash investment of US$100,000. At the time of the MOU, Mr Trew and Mr Dickie understood that this third party funder was to be Worldlink Asset Management Limited ("Worldlink"), an entity which had been introduced to the project by Mr Cavaco.
>
> (2) Debt finance of US$100,000,000 required for the construction of the mine to be raised by way of a bond issue on the Swedish or Canadian debt markets.

(3) Further equity funding to be raised by the sale of shares in CMDN by Mr Cavaco and JVC to a company called IM Energy Ltd, (described as a *'Proposed shareholder'*) over an agreed time period. (IM Energy Ltd in the event was never incorporated).

29. The MOU expressly provided: "This proposal is operative under the Laws of England and Wales. It is agreed that all parties will submit to the Supreme Court of Judicature in London in the settlement of all disputes arising from the provisions contained in the proposal".

30. Shortly after the MOU was executed Mr Trew and Mr Dickie were told by Mr Cavaco that Worldlink was no longer able or willing to invest in the venture and following further discussions Mr Trew and Mr Dickie agreed with Mr Cavaco (on behalf of himself and JVC) that IMG would instead provide the initial equity funding required to move the project forward.

31. A written agreement entitled "Share Option Agreement" dated 10 February 2006 was executed by IMG, JVC and Mr Cavaco ("the Share Option Agreement"). This document was drafted by Mr Dickie, who is not a lawyer, without any legal advice or assistance from lawyers. In relevant part it reads:

WHEREAS:

(1) "Party A" [IMG] has signed a Memorandum of Understanding with "Party B" [JVC and Mr Cavaco] dated 28th November 2005 whereby "Party A" will provide and arrange services of Engineering, Insurance and Finance to complete the construction and development of a mine to extract Titanium Ore from a deposit at Naburi in Mozambique that is owned by **COMPANHIA MINEIRA DE NABURI SARL.**

(2) "Party A" is granted an option by "Party B" to purchase 80 % of the shares in **COMPANHIA MINEIRA DE NABURI SARL** for the sum of US$ 10,000,000.00 (Ten Million United States Dollars) as recognition of the benefit to "Party B" of the services provided by "Party A". This sum to be paid not later than 6 months from signature to the construction contract between **COMPANHIA MINEIRA DE NABURI SARL** and **MOTA-ENGIL Engenharia**.

(3) "Party B" confirms that the rights and title to License No 760C and No 575L issued on the 13/09/2004 by the Minister of Mineral Resources and Energy of the Republic of Mozambique has been transferred from

J.V. CONSULTORES INTERNACIONAIS LTDA to COMPANHIA MINEIRA DE NABURI SARL.

IT IS AGREED THAT:

Option Purchase price.

"Party B" agrees to sell to "Party A" this option for a consideration in the sum of USD100,000.00 (One hundred thousand United States Dollars).

Payment of the option purchase price.

The payment of the option purchase price will become due as follows:

On signature to this option agreement. $ 20,000

On delivery of share certificates in **COMPANHIA MINEIRA DE NABURI SARL.** $ 30,000

Payable within 14 days of delivery of the balance of Documents and evidence of completion of the demarcation of site. $ 50,000

Delivery of option

In exchange for the payment of the "option purchase price", "Party B" undertakes to deliver to lawyers appointed by "Party A" share certificates and duly signed share transfer forms equal to 80 % of the issued share capital of **COMPANHIA MINEIRA DE NABURI SARL**, together with a copy of the company registration certificate, current balance sheet and accounts and the documents evidencing the transfer of license from **J.V. CONSULTORES INTERNACIONAIS LTDA** to **COMPANHIA MINEIRA DE NABURI SARL.**

Governing law

This Agreement will be governed by and construed in accordance with the Law of England and Wales. The courts of England and Wales are to have exclusive jurisdiction to settle any disputes or claims which may arise out of or in connection with this Agreement for which purpose all parties agree to submit to the jurisdiction of the courts of England and Wales.

32. At the time of the Share Option Agreement, shares in CMDN were in bearer form. On 14 February 2006, IMG paid to Mr Cavaco and JVC the first US$20,000 of the Initial Amount. Shortly before 20 March 2006 the Defendants delivered bearer share certificates representing 80% of the shares in CMDN to IMG, who passed them on to their lawyers, Penningtons LLP

("Penningtons"). By a letter dated 20 March 2006 to Mr Cavaco, Mr Brooks of Penningtons confirmed that he was holding, inter alia, six signed certificates signed by [CMDN] and dated March 2006 to the order of his clients, IMG.

33. After the payment of the first part of the Option Purchase Price there was a considerable delay in raising the funds required by IMG to pay the balance of the Option Purchase Price.

34. Very little drilling data had been obtained to show the mineral composition of the deposits at the site and without this data, there was no immediate prospect of completing the feasibility studies required to confirm that extraction was commercially viable. The ultimate requirement was to obtain a Definitive Feasibility Study ("DFS") which could then be used as the basis on which the substantial funding needed for the construction phase of the project could be raised. To obtain the relevant data to carry out a DFS of the Naburi site, a drilling programme estimated to cost over US$10,000,000 was required.

35. In early 2008, Mr Cavaco alerted Mr Trew and Mr Dickie to the opportunity to acquire from BHP Billiton ("BHP") its Mozambican subsidiary, Sociedade Geral de Mineracao de Mocambique SARL ("Genbique"). Genbique held a research and exploration licence over the Moebase site (the "Moebase Licence") and the possibility existed of acquiring Genbique from BHP, and then seeking to obtain an extension of the period of validity of the Moebase Licence from the Mozambique government.

36. This opportunity was of great potential benefit to the Naburi site project because BHP and its predecessors had already spent over US$35,000,000 on the Moebase site and associated infrastructure, including drilling almost 3,000 boreholes from which core samples had been obtained, and many thousands of pages of drilling data were available showing confirmed resources. The existence of this drilling data meant that the Moebase site was capable of proceeding directly to the stage of advanced feasibility studies, and ultimately a DFS.

37. At around the same time as the possibility of acquiring Genbique arose, in early 2008, Mr Trew met Mr Baldwin. Mr Baldwin had experience that was highly relevant to the project, having previously arranged funding for another mineral sands mining project in Mozambique, close to the Moebase site, which had successfully reached production. Mr Baldwin told Mr Trew and Mr Dickie that he could assist in obtaining initial funding to pay the balance of the Option Purchase Price under the Share Option Agreement, and for some preliminary due diligence to be carried out at the Naburi site. Mr Baldwin also recognised that if the Moebase Licence were acquired, the venture could soon acquire drilling data with which to proceed to a DFS and thereafter production at the Moebase site could commence. And once production at the Moebase site was underway, the proceeds could be used to unlock the potential value of the Naburi site.

38. Mr Trew, Mr Dickie and Mr Baldwin agreed to form a joint venture with a view to raising funding for the project through a listing on the London Alternative Investment Market ("AIM") via a 'reverse takeover' ("RTO"). A private joint venture company would be formed, which would pay the balance of the Option Purchase Price outstanding under the Share Option Agreement which it was believed would result in the acquisition of 80% of the shares in CMDN. This private company would then be acquired by a dormant 'shell' company already listed on AIM, in exchange for the allocation to the joint venture company shareholders of in the AIM listed vehicle. Shareholders in the private joint venture company would thereby acquire shares in a publicly traded company, which would hold the key assets through its subsidiary (the joint venture company), without having to go through the lengthy process of an Initial Public Offering ("IPO"). An RTO is an established method of obtaining access to the AIM market.

39. As regards the joint venture company, Mr Trew, Mr Dickie and Mr Baldwin agreed to use a shelf company already owned by Mr Baldwin called Equity for Growth (Investment Management) Limited ("EFGIM"). EFGIM subsequently changed its name to IM Minerals Ltd (IMM) on 25 September 2008. Originally, it was intended that shareholdings in the joint venture company

(IMM) would be held by companies owned and controlled by the respective individuals: IMG on behalf of Mr Dickie and Mr Trew, and Equity for Growth (Securities) Limited ("EFGSL") on behalf of Mr Baldwin. In the event, shares in IMM were substantially issued directly to the individuals involved.

40. In the belief that payment of the final instalment of the Option Purchase Price would result in the acquisition of the shares in CMDN, the next step was to substitute IMM for IMG under the Share Option Agreement, in order for IMM to pay the balance of the Option Purchase Price and acquire the shares in CMDN. This substitution was done by oral agreement of all the relevant parties (including Mr Cavaco on behalf of himself and JVC) in a number of conversations held at around the same time in early 2008.

41. Also at around this time, Mr Trew and Mr Dickie agreed with Mr Cavaco that the percentage of shares to be acquired from JVC and Mr Cavaco under the Share Option Agreement would be reduced from 80% to 70%. It was Mr Cavaco who proposed this variation at a meeting in London attended by Mr Trew and Mr Dickie. Mr Cavaco told Mr Dickie and Mr Trew that General Veloso had been approached by potential third party buyers with a view to their acquiring an interest in CMDN. He said that General Veloso was unhappy about the length of time it was taking to progress matters and that Mr Trew and Mr Dickie should agree to vary the Share Option Agreement to accept a 70%/30% split of shares in CMDN in order to keep General Veloso on side. Mr Trew and Mr Dickie confirmed their agreement to this proposal on the same day.

42. Shortly after these events, Mr Baldwin obtained a commitment from Mr McKeon, one of his business contacts, to invest £125,000 in IMM. With part of the sums advanced by Mr McKeon, IMM paid the balance of the Option Purchase Price to JVC and Mr Cavaco on 19 May 2008. A few days previously on 10 May 2008, Mr Cavaco had emailed Mr Brooks of Penningtons authorising him to hand over to Mr Trew all the documents referred to in Mr Brooks' letter of 26 March 2006, including the six share certificates in CMDN.

43. Meanwhile, Mr Dickie was continuing to lead the negotiations to purchase Genbique throughout the remainder of 2008 and early 2009 on behalf of IMM on the basis that it was now a majority shareholder in CMDN. The negotiations culminated in a written agreement dated 26 May 2009 for the acquisition of Genbique by CMDN, with IMM acting as guarantor of CMDN's obligations (the "Genbique Agreement"). The Genbique Agreement was signed by Mr Trew on behalf of CMDN, pursuant to a Power of Attorney granted by CMDN expressly for that purpose.

44. Under the Genbique Agreement, the total consideration agreed was US$10,000,000, payment of which was split into tranches (i) upon payment of an initial amount of US$500,000, ownership of the share capital of Genbique was to be transferred to IMM and (ii) two further instalments of US$5,000,000 and US$4,500,000 were to be paid respectively upon appointment of a contractor for the installation of mining and processing equipment and upon production and shipping of product from the mine for commercial sale. IMM, on behalf of CMDN, made the first part payment of the initial amount to BHP in September 2009 in an amount of US$50,000. Subsequent payments of US$300,000 and US$150,000 were made by IMM in October 2009 and March 2010 respectively.

45. In late June 2009, Mr Cavaco attended various meetings in London with Mr Trew and Mr Dickie to discuss progress of the project. At one of these meetings on 29 June 2009, Mr Cavaco proposed that he exchange a further 5% of the shares in CMDN for an equivalent proportion of shares in IMM. Mr Trew and Mr Dickie agreed to this proposal as recorded in Mr Trew's contemporaneous email. On 4 December 2009, pursuant to this agreement ("the London Agreement"), 67,470 shares in IMM were issued to Mr Cavaco in exchange for IMM acquiring bearer share certificates for a 5% of the shares in CMDN (from the certificates which had been received from the Defendants in March 2006).

46. The London Agreement contained no express choice of governing law. The Rome Convention on the Law Applicable to Contractual Obligations ("the Rome Convention") applied to this agreement by reason of the Contracts

(Applicable Law) Act 1990. In my judgement, the governing law of the London Agreement is English Law by virtue of Article 3 of the Rome Convention since the circumstances demonstrate with reasonable certainty that the parties impliedly agreed that English law should govern the agreement. I say this because the London Agreement was essentially collateral to the Share Option Agreement and that agreement was expressly governed by English law. Alternatively, English law is the governing law under Article 4 of the Rome Convention because the London Agreement is most closely connected with English law. Pursuant to Article 4 (2), a contract is presumed to be most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has his habitual residence. In this case, that party was IMM and IMM's central residence is in England.

47. In late 2009, further progress was made towards completion of the RTO. Further investment was raised including, in October 2009, an investment of £200,000 in IMM from Mr Tim Horlick and Mr Richard Horlick. The Horlicks had been introduced by Mr Baldwin, and had received a presentation on the project from Mr Trew, Mr Baldwin and Mr Dickie in June 2009.

48. In November 2009, the board of IMM arranged a visit to Mozambique. This was in order to promote good local relations with the Ministry of Mines and Mineral Resources ("the Ministry") in Mozambique ahead of the next steps in the development of the project, by demonstrating that all parties involved were proceeding in good faith and with serious intent. Mr Trew, Mr Dickie, Mr Baldwin, Mr McKeon, Mr Cavaco and General Veloso all attended a meeting at the Ministry in Maputo, Mozambique, on 4 November 2009, at which a presentation was made to the Ministry setting out the planned development of the project.

49. Meanwhile, Mr Baldwin had identified Pathfinder Properties Plc ("Pathfinder Properties") as a suitable dormant AIM-listed company which could be converted into IMM's listed equity vehicle. Trading in the shares of Pathfinder Properties had been suspended, and the company required recapitalisation before trading could resume. Accordingly, IMM arranged for the company to be recapitalised by the issue of convertible loan notes, subscribed for mainly

by friends and family of Mr Baldwin and Mr McKeon. It was further proposed that the company be renamed Pathfinder Minerals Plc. The proposed issue of the convertible loan notes, together with, inter alia, the proposed change of name, required the approval of the existing shareholders of Pathfinder Properties in general meeting. A shareholders' circular (the "2009 Circular") was therefore produced, seeking the shareholders' approval for the various steps that needed to be taken to prepare Pathfinder Properties for the RTO.

50. Pathfinder Properties appointed Maxwell Winward LLP ("Maxwell Winward") as its lawyers in connection with the preparation of the 2009 Circular. Maxwell Winward in turn appointed a Mozambique law firm, MGA Advogados & Consultores, LDA ("MGA"), to provide a legal opinion on a number of issues of Mozambique law, including as to IMM's ownership of CMDN, the corporate status of CMDN and Genbique and the status of the Licences. Mr Cavaco worked closely with MGA in assisting with the preparation of their legal opinion. IMM's ownership of 75% of the shares in CMDN was verified in the final version of MGA's opinion produced on 26 November 2009.

51. Prior to finalising its opinion, MGA advised that IMM's acquisition of 75% of the share capital of CMDN be formally approved by CMDN's shareholders in general meeting. An EGM of CMDN was accordingly convened for this purpose on 8 October 2009, at which IMM's acquisition of 300,000 shares in CMDN, representing 75% of CMDN's share capital, was approved. The transfer of these shares to IMM was thereafter recorded in the Share Registry Book of CMDN.

52. The 2009 Circular was sent to Pathfinder Properties' shareholders on 27 November 2009. The requisite approvals to the proposed change of name and issue of convertible loan notes were given by the shareholders at a general meeting of Pathfinder Properties held on 21 December 2009 .

53. In early 2010, the board of IMM determined that it would be easier for Pathfinder to raise funding on the markets if its key assets (the Licences) were held in a company wholly owned by its subsidiary IMM, without a significant

minority interest. This would also avoid the need for a complicated shareholders agreement.

54. In the summer of 2010, Mr Trew therefore proposed to Mr Cavaco that he and JVC exchange their remaining combined shareholding of 25% for an equivalent shareholding in IMM. The effect of the proposal was to move their shareholding in CMDN up into IMM, which would in turn ultimately become a shareholding in a listed entity (Pathfinder) following the RTO. Mr Cavaco confirmed his and General Veloso's agreement to this proposal. In order to comply with Mozambique law requirements for CMDN to have at least three shareholders, it was agreed that Mr Cavaco and General Veloso would each retain a single share in CMDN to satisfy this formality.

55. The parties' agreement was recorded in a written agreement called "the Share Exchange Agreement" which was executed by Mr Cavaco and by General Veloso on behalf of JVC on 18 August 2010.

56. In December 2009, Mr Normand was appointed Finance Director of Pathfinder. In early 2010, he commenced the process of drawing up the accounts of IMM for the year ending January 2010 in preparation for the proposed RTO. In order to complete these accounts, Mr Normand needed to review the agreements by which IMM had come to hold (as at the year ending January 2010) 75% of the shares in CMDN.

57. Upon obtaining a copy of the Share Option Agreement, Mr Normand noted that it appeared to contemplate the transfer of 80% of the shares in CMDN to IMG. Mr Normand further noted that it was entitled a 'Share Option Agreement', and the word 'option' appeared several times. Mr Normand raised these points with Mr Trew and Mr Dickie. Mr Trew and Mr Dickie informed Mr Normand of the variations that had been agreed in 2008, and explained that, regardless of the labels used in the agreement, all the relevant parties had always understood and proceeded on the basis that the Share Option Agreement was a contract for sale and purchase.

58. Mr Normand was concerned, however, that no formal document had been drawn up to reflect the 2008 variations to the Share Option Agreement and at his suggestion solicitors, Penningtons, were instructed by IMM to draft an agreement to record accurately the chronology of IMM's investment in CMDN and that 70% of the shares in CMDN had been transferred to IMM following payment of the Option Purchase Price. Mr Normand also wanted to make a formal record of the amount and status of payments which had been made to Mr Cavaco by IMM on account of his portion of the US$9,900,000 deferred consideration under the Share Option Agreement.

59. On 8 September 2010 a Novation Agreement was concluded between IMG, IMM, Mr Cavaco and JVC, acting by General Veloso, ("the Novation Agreement"). Under this agreement, IMM was substituted for IMG in the Share Option Agreement and the latter agreement was amended, inter alia, by substituting the figure of 70% for 80% in references to the share capital of CMDN and providing that the sums paid to Mr Cavaco by IMM totalling $175,425 were to count towards the payment of the whole price for the acquisition of his shares in CMDN. The Recitals to the Novation Agreement provided:

> **"Background:**
>
> A. This Novation Agreement is supplemental to a share option agreement dated 10 February 2006 and made between IMG and the Sellers for the sale and purchase of certain of the Sellers' shareholdings in COMPANHIA MINEIRA DE NABURI S.A.R.L. (CMdN) (Contract).
>
> B. The Parties hereto agreed that the shares in CMdN, which were the subject of the Contract, would be reduced from 80% to 70% and were in fact transferred by the Sellers to IMM and not to IMG, and in respect of which IMM has made payment of the option purchase price as set out in the Contract.

C. IMM has made certain payments to Mr Cavaco on account of that part of the total purchase price due to him which the parties wish to acknowledge.

D. As a consequence of the foregoing, IMG wishes to transfer all its rights, obligations and liabilities under the Contract to IMM on the terms set out below and the Sellers and IMM wish to agree certain changes to the terms of the Contract also as set out below.

E. IMG wishes to be released and discharged from the Contract as from 19 May 2008 (Effective Date) and the Sellers have agreed to release and discharge IMG from the Effective Date upon the terms of IMM's undertaking to perform the Contract and be bound by the terms of the Contract in place of IMG".

60. Clause 10 of the Novation Agreement provided that it was to be governed by English law and that the courts of England were to have non-exclusive jurisdiction over all disputes arising thereunder.

61. The Admission Document required by the AIM rules for Pathfinder to be readmitted to AIM was prepared under the supervision of Daniel Stewart & Co Plc ("Daniel Stewart"), Pathfinder's Nominated Adviser ("NOMAD"). The document had to describe accurately the business, financial and legal affairs of the company and further due diligence was required. Again, Maxwell Winward were retained by Pathfinder to assist in the exercise and MGA were retained in Mozambique to produce a legal opinion on matters of Mozambique law In particular, it was important again to verify the status of IMM's sole asset, namely its shareholding in CMDN.

62. Mr Cavaco was again closely involved in the preparation of MGA's legal opinion. The final version of the opinion was produced on 30 December 2010, and expressly confirmed IMM's ownership of 99.99% of the shares in CMDN.

63. Prior to MGA finalising its opinion, an EGM of CMDN's shareholders was convened on 28 October 2010 for the purposes of formally approving the transfer to IMM of all but two of the remaining 25% of the shares in CMDN.

At this meeting, resolutions were passed formally confirming IMM's acquisition of a further 99,998 shares in CMDN, as a result of which IMM held 399,998 of the shares in CMDN, representing 99.99% of the company's share capital.

64. In the course of the 2010 due diligence exercise, Fox Williams LLP, the lawyers retained by the NOMAD Daniel Stewart, expressed concern about IMM's shares in CMDN being in bearer form, since bearer share certificates could be misplaced and were not secure. They suggested that IMM's shareholding should be converted into nominative (registered) form. Following discussion with MGA, who confirmed that this was possible under the Articles of Association of CMDN, Mr Trew asked Mr Cavaco to arrange for the conversion of IMM's shareholding into nominative form. On 6 December 2010, Mr Cavaco duly sent Mr Trew a copy of a nominative share certificate (the "Nominative Share Certificate"), signed by both him and General Veloso as directors of CMDN, recording IMM's ownership of 399,998 shares in CMDN. The issue of this Nominative Share Certificate to IMM was registered in CMDN's Share Registry Book.

65. MGA's final due diligence opinion was relied upon by Pathfinders' directors in confirming the accuracy of the statements in the Admission Document concerning IMM's acquisition and ownership of 99.99% of CMDN (as evidenced by the verification notes produced in connection with the Admission Document: see Questions 148, 151, 153 and 160). The Admission Document was published on 30 December 2010.

66. The consideration for the acquisition by Pathfinder of all the issued shares of IMM was to be satisfied by the issue and allotment to IMM's shareholders of 310 shares in Pathfinder for each share held in IMM. This was achieved by the execution on 30 December 2010 of a Share Purchase Agreement ("the 2010 SPA") which was signed on behalf of Pathfinder and on behalf of all shareholders in IMM, including by Mr Dickie on behalf of Mr Cavaco, General Veloso and JVC pursuant to signed Powers of Attorney granted by Mr Cavaco, General Veloso and JVC to Mr Dickie for that specific purpose.

67. Clause 25 of the 2010 SPA provided that it was governed by English law and that England was the exclusive jurisdiction for the resolution of all disputes arising thereunder.

68. On 9 February 2011, Pathfinder's shareholders approved the RTO and the acquisition of IMM by Pathfinder was duly completed by the issue and allotment of shares in Pathfinder to the former shareholders of IMM. Pathfinder's enlarged share capital was re-admitted to trading on AIM the following day.

69. A scoping study commissioned from Scott Wilson Limited, an engineering firm, for both the Moebase and Naburi sites was completed in May 2011. It indicated that reserves were significant, commercially viable, and justified mine development. Subsequently, Jacobs Matasis Pty Limited, a South African engineering firm, were engaged to produce a DFS of the Moebase site, and numerous other contractors were engaged, or close to being engaged, for drilling and other work (all of these have since had to be stood down because of this dispute between the Claimants and the Defendants).

70. Following the relisting Pathfinder's board agreed with Mr Cavaco's suggestion that there ought to be a Mozambique national on the board of Pathfinder on 16 June 2011 appointed General Veloso to the board of Pathfinder as a non-executive director, he having signified his willingness so to be appointed.

71. In order to raise additional funds for the next phase of the project, Arlington Asset Management Limited ("Arlington") were retained to place shares with prospective investors. During the period from May to July 2011 Mr McKeon and Mr Trew made a number of presentations to institutional investors introduced by Arlington. These presentations culminated in the agreement on 13 July 2011 of a number of institutional investors, including JP Morgan Asset Management, to subscribe £11,000,000 for new shares in Pathfinder.

72. Also on 13 July 2011, the Ministry issued to Genbique a new mining concession licence, numbered 4623C, over the Moebase site, for a period of

25 years. This licence replaced the previous exploration and research licence held by Genbique, numbered 73L, relating to this site.

73. Pathfinder's Annual General Meeting ("AGM") was set to take place on 16 September 2011.

74. On 8 September 2011, shortly before the Pathfinder AGM due to be held on 16 September, there was a meeting attended by Mr Baldwin, Mr Tim Horlick, Mr Richard Horlick, and Mr Cavaco. At the meeting, Mr Tim Horlick announced to Mr Baldwin that they (the Horlicks and Mr Cavaco) wanted to change the board of Pathfinder, and wanted Mr Baldwin to use his shareholder vote to that effect at the forthcoming AGM. Mr Cavaco said they had no confidence in the existing management of Pathfinder, and stated that if Mr Baldwin did not vote to change the board *'then the licence would be lost.'*

75. Mr Cavaco and the Horlicks also held a meeting with another shareholder in Pathfinder, Lord Nicholas Monson, at which Mr Cavaco made the same threat to Lord Monson, namely that if he did not vote in favour of changing Pathfinder's board, the Licences would be lost.

76. On 12 September 2011, Mr Trew learned that Mr Cavaco, together with Messrs Tim and Richard Horlick, were planning to vote against the reappointment of Mr McKeon, Mr Dickie and Mr Trew as directors of Pathfinder at the AGM. On 14 or 15 September 2011, the Pathfinder board met with Mr Cavaco and the Horlicks who indicated that they were unhappy that the Pathfinder share price was lower than they thought it should be, that they felt the current board lacked mining experience, and that they were unhappy with the grant of share options to the board in August 2011.

77. At the AGM on 16 September 2011, General Veloso (by proxy), Mr Cavaco and the Horlicks each voted against the reappointment of the board (other than Mr Normand). Despite this, the result of the vote was that Mr Trew and Mr McKeon were re-elected to the Pathfinder board, but Mr Dickie was not.

78. Shortly after the AGM, Mr McKeon and Mr Trew had dinner with Mr Cavaco and his wife in London. At the dinner, Mr Trew told Mr Cavaco that he was content to put the events of the AGM behind them in the interests of moving the project forward and Mr Cavaco indicated that he too was committed to doing so.

79. On 21 October 2011 General Veloso told Mr Trew over the telephone that he had been told by his lawyers that he should resign as a director of Pathfinder and said that Mr Cavaco would explain why. Mr Trew informed General Veloso of the most recent developments on the project, including the appointment of the various contractors to carry out the DFS following which he understood General Veloso to say that he would consider his position, and the call ended.

80. A few minutes after this call, General Veloso sent an email to Mr McKeon, copied to Mr Trew and Mr Normand, attaching a letter to the directors of Pathfinder stating that he was resigning as a non-executive director of the company with immediate effect. Mr Trew's understanding was that this email had been superseded by his recent telephone conversation and that the General had agreed to reconsider his position.

81. Later in the evening of the same day, Mr Cavaco telephoned Mr Trew and told him that General Veloso was upset by the dilution to his shareholding in Pathfinder resulting from the placing of shares with institutional investors in July 2011, and the grant of share options to the board in August 2011. Mr Cavaco then went on to say that Pathfinder had *'lost the licence'*, almost as a throw away remark. Mr Cavaco would not elaborate on this despite Mr Trew's request that he do so.

82. It was by now clear to the Pathfinder board that there was ill feeling between Pathfinder and General Veloso and in an attempt resolve the situation there were a number of discussions and emails between the parties, in which, inter alia, Mr Trew communicated a good faith offer from the four founding shareholders of Pathfinder (Mr Trew, Mr McKeon, Mr Dickie, and Mr

Baldwin) to transfer shares to General Veloso in order to restore him to the 15% shareholding in Pathfinder which he had held prior to July 2011.

83. However, these attempts to assuage the dissatisfaction of General Veloso were unsuccessful. On 11 November 2011, Mr Trew received an email from General Veloso attaching a letter in which he confirmed his resignation The letter went on to state *'I can also confirm that the licence to mine heavy mineral sands previously owned by [CMDN] is no longer owned by CMDN, as also notified to you on 21 October 2011'*. The letter also made accusations against the directors of Pathfinder of alleged wrongdoing, which was said to include *' deceit, negligent misstatement, misrepresentation, breach of contract, criminal liability under the Theft Act 1968 and the Fraud Act 2006 and breaches of FSMA regulations*'.

84. Upon receipt of this letter, and after discussion with Pathfinder's NOMAD Daniel Stewart and the London Stock Exchange, Pathfinder requested and obtained an immediate temporary suspension in the trading of its shares. Pathfinder also demanded an explanation from General Veloso for his conduct and his allegations.

85. Meanwhile, Pathfinder became aware of an unconfirmed report that a merged licence had been issued by the Ministry in the name of a company called Pathfinder Moçambique and discovered that a company named Pathfinder Moçambique SA had been incorporated on 27 September 2011. The company's shareholders were General Veloso, JVC and Mr Cavaco, and the company's directors were General Veloso, Mr Cavaco and Ms Miriam Veloso, the daughter of General Veloso.

86. On 25 November 2011, Mr Trew attended a meeting in Mozambique with the Inspector of Mines of Mozambique, the National Director of Mines of Mozambique, Deputy Minister Razak, the Deputy Minister of Mineral Resources, and a member of the Ministry's legal team. At that meeting it was orally confirmed by the National Director of Mines that the Ministry had received and had been processing an application from Pathfinder Moçambique for the amalgamation of the Moebase and Naburi Licences into a single

licence to be assigned to Pathfinder Moçambique. However, the Ministry could not at the time confirm the status of the Moebase and Naburi Licences. Mr Trew confirmed to them that Pathfinder Moçambique had no lawful connection to Pathfinder. This shocked them, and the Inspector of Mines declared that a fraud had been committed. Deputy Minister Razak immediately requested the National Director of Mines to carry out an investigation into what had occurred.

87. Following this meeting, Pathfinder repeatedly sought urgent clarification from the Ministry of the status of the Licences, and sought a further meeting with Deputy Minister Razak. However, Pathfinder received no indication as to whether the Ministry's investigation had been completed, and Deputy Minister Razak stated that he did not wish to meet any of the parties while the investigation was ongoing.

88. On 1 February 2012, Pathfinder's lawyers in Mozambique received a letter from the Ministry. The letter confirmed that the Licences are no longer registered in the name of CMDN. No further information was provided.

89. In their evidence served on 17 February 2012, the Defendants exhibited the merged licence issued to Pathfinder Moçambique. It bears the same licence number (4623C), date of issue and duration as the Moebase Licence reissued by the Ministry to CMDN in July 2011.

90. On 6 December 2011, IMM received a letter from Mr Cavaco. The letter was dated 25 November 2011 but contained a London postmark dated 5 December 2011. The letter made a number of allegations against IMM. In particular, it alleged that the agreements pursuant to which IMM had acquired its shares in CMDN were liable to be unravelled because of alleged misrepresentation, 'bad faith', and breach of contract. The letter stated that if the shares held by IMM were not returned within five days, they would be considered lost and *'we will request the company to issue new [shares]'*. On the following day, IMM received a letter in substantially the same terms from General Veloso.

91. On 9 December 2011, General Veloso and Mr Cavaco published a full page paid advertisement in a prominent Mozambique newspaper, which repeated the allegation made in their letters of 25 November 2011 that the relevant agreements were null and void and/or had been terminated, and that accordingly IMM and Pathfinder were *'neither directly nor indirectly shareholders, nor do they have any corporate relationship with CMDN'*.

92. As a result of the above statements, on 19 December 2011 the Claimants sought and were granted urgent injunctive relief (without notice) from the English Court in respect of IMM's rights of ownership in shares in CMDN pursuant to the Agreements. The Claimants commenced these proceedings on the same day.

The relief sought by the Claimants

93. The Claimants seek declarations: (i) as to the validity and enforceability of the Share Option Agreement, the London Agreement, the Share Exchange Agreement, the 2010 SPA and the Novation Agreement (together "the Agreements"); (ii) that the London Agreement is governed by English law; (iii) as to the true construction and meaning of the Agreements. Further, in the event that it be held that the Share Option Agreement granted an option rather than operated as a sale and purchase agreement, the Claimants seek a declaration that the Defendants are estopped from denying that agreement operated as a sale and purchase agreement.

94. The Claimants also seek a permanent injunction restraining the Defendants from interfering with IMM's rights of ownership in its shares in CMDN and otherwise acting in breach of the Agreements.

95. Finally, in the event that the Court concludes that IMM never acquired any shares in CMDN, the Claimants seek to recover damages for breach of warranties contained in the Share Exchange Agreement and the 2010 SPA.

The validity and enforceability of the Agreements

96. The Defendants deny that the parties agreed in 2008 to substitute IMM for IMG in the Share Option Agreement, asserting that IMM was introduced only by the Novation Agreement in 2010.

97. I reject this assertion. In my judgement, it is clear on the evidence that IMM to the exclusion of IMG advanced the project from about mid-2008 and in doing so represented the 70% shareholders' interest in CMDN. Further, the Defendants' assertion is fundamentally at odds with IMM's involvement in the Genbique Agreement, the London Agreement, the Share Exchange Agreement and the Recitals in the Novation Agreement.

98. The Defendants have also maintained that that the reduction in the percentage of shares in CMDN to be transferred pursuant to the Share Option Agreement from 80% to 70% was not agreed in 2008 but was agreed in 2009. This assertion I also reject. The Heads of Terms agreement between IMG and EFGSL dated 26 April 2008 provided for a new company to be set up *'to represent the 70% shareholders interest in [CMDN]'* and thus, the reduction must have been agreed by late April 2008. Further, the minutes of the IMM board meeting of 12 May 2008 refer at paragraph 4 to *'the 70% shareholder interest'* in CMDN and a document prepared by Mr Trew on or around 18 August 2008 entitled *'Heads of Terms for Mozambique'* (E1/145) states *'IM Minerals Ltd has acquired a 70% stake holding [in CMDN]'*. It is also noticeable that the minutes of the board meeting of IMM held on 14 October 2008 refer to *'the local 70% held subsidiary'*.

99. The Defendants further deny that the London Agreement was entered into. They have admitted that Mr Cavaco was issued with shares in IMM in 2009, but allege that these shares were issued to him simply in consideration for work he had undertaken on the project up to that point. As I have said above, I accept the evidence of the Claimants' witnesses and prefer their evidence to the conflicting averments in the Defence and in the Defendants' evidence served for the jurisdiction challenge they advanced. The Claintiffs' evidence is reinforced by the following contemporaneous documentary evidence:

(1) In an email dated 29 June 2009 (the day of the London Agreement) to Ms Efua Forson, an employee of one of Mr Baldwin's companies which provided administration services to IMM, Mr Trew recorded the agreement they had made, stating that as Mr Cavaco *"was leaving this afternoon he expressed a*

wish that 5% of his shares in [CMDN] be in fact allocated into IM Minerals. This has the effect of increasing IM Minerals stake in the Titanium Mine to 75% leaving [CMDN] which includes [Mr Cavaco] and General Veloso 25% in total.... Clearly, you may want to check with Tim [Mr Baldwin] the allocated pricing for Diego's 5% stake in IM Minerals which, based upon Net Present Values suggested yesterday in an issued memo could be between £1.25 million and £2.5 m?"

(2) The minutes of a board meeting of IMM held on 14 September 2009 record that the board resolved *'to undertake a share swap of 64670 shares which equates to 5% of the issued share capital for shares in [CMDN] equivalent to 5% of its issued share capital'*.

(3) An email of 1 October 2009 from Mr Cavaco to Mr Trew referring to an attached document delivered to the Mining National Director which reads (in part): "In the third paragraph (underlined) I put as a result of the tecnic e financial resources that IMMinerals will go to invest in this project, [CMDN] gave to IMMinerals 75% of its capital. As you can see, I am very correct in doing things, they are well donne and more than doing the things internally, they are already donne, I Informed officially the Mining Ministry and the Nacional Mining Director that IMMinerals [h]as 75% of [CMDN]".

100. The Defendants' denial of the London Agreement is also contradicted by the Share Exchange Agreement, which contemplated the purchase by IMM of the remaining shares in CMDN which it did not already own. This Agreement provided for the acquisition by IMM of all but two of the remaining 25% of the share capital of CMDN, and not the remaining 30%. The agreement is accordingly plainly predicated on IMM having acquired a further 5% of CMDN, in addition to the 70% it was believed it had acquired pursuant to the Share Option Agreement.

101. In addition, the Defendants' case ignores the fact that the parties were at the time of the Share Exchange Agreement negotiating for the purchase of the remaining 25% of CMDN, not 30%.

102. As to the Defendants' assertion that the issue of shares in IMM to Mr Cavaco in 2009 was to cover expenses and/or in recognition for services performed, Mr Cavaco had by this time received (and would continue to receive) cash advances from IMM on account of his portion of the deferred US$9,900,000 due under the Share Option

Agreement. Accordingly, the payment of remuneration Mr Cavaco by the issue of shares makes little, if any. sense.

103. The Defendants allege in their Defence that the 2010 SPA was not binding on them because it was "neither signed by the Defendants, nor by anyone acting on their behalf."

104. I reject this contention. Mr Dickie signed the 2010 SPA on behalf of Mr Cavaco and JVC as vendors (of shares in IMM), and on behalf of Mr Cavaco and General Veloso as warrantors, pursuant to Powers of Attorney signed by Mr Cavaco and General Veloso and granted expressly for that purpose. The Defendants never sought to impugn the validity of these Powers of Attorney and there would have been no grounds for doing so.

105. The Defendants' allegation is in any event wholly inconsistent with their admitted and continued ownership of 19.12% of the shares in Pathfinder. If the 2010 SPA had not been valid and binding, they would not have validly acquired any shares in Pathfinder.

106. The Defendants have alleged that the Agreements are void and unenforceable for illegality. Their case, as advanced in their witness statements and Defence, is that the Claimants had from the outset of their dealings with the Defendants intended to perpetrate, and had perpetrated, a fraud on investors and the markets, by falsely presenting IMM to be the owner of shares in CMDN when in fact it was not.

107. This allegation is premised on the Defendants' case that the true construction and effect of the Agreements is that IMM acquired no shares in CMDN. If that case fails, the illegality argument must also fail. Thus if, as the Claimants contend, the relevant Agreements provided upon their true construction for the acquisition by IMM of an aggregate 99.99% of the shares in CMDN, or the Defendants are estopped from denying that to be the case, then any representations by the Claimants as to IMM's ownership of shares in CMDN would have been true, and honestly and reasonably believed by them to be true; and none of the Claimants would have acted illegally.

108. I deal with the construction and estoppel issues below where I conclude that: (i) although on its true construction the Share Option Agreement did not operate so as to pass ownership in 70% of the shares in CMDN to IMM on payment of the Option Purchase Price, the Defendants are estopped from denying that that was the effect of

Share Option Agreement; and (ii) the effect of this estoppel and of the rest of the Agreements is that IMM acquired 399,998 shares in CMDN, representing 99.99% of CMDN's share capital, from Mr Cavaco and JVC.

109. The foregoing conclusions dispose of the Defendants' illegality case, but I think it nonetheless appropriate to state that I am entirely satisfied on the evidence that the Claimants at no time had the fraudulent intent alleged by the Defendants but instead they and the Defendants honestly and genuinely believed, and proceeded throughout on the basis, that the Claimants had acquired 70% of CMDN certainly by the time the Option Purchase Price was fully paid, and that this stake had thereafter been increased to 75% and then to 99.99% of the company. I base this finding on the evidence of the dealings between the parties relevant to the estoppel issue set out in paragraphs 135 - 162 below.

110. The Defendants allege that the Claimants made misrepresentations which entitle them to the remedy of rescission. Their case appears to be as follows: (i) if, contrary to their primary case, the Novation Agreement did not revoke the Share Exchange Agreement, the Claimants misrepresented to the Defendants that the Share Exchange Agreement would be superseded by the Novation Agreement; and (ii) the Defendants were 'misled as to the effects' of the 2010 SPA, an allegation based on the general assertion that the Claimants represented to the Defendants that 'the various agreements would not vary their rights under the [Share Option Agreement] and the Novation Agreement, and the Novation Agreement did no more than transfer the rights and obligations of IMG under the [Share Option Agreement] to IMM'.

111. As regards (i), I have no doubt that the Defendants understood the true purpose and effect of the Share Exchange Agreement. In so holding, I have in mind in particular the following:

(1) On 25 June 2010, shortly ahead of the Share Exchange Agreement, Mr Trew sent an email to Mr Cavaco as follows:

> *'Hi Diogo,*
>
> *This response is somewhat delayed but following our discussions in Mozambique and our earlier telephone conversations, the effect of amalgamating your 10% holding together with the General Veloso's 15% shareholding – totally 25% shareholding – into IM Minerals will negate the need for a very complicated Shareholders Agreement with effect from completion of the share exchange mentioned below and enable IM Minerals to own 100% of CMDN (excluding 2 shares as below).*

...

As you know, when we checked the legal implication with MGA whilst in Mozambique we were assured that provided the General and you hold one share each in CMDN in respectively [JVC]'s and your name that it will not effect CMDN's Licences. These two shares would be held as nominees for and on behalf of [IMM]/[Pathfinder].

...

I hope this explains the position understandably from your end, but please let me know if you need any further clarification.

The lawyers have prepared a Share Exchange Agreement to put this into legal effect at your's and the General's convenience'.

(2) On 25 June 2010, Mr Cavaco sent the following reply:

'Hi Nick,

As you know [CMDN] as the capital divided in 400.000 shares.

Normally a SA company in Mozambique should have, at least, 3 shareholders and how we will pass "100%" to IMMinerals, according the Mozambique law we will pass 399.998 shares to IMMinerals and the other 2 shares will stay respectively in my name and [JVC]'s name.

With this [CMDN] will have 3 shareholders (IMMinerals with 399.998 shares, [JVC] with 1 share and myself also with 1 shares) and then we respect the law.'

(3) I accept Mr Trew's evidence there was never any understanding that the Share Exchange Agreement would be revoked by the Novation Agreement and that it was initially contemplated that the Share Exchange Agreement and the Novation Agreement would be sent to Mr Cavaco and General Veloso for their signature *at the same time* and that Mr Trew explained this to Mr Cavaco in a number of conversations during the summer of 2010. Plainly, simultaneous execution is wholly at odds with the proposition that the Claimants had been representing that one agreement would revoke the other.

112. As to (ii), the 2010 SPA was concluded in the context of, and for the purposes of, the RTO of Pathfinder by IMM and there can be no doubt but that Mr Cavaco and General Veloso were fully apprised of the proposed listing of Pathfinder on AIM. Thus: (1) on 16 November 2010, Mr Trew sent an email to Mr Cavaco attaching the most recent draft of 2010 SPA and stating '*For information only, please also see a draft of the Share Purchase Agreement – this is not fully complete at this stage...but at least it gives you an outline*'; and (2) on 10 December 2010, Ms Hilary Bentley on

behalf of Penningtons sent an email to Mr Cavaco attaching the latest draft of the 2010 SPA for his perusal, and seeking his advice and confirmation on particular outstanding points.

113. In any event, any claim that the effect of the Share Exchange Agreement or the 2010 SPA was misrepresented is precluded in my judgement by the whole agreement clauses in the Share Exchange Agreement (clause 10.1) and the 2010 SPA (clause 14) which expressly provide that each agreement supersedes any arrangements or understanding between the parties in relation to its subject matter.

114. Still further, any right to rescind has been lost in respect of the 2010 SPA by affirmation arising out of the Defendants' admitted and continued ownership of the shares in Pathfinder which they acquired pursuant to the 2010 SPA. In addition, it would not be possible to restore to the Defendants their shares in IMM without unwinding the entire 2010 SPA including in respect of all other former shareholders in IMM and there is no basis for doing that.

115. Moreover, to achieve the re-vesting in the Defendants of their shares in IMM (which on their case they never acquired) all the Agreements would have to be rescinded and *restitutio in integrum* is impossible since: (i) CMDN and IMM are now materially different companies to what they were in February 2006 (at the time of the Share Option Agreement) and/or June 2009 (at the time of the London Agreement) and/or August 2010 (at the time of the Share Exchange Agreement). In addition, even before the RTO, Mr Cavaco had sold off 20,000 of the shares in IMM which he received pursuant to the London Agreement.

The Construction of the Agreements

116. I turn now to the issues of construction that arise on the Claimants' application and begin with the Share Option Agreement. The court's task when construing a contract is to ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant; see *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896; *Chartbrook v Persimmon Homes* [2009] 1 AC 1101. Thus, as is well-known, the court is involved in establishing the objective intention of the parties, not what one or other of them subjectively believed to be the effect of the agreement.

117. Mr Orr QC for the Claimants submitted that the Share Option Agreement was poorly drafted by a non-lawyer and urged me to give it a construction which accords with business common sense, namely, that it is a sale and purchase agreement (rather than an option agreement) under which title in the shares in CMDN passed on delivery of the share certificates or at the latest on payment in full of the Option Purchase Price. Mr Orr focused on Recital 2:

> "Party A" is granted an option by "Party B" to purchase 80 % of the shares in COMPANHIA MINEIRA DE NABURI SARL for the sum of US$ 10,000,000.00 (Ten Million United States Dollars) as recognition of the benefit to "Party B" of the services provided by "Party A". This sum to be paid not later than 6 months from signature to the construction contract between COMPANHIA MINEIRA DE NABURI SARL and MOTA-ENGIL Engenharia.

118. In his submission, if the agreement were an option agreement, rather than a sale and purchase agreement, Recital 2 would make no sense because it purports to impose an obligation on Party A actually to pay US$10 million no later than 6 months after signature of the construction contract and there is no reference to that sum being payable on the exercise of the option at that stage. Indeed, there is nowhere in the agreement any mechanism or provisions about how and when any option was to be exercised.

119. Citing the Genbique Agreement as an example, Mr Orr argued that it was common in agreements for the sale of mining interests for ownership to pass on the payment of a relatively low sum, with the balance becoming payable once major construction work has been contracted for. Before such work is commissioned, the value of the mine is highly speculative and thus the initial price was low. If, however, the mine has sufficient potential to justify major construction work, the full price becomes payable.

120. Mr Orr also contended that the term requiring the delivery of the share certificates to Party A's lawyer indicated an intention that title was to pass either upon delivery of the certificates or on payment of the initial US$100,000.00

121. I agree that the drafting of the Share Option Agreement is far from perfect but in my judgement the language used compels the conclusion that the scheme of the agreement was the grant of an option in consideration of the Option Purchase Price with title in the shares only passing on when the option was exercised by paying the balance of US$9,900,000.00. It is true that no time limit is provided for the exercise of the option and no exercise machinery is prescribed but in my view those

deficiencies would be cured by the implication of reasonable terms. I also do not think that the obligation to deliver share certificates to Party A's lawyers after payment of US$20,000.00 is a strong indicator in favour of a sale and purchase agreement. In my judgement, the Share Option Agreement contemplates that the certificates are to be held in escrow by Party A's lawyers to secure completion upon payment of the balance of US$9,900,000.00.

122. Turning to the other Agreements, in my judgement the London Agreement and the Share Exchange Agreement provided for the transfer of shares in CMDN (by Mr Cavaco and, in the case of the latter, JVC) to IMM, in exchange for the issue of shares in IMM to Mr Cavaco and JVC. I can see no basis for the Defendants' contention that these agreements were intended to be revoked or superseded by the Novation Agreement. As I have already held (paragraph 111 above), the documentary evidence shows that the Defendants understood the Share Exchange Agreement to have the effect which I find it has. Moreover, the London Agreement and the Share Exchange each dealt with a different subject matter to the Novation Agreement and there is accordingly no reason why the parties would or should have intended the former agreements to be superseded by the latter.

123. As for the Novation Agreement, this confirmed and regularised the variations to the Share Option Agreement agreed between the parties during 2008, by which IMM had been substituted for IMG under the Share Option Agreement and 70% was substituted for 80% in respect of the shares in CMDN. It further recorded and confirmed the status of payments made by IMM to Mr Cavaco on account of his share of the deferred and contingent consideration owing under the Share Option Agreement (as varied). I reject the Defendants' contention that the Novation Agreement revoked the London Agreement and the Share Exchange Agreement. It is clear from its express terms that the agreement is concerned with regularising amendments and variations to the Share Option Agreement and had nothing to do with the London Agreement or Share Exchange Agreement, neither of which is referred to in the Novation Agreement.

124. It follows from my construction of the Share Option Agreement that, considerations of estoppel aside, the Novation Agreement was substituting IMM for IMG in an option agreement and not a sale and purchase agreement. However, for the reasons I give below, I find that the Defendants are estopped from denying that the effect of the

Novation Agreement was to make IMM party to a sale and purchase agreement rather than an option agreement.

125. The 2010 SPA provides, inter alia:

(1) At Recital (D) that '*The Sellers[the shareholders in IMM] have agreed to sell and the Buyer [Pathfinder] has agreed to buy the Sale Shares [the entire issued share capital of IMM] subject to the terms and conditions of this agreement*';

(2) At clause 3.1 that '*On the terms of this agreement ... the Sellers shall sell, and the Buyer shall buy, the Sale Shares ...* ';

(3) At clause 4.1 that *'The Purchase Price for the Sale Shares is £36,606,444.68, to be satisfied by the allotment and issue by the Buyer on Completion to the Sellers of the number of Consideration Shares [shares in Pathfinder], credited as fully paid, set out opposite their respective names in Part 1 of Schedule 1*';

(4) At clause 14.1 that *'This agreement, and any documents referred to in it, constitute the whole agreement between the parties and supersede any arrangements, understanding or previous agreement between them relating to the subject matter they cover*';

(5) At clause 20 that *'This agreement (other than obligations that have been fully performed, remains in full force after Completion)*'.

126. In my judgement the words used in these provisions are to be given their ordinary meaning. In short, the provisions mean what they say.

127. The shares in IMM to be sold to Pathfinder by each of the Sellers under the 2010 SPA are set out in Schedule 1, Part 1 of the 2010 SPA. These comprised, in the case of Mr Cavaco, 284,288 shares (47,670 shares acquired pursuant to the London Agreement and 236,618 shares acquired pursuant to the Share Exchange Agreement). In the case of JVC, it was to sell 355,228 shares in IMM, representing the shares it had acquired pursuant to the Share Exchange Agreement.

128. Accordingly, upon its true construction, the 2010 SPA provided for Mr Cavaco and JVC, in consideration for the issue and allotment to them of shares in Pathfinder, to

sell to Pathfinder the shares they held in IMM that had been acquired pursuant to the London Agreement and/or Share Exchange Agreement.

129. In a letter dated 25 November 2011 to IMM, Mr Cavaco advances a series of contentions to justify a purported termination of "the Contract of Assignment of 160,000 shares of CMN included in the minutes of the General Meeting of CMDN held in October 2009". General Veloso sent a letter in similar terms. With respect it is difficult to follow the reasoning in these letters but it appears that what is being advanced is founded on Mozambique law and as such it can have no application to the determination of the issues I have to decide. The Agreements are all governed by English law.

Estoppel

130. I deal now with the Claimants' estoppel argument. They contend that even if the true construction of the Share Option Agreement is that it conferred an option to acquire shares in CMDN upon payment of the Option Purchase Price, and/or the true construction of the Novation Agreement is that it transferred the option to IMM, the Defendants are estopped by convention and/or deed from denying that those agreements have the construction for which the Claimants contend.

131. In *Amalgamated Property Co v Texas Bank* [1982] 1 QB 84 Lord Denning MR said (at 121-2):

> "*When the parties to a contract are both under a common mistake as to the meaning or effect of it - and thereafter embark on a course of dealing on the footing of that mistake - thereby replacing the original terms of the contract by a conventional basis on which they both conduct their affairs, then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis. Either party can sue or be sued upon it just as if it had been expressly agreed between them.*"

132. The key principles governing estoppel by convention are set out in Chitty on Contracts, 30th edn at 3-107 to 3-109:

(1) Estoppel by convention may arise where both parties to a transaction act on an assumed state of facts or law, the assumption being shared by both or made by one and acquiesced in by the other.

(2) The parties are then precluded from denying the truth of that assumption if it would be unjust or unconscionable to allow them (or one of them) to go back on it.

(3) Estoppel by convention differs from estoppel by representation and from promissory estoppel in that it does not depend on any representation or promise. It can arise by virtue of a common assumption which was not induced by the party alleged to be estopped but which was based on a mistake spontaneously made by the party relying on it and acquiesced in by the other party.

(4) The mistaken assumption of the party claiming the benefit of the estoppel must have been shared or acquiesced in by the party alleged to be estopped; and both parties must have conducted themselves on the basis of a shared assumption; the estoppel requires communications to pass "across the line" between the parties. It is not enough that each of two parties acts on an assumption not communicated to the other.

133. Where an estoppel is made out on the basis of a shared assumption as to the construction of a contract, the party estopped is precluded from denying the truth of the shared assumption, and cannot operate the contract inconsistently with the estoppel: see *Amalgamated Property Co v Texas Bank* (above) 1982] at 126 per Denning LJ; *ING Bank v Ros Roca* [2011] EWCA Civ 353 at [105] per Rix LJ. Whilst a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, would necessarily have failed: *(Amalgamated Property* at 131-2 per Brandon LJ and Goff J at 105-6 (at first instance). As Mance LJ said in *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] CLC 999 at [88], an estoppel "*may enlarge the effect of an agreement, by binding parties to an interpretation which would not otherwise be correct*".

134. In my judgement, the Claimants and the Defendants proceeded on the shared assumption of law and/or fact that: (1) on its true construction, the Share Option Agreement provided for the transfer by JVC and Mr Cavaco of shares in CMDN upon payment of the Option Purchase Price by way of purchase and sale, and not merely for the grant of an option to acquire such shares in the future; (2) with effect from May 2008, IMM had been substituted for IMG in the Share Option Agreement

and the percentage of CMDN shares transferred by JVC and Mr Cavaco pursuant to the Share Option Agreement had been varied from 80% to 70%; (3) upon payment by IMM of the Option Purchase Price under the Share Option Agreement, IMM acquired 70% of the shares in CMDN from JVC and Mr Cavaco; and (4) on its true construction, the Novation Agreement confirmed and regularised the effect of the variations agreed to the Share Option Agreement in 2008. Hereafter, I shall refer to the foregoing assumptions as "the Shared Assumptions".

135. In my judgement, the Shared Assumptions are established by the following dealings between the Claimants and Defendants:

(1) The Genbique Agreement

136. Mr Dickie led the negotiations for the purchase of Genbique by CMDN on the manifest basis that IMM had become a shareholder of CMDN.

137. Under clause 7 of the Genbique Agreement, IMM contracted as guarantor of CMDN's obligations thereby assuming potential liabilities of US$10 million in connection with CMDN's purchase of Genbique. IMM would not have done this if it had not believed that it owned 70% of the shares in CMDN.

138. Clause 1.1.1 of the Genbique Agreement provides that '*"Affiliates" in relation to the Purchaser [CMDN] means the group of companies comprising the Guarantor [IMM] and all of its subsidiaries from time to time*', which definition assumes that IMM is a shareholder in CMDN.

139. It was a condition precedent of the Genbique Agreement that the Ministry approve in writing the transfer of the sale shares by BHP to CMDN (clause 2.1). Following the conclusion of the Genbique Agreement, IMM sent a letter dated 22 June 2009 to the Ministry which confirmed its involvement in the purchase of Genbique *as a shareholder in CMDN.* Mr Trew believes that this letter was copied to Mr Cavaco. At no stage did Mr Cavaco suggest to anyone that this letter did not accurately reflect IMM's position as a shareholder in CMDN following its payment of the balance of the Option Purchase Price in May 2008.

(2) Statements Made and Presentations Given to the Ministry in 2009

140. On 1 October 2009, ahead of the visit arranged by IMM to Mozambique, Mr Cavaco and General Veloso sent a letter (in Portuguese) to the National Director of Mines, a copy of which was given by Mr Cavaco to the Mining Minister in Mozambique. This

letter confirmed that CMDN had transferred ('*assigned*') 75% of its share capital to IMM.

141. Mr Cavaco explained the content of this letter in an email to Mr Trew on 1 October 2009 as follows:

> *'I put as a result of the tecnic e financial resources that IMMinerals will go to invest in this project, [CMDN] gave to IMMinerals 75% of its capital. As you can see, I am very correct in doing this, they are well donne and more than doing the things internally, they are already done, I Informed officially the Mining Ministry and the Nacional Mining Director that IMMinerals [h]as 75% of [CMDN]. I also sent a cope to Mining Minister and I can repeat, she is completely aware of t he situation and she knows that IMMinerals already [h]as 75% of the capital of [CMDN]. How you can see this communication was made by the company of the General and was signed by the General himself'.*

142. Prior to IMM's visit to Mozambique, Mr Dickie had circulated the Powerpoint slides he was intending to use for the presentation IMM intended to give to the Ministry. These had been prepared for presentations given to prospective investors earlier in the year and had been overtaken by the London Agreement. Mr Cavaco corrected the slides in order to amend the percentage shareholding of CMDN shown as owned by IMM from 70% to 75%.

(3) The 2009 Due Diligence Exercise

143. Mr Cavaco played a significant role in facilitating the production of the legal opinion prepared by MGA in 2009 which verified IMM's ownership of 75% of CMDN for the purposes of the 2009 Circular. He met with MGA and provided key documents and information to them to enable them to complete their report, including verification of IMM's then 75% shareholding in CMDN. There was no suggestion at any point during this due diligence process that IMM was proceeding on a misunderstanding of the position under the Share Option Agreement. This is evidenced by a number of e-mail exchanges from the relevant period, including:

(1) An email to Mr Trew dated 28 September 2009 from Mr Cavaco confirming the correctness of particulars of IMM's Mozambique subsidiaries showing IMM as owning 75% of the shares in CMDN.

(2) An email to Mr Baldwin dated 12 November 2009 in which Mr Cavaco referred to a meeting he had had with MGA at which he had provided MGA with documentation relating to IMM's shareholding in CMDN. He assured Mr Baldwin that "*all the documents are correct*" and that there was "*legal confirmation that 75% of the shares of [CMDN] are already registered in the name of [IMM]*".

(3) An email dated 19 November 2009 to Maxwell Winward (Pathfinder's lawyers in London), Mr Dickie and Mr Trew, from Ms Harburn, a lawyer at MGA, stated that MGA was not yet in a position to provide certain information that had been requested in relation to CMDN's shareholders but that they had requested Mr Cavaco to provide the information, "*including [CMDN's] share certificates and the Company Shares Registration Books were [sic] this information should be available*".

(4) A further email dated 26 November 2009 from Ms Harburn reporting that Mr Cavaco had sent MGA "*some documents for Genbique that we need to analyze [sic] and include on [sic] the report*".

(5) On page 9 of MGA's draft due diligence report attached to an email from Ms Harburn on 26 November 2009, a note in relation to the corporate records for Genbique states: "*NOTE THAT THIS INFORMATION WAS OBTAINED FROM THE SALE SHARES AGREEMENT OF GENBIQUE AND WE CANNOT CONFIRM THE LEGAL STATUS OF THE COMPANY UNLESS WE RECEIVE THE PROPER CONSTITUTIONAL DOCUMETNS [SIC] OF THE COMPANY. MR DIOGO [SIC] HAS INFORMED MGA THAT HE HAS ALREADY REQUESTED COPIES OF SUCH DOCUMENTS TO THE RELEVANT AUTHORITIES [sic]*".

(6) Page 7 of MGA's draft report referred, in paragraph A.1.3, to the approval by the shareholders of CMDN in a General Meeting on 8 October 2009 of the transfer of 300,000 shares in CMDN, corresponding to 75% of the company's share capital, to IMM. This was a reference to the meeting of CMDN shareholders specifically convened on the advice of MGA in order formally to record IMM's acquisition of 75% of the shares in CMDN. The draft MGA report noted that the transfer of these shares to IMM had not yet been registered in the Shares Registry Book of CMDN and there was no evidence of payment of stamp duty on the transfer. These matters were duly addressed

with Mr Cavaco's assistance: the Share Registry Book was updated and stamp duty was paid.

(7) The final version of MGA's 2009 due diligence report, issued on 26 November 2009, states in relation to the ownership of shares in CMDN:

> *"The shareholders approved the transfer of shares in a General Meeting held on the 8th October 2009 under which: (i) all minority shareholders of the Company sold their shares to [JVC] and Mr. Diogo Cavaco; and (ii) [JVC] and Mr. Diogo Cavaco sold part of their shares to [IMM]. In virtue of such transaction the Company's shareholding structure shall be as follows:*
>
> • *[IMM] holder of 300,000 shares, correspondent to 75% of the share capital;*
>
> • *[JVC] holder of 60,000 shares, correspondent to 15% of the share capital; and*
>
> • *Diogo Cavaco holder of 40,000 shares, correspondent to 10% of the share capital.*
>
> *The transfer is registered in the shares registry book and payment of Stamp Duty was legaly [sic] made".*

(8) In the email from Ms Harburn to Maxwell Winward attaching the final version of MGA's 2009 due diligence report, Ms Harburn stated that *"the books of both companies [i.e. CMDN and Genbique] are legalized and ... payment of stamp duty has been made, therefore we have deleted the comments in relation to these two issues".*

144. Given the wording contained in the previous draft of the report (referred to at (5) above), the clear inference is that the transfer of shares to IMM had been recorded in CMDN's Share Registry Book and the requisite stamp duty paid subsequently to the circulation of the last draft of the report on 26 November 2009, either by the act of or at least with the knowledge of Mr Cavaco.

(4) The CMDN EGM on 8 October 2009

145. The EGM held on 8 October 2009 for the purposes of formally recording the transfer of 75% of the shares in CMDN to IMM was attended by General Veloso, representing JVC, and Mr Cavaco, representing himself and IMM.

146. The Defendants allege that these resolutions were invalid under Mozambique law on the ground that the act of transferring shares was not within the powers conferred by CMDN's constitution. The purpose of the resolutions was formally to record the shareholders' approval of IMM's acquisition of 75% of the company. In paragraphs 13 and 14 of his report, Mr Caldeira states that there was nothing in CMDN's constitution, or the general law, to preclude the company from resolving upon the transfer of its shares. The resolutions were therefore not invalid as asserted by the Defendants. There was nothing to stop the shareholders of CMDN confirming the transfer of their shares in a General Meeting. I accept Mr Caldeira's evidence and accordingly find that the resolutions passed at CMDN's EGM on 8 October 2009 were not invalid as the Defendants allege.

(5) Subsequent EGMs of CMDN during 2010

147. Throughout 2010, Mr Cavaco attended further EGMs of CMDN on behalf of IMM as a shareholder. This is expressly recorded in the minutes of EGMs held on 14 July 2010, 8 September 2010, and 17 September 2010. In each of these minutes, IMM is described as *'holding 300,000 shares of stock'*.

(6) The 2010 Due Diligence Exercise

148. Mr Cavaco was closely involved during 2010 in assisting MGA with preparation of the due diligence report required in connection with the issue of Pathfinder's Admission Document on 30 December 2010. This process took from June 2010 until 30 December 2010, when MGA's 2010 due diligence report was signed. That report expressly confirmed IMM's ownership of 99.99% of the shares in CMDN. Mr Cavaco's involvement is evidence by a number of emails passing between him and Mr Trew either directly or "cc" on the following dates: (a) 14 July 2010; (b) 17 August 2010; (c) 4 September 2010; (d) 20 September 2010; (e) 28 October 2010; (f) 11 November 2010; (h) 30 November 2010; (i) 3 December 2010; (j) 13 December 2010; (k) 15 December 2010; (l) 16 December 2010; (m) 20 December 2010.

(7) The CMDN EGM on 28 October 2010

149. On 28 October 2010, Mr Cavaco and General Veloso attended a further general meeting of the shareholders of CMDN at which the shareholders formally confirmed and approved the transfer of all but two of the remaining 25% of the shares in CMDN to IMM (following the Share Exchange Agreement). General Veloso was present as

the representative of JVC; Mr Cavaco was present in his personal capacity and as a representative of IMM. The minutes of the meeting record:

> *'After discussion...by unanimous vote, it was resolved to approve the transfer of 59,999 shares of stock held by [JVC] and 39,999 shares of stock held by [Mr Cavaco] to shareholder IMMinerals Limited. Therefore, the structure of the capital stock of [CMDN] is as follows: (a) IMMinerals Limited shall hold 399,998 shares of stock (b) [JVC] shall hold 1 share of stock (c) Diogo Jose Henriques Cavaco shall hold 1 share of stock'.*

(8) The Nominative Share Certificate

150. In December 2010, Mr Cavaco and General Veloso procured the conversion of CMDN's share capital into nominative form and the issue to IMM of the Nominative Share Certificate (which they signed) recording IMM's ownership of 399,998 shares in CMDN, representing 99.99% of its issued share capital.

151. The Defendants through Mr Cavaco allege that Mr Cavaco and General Veloso issued the Certificate '*knowing that it would not be valid under the articles of association of the company ... [as] ... only bearer shares were allowed to be issued under the Articles of CMDN*'. They assert that the Certificate had been requested by IMM in order to facilitate the raising of finance by misrepresenting its ownership of shares in CMDN to the markets.

152. I reject these allegations. First, as recorded above, the conversion of CMDN's shares into nominative form was requested by IMM as part of the detailed verification undertaken for the purposes of the Admission Document, and arose out of concerns raised by the NOMAD's lawyers that bearer shares could be misplaced.

153. Second, the Defendants' contention that the Nominative Share Certificate was invalid under Mozambique is misconceived. Article 5, para 2(2) of CMDN's Articles of Association provides that: '*The shares shall be issued to the bearer, but may be converted to registered shares or may be converted from registered to bearer shares whenever the interested parties so require*' and I accept Mr Caldeira's evidence that the conversion of CMDN's bearer shares into nominative form was carried out in accordance with the requirements of CMDN's Articles and Mozambique law. I also accept Mr Caldeira's evidence that: (i) there are no specific requirements under Mozambican law concerning the substitution and/or cancellation of previously issued share certificates; (ii) provided the new certificate complies with the formalities specified in the Mozambique Commercial Code (i.e. contains the name of the

company, relevant serial numbers, etc), it is valid and effective; (iii) the Nominative Share Certificate complied with these requirements and is therefore valid.

(9) The Share Registry Book

154. As recorded in MGA's due diligence reports, the transfer of 300,000 and then 99,998 shares in CMDN to IMM was recorded in CMDN's Share Registry Book in 2009 and 2010 respectively. These transfers are recorded in the Share Registry Book.

(10) Preparation of the Accounts of CMDN and Genbique

155. As part of the preparation of the prospectus for the readmission of Pathfinder to AIM following the RTO (i.e. the Admission Document), it was necessary to obtain audited accounts for IMM's subsidiaries, CMDN and Genbique, in order for these to be consolidated into IMM's accounts. Mr Normand oversaw arrangements for the preparation and audit of these accounts by KPMG Mozambique ("KPMG"). He was assisted by Mr Cavaco, who liaised with KPMG in Mozambique. Both sets of accounts were signed by Mr Cavaco, as the responsible director of each of CMDN and Genbique. Each set of accounts makes explicit reference to IMM being a shareholder in CMDN.

156. It goes without saying that the process whereby the accounts for CMDN and Genbique were consolidated into the accounts of IMM was premised on the fact that CMDN and Genbique were each subsidiaries of IMM. The following documents demonstrate that Mr Cavaco was aware of this and shared (or alternatively acquiesced in) this understanding:

(a) in an email dated 28 May 2010 from Mr Normand to Ms Sheila Matos, an employee of the local accountancy firm retained by CMDN, which was copied to Mr Cavaco, Mr Normand stated that *'[i]n order that we can "close" the accounts of CMdN for the period ended 31 December 2009 and to enable us to consolidate them with the accounts of IM Minerals Limited, I need to ensure that the transactions between the two companies have been recorded in the same way in each set of accounting records'*. In relation to the treatment of IMM's investment in Genbique, Mr Normand explained that IMM's accounts showed an "*advance to subsidiary*" of US$500,000, payments made to date of US$350,000 and an outstanding liability to BHP of US$150,000. Mr Normand stipulated that this treatment should be reflected in the accounts of CMDN and explained that the payments of US$350,000 should be treated as *'loan from parent company'*. He added that that the accounts of CMDN

should also show that *'[CMDN's] holding company (IM Minerals Limited)'* had guaranteed and undertaken to finance CMDN's liability to pay BHP;

(b) by an email dated 10 June 2010, Mr Cavaco asked Mr Normand to arrange for the signature by IMM, as the majority shareholder in CMDN, of comfort letters to be provided to KPMG in connection with the audit of the Genbique and CMDN accounts. The comfort letter in respect of CMDN required IMM to confirm, *as the majority shareholder* of CMDN, that it was confident that CMDN would have sufficient cash resources to continue to trade at normal levels and that if it was unable to generate sufficient funds, IMM *as shareholder* would provide sufficient funds to enable CMDN to carry on its operations;

(c) in an email dated 13 July 2010 from Mr Normand to Mr Cecil Mirissao, an accountant at KPMG, which was copied to Mr Cavaco, Mr Normand explained that *'[w]e have prepared consolidated accounts for IM Minerals and its subsidiary, CMDN, and its sub-subsidiary, Genbique'*;

(d) in an email dated 23 August 2010 from Mr Normand to Ms Matos which was copied to Mr Cavaco, Mr Normand attached a memorandum which described the obligations owed by CMDN to BHP as *'guaranteed by the Company's parent company, IM Minerals Limited'*;

(e) at Mr Normand's request, Mr Cavaco and General Veloso signed a letter to KPMG dated 29 September 2010, confirming that Genbique's accounts were not to be consolidated into the accounts of CMDN, as they would instead be consolidated into the accounts of IMM *as parent company* of CMDN;

(f) on 6 October 2010, draft CMDN accounts were circulated by Mr Mirissao to (amongst others) Mr Cavaco, for review and comment; Mr Mirissao specifically asked the recipients of his email (including Mr Cavaco) to "*go through [the accounts] and let us know of any clarification and necessary changes that you may need us to make*"; the draft accounts expressly provided, at Note 6, that IMM held 75% of the shares in CMDN; Mr Cavaco did not question this or make any comments on the draft accounts);

(g) on 22 October 2010 Mr Cavaco signed the final version of CMDN's accounts; Note 6 was in the same form as in the draft accounts provided to him on 6 October 2010: it expressly provided that IMM held 75% of the shares in CMDN; (h) Mr

Cavaco also signed Genbique's accounts for the period ended 31 December 2009; Note 6.3, dealing with CMDN's acquisition of Genbique by CMDN, records that the Genbique Agreement was *'guaranteed by IM Minerals Limited, as one of the shareholders of the purchaser'*.

(11) The Share Exchange Agreement and 2010 SPA

157. The fundamental basis for the Share Exchange Agreement was the parties' manifest assumption that IMM already owned 75% of the shares in CMDN and neither Mr Cavaco nor General Veloso challenged this assumption. Indeed, by clause 3.1 of Schedule 3 of the Share Exchange Agreement, together with Schedule 2, Mr Cavaco and JVC (acting by General Veloso) expressly warranted that IMM was owner of 300,000 shares in CMDN.

158. The fundamental basis of the RTO, and therefore the 2010 SPA, was IMM's ownership of shares in CMDN. General Veloso and Mr Cavaco were warrantors under the 2010 SPA. The warranties in the 2010 SPA were set out in schedule 5 to the agreement:

(1) By paragraph 2.2 of Part 2 of Schedule 5, Mr Cavaco and General Veloso warranted (amongst other things) the particulars of the issued share capital of CMDN set out in Schedule 2, Part 2, which stated that IMM held 399,998 shares in CMDN;

(2) By paragraph 2.3 of Part 2 of Schedule 5, Mr Cavaco and General Veloso warranted that IMM was the sole legal and beneficial owner of all but two of the shares in CMDN;

159. Mr Cavaco is a lawyer by profession and states in his witness statement that he has 'extensive experience' of civil engineering, construction and public works projects. In my judgement, neither he nor General Veloso can have been in any doubt about the legal effect and significance of the warranties to which they subscribed in each of the Share Exchange Agreement and 2010 SPA.

(12) The Defendants' Ownership of Shares in Pathfinder

160. Between them, the Defendants own 198,249,960 shares in Pathfinder, representing approx. 19.12% of its current issued share capital. The Defendants acquired these shares in Pathfinder pursuant to the 2010 SPA, in return for the sale of their shares in

IMM. The shares held by the Defendants in IMM were in turn acquired pursuant to the London Agreement and Share Exchange Agreement. By affirming their ownership of shares in Pathfinder, the Defendants are thereby affirming the London Agreement and Share Exchange Agreement and as I have said the Share Exchange Agreement was premised on IMM's ownership (at the time) of 75% of the shares in CMDN.

(13) Other Matters

161. In an email sent on 22 April 2011 to representatives of Scott Wilson and other contractors involved in preparation of the scoping study for Pathfinder, Mr Cavaco stated that CMDN's '*principal shareholder is the English company Pathfinder Minerals with 99.99% of the capital.*

162. On 6 June 2011, General Veloso approved the Regulatory News Service ("RNS") announcement proposed to be made by Pathfinder to the market in connection with his appointment as a non-executive director of Pathfinder. The draft announcement stated:

> '*General Veloso was instrumental in identifying Pathfinder Minerals' opportunity to mine heavy minerals sands on the Indian Ocean coast of Mozambique. Together with Diogo Cavaco, he co-founded the Company's 99.99%-owned subsidiary, Companhia Mineira de Naburi, S.A.R.L., which holds the Naburi and Moebase licences ...*'

The Notes to Editors attached to the announcement confirmed that Pathfinder held licences over the Naburi and Moebase sites through a "*wholly owned subsidiary*".

Unconscionability

163. The Claimants have invested very significant time and resources in pursuing the project for development of the Naburi and Moebase mines on the basis of the Shared Assumptions. Amongst other things they funded and guaranteed the acquisition of Genbique by CMDN and raised funds from third parties whose investment in the project is represented by their shares in Pathfinder, whose sole asset (apart from cash in its bank account) is its interest in the Naburi and Moebase deposits.

164. In my judgement, it would unconscionable if the Defendants were to be permitted to resile from the Shared Assumptions because the result would be that Pathfinder would lose its interest in the Naburi and Moebase deposits whilst the Defendants would be left with the sole ownership and control of the project which has been

funded and developed since 2008 entirely by the Claimants. I conclude therefore that the Claimants have made out their case on estoppel by convention.

165. The effect of this estoppel is that the parties are bound by their conventional treatment of the meaning of the Agreements. It follows that the Defendants are estopped from denying that:

(1) the Share Option Agreement provided for the transfer by JVC and Mr Cavaco of shares in CMDN upon payment of the Option Purchase Price (US$100,000) by way of purchase and sale, and not merely for the grant of an option to acquire such shares in the future;

(2) with effect from May 2008, IMM was substituted for IMG under the Share Option Agreement and the percentage of CMDN shares transferred by JVC and Mr Cavaco pursuant to the Share Option Agreement varied from 80% to 70%;

(3) upon payment by IMM of the Option Purchase Price under the Share Option Agreement, IMM acquired 70% of the shares in CMDN from JVC and Mr Cavaco;

(4) on its true construction, the Novation confirmed and regularised the effect of the variations to the Share Option Agreement agreed by the parties in 2008.

Estoppel by Deed

166. Since the Claimants have succeeded on their conventional estoppel case, it is unnecessary to determine their estoppel by deed claim and I decline to lengthen this already over long judgement by doing so.

The appropriateness of making the declarations sought by the Claimants.

167. In FSA v Lukka (unreported, 23.4.1999) Neuberger J said:

> *"In exercising its undoubted discretionary jurisdiction to grant declarations, it appears to me that the court should plainly not grant a declaration simply because parties agree or simply because one party seeks a declaration in the absence of the other party who is in default. The court should in each case first ask itself whether it is satisfied that the legal basis for the declaration is present on the facts and the law, and should then ask itself whether in all the circumstances it is appropriate to grant the declaratory relief sought. I see no reason in principle or practice why the court's jurisdiction should be any more fettered than that."*

168. In my judgement, that is the approach I should adopt when considering whether to make the declarations sought by the Claimants in proceedings in which the Defendants have been debarred from participating.

169. Although the Defendants have not appeared and not have been represented, I have taken account of the contentions raised in their Defence and the evidence they served for the jurisdictional challenge. I have also assessed the Claimants' evidence in deciding the issues calling for determination in this application.

170. In my judgement, it is appropriate to make the declarations sought because to do so would be to serve a useful purpose and because justice requires it. The Agreements are governed by English law and the general rule is that an English court is the most appropriate forum for the determination of questions of English law. Further, the Claimants have a real interest in obtaining the declaratory relief they seek and I am persuaded by Mr Caldeira's expert evidence that this judgement on the Claimants' claims is likely to be recognised and enforced in Mozambique. In paragraph 34 of his report he states:

> In this case a judgment of the English Court granting the declarations and injunction sought by the Claimants in respect of their contractual claims would be confirmed under the Civil Procedure Code, and once confirmed it would be recognised and given effect to in Mozambique. Provided the Defendants were duly summoned and the judgment of the English Court was res judicata (i.e. not subject to appeal), the requirements for recognition and enforcement would be met in the present case:
>
> (i) The English Court is a court of competent jurisdiction because the Agreements provide for the jurisdiction of the English courts and the Defendants submitted to the jurisdiction of the English Court in the course of the proceedings in England;
>
> (ii) There would be no ground for contending that the judgment of the English Court was contrary to public policy in Mozambique;
>
> (iii) The judgment would not offend against the private law in Mozambique. Since the Agreements are governed by English law, the declarations and injunction sought by the Claimants are not matters which should have been resolved under the terms of Mozambican law.

171. Further and in any event, a declaration from the English court as to the parties' rights will also be recognised in Portugal, where Mr Cavaco is probably domiciled, pursuant to Articles 32-33 of Regulation EC 44/2001.

Permanent Injunction

172. The Claimants seek a permanent injunction to restrain the Defendants from taking any steps to interfere with IMM's rights of ownership in its shares in CMDN.

173. Under s. 37 of the Senior Courts Act 1981 the court may grant an injunction where "*it is just and convenient to do so*". In Mercedes Benz AG v Leiduck [1996] AC 284 Lord Nicholls said at 308:

> "the jurisdiction to grant an injunction, unfettered by statute, should not be rigidly confined to exclusive categories by judicial decision. The court may grant an injunction against a party properly before it where this is required to avoid injustice, just as the statute provides and just as the Court of Chancery did before 1875. The court habitually grants injunctions in respect of certain types of conduct. But that does not mean that the situations in which injunctions may be granted are now set in stone for all time. The grant of Mareva injunctions itself gives the lie to this. As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year."

174. Injunctions have been granted under this power where (a) the defendant has invaded, or threatened to invade, a legal or equitable right of the claimant or (b) the defendant has behaved, or threatens to behave, in an unconscionable manner; see *South Carolina Insurance v Maatschappij De Zeven Provincien* [1987] AC 24 at 39-41.

175. Here I think there are good grounds for concluding that the Defendants will not conform to the declarations I propose to make as to the meaning and effect of the Agreements but instead will remain bent on interfering with IMM's rights of ownership in its shares in CMDN and will continue to threaten to act in breach of the Agreements and/or to deny that the Agreements have the effect the parties mutually assumed they had. The Defendants are all outside the jurisdiction but there is no territorial limit to the Court's power to grant injunctions under s.37(1) of the Senior Courts Act 1981. Provided a person is amenable to the jurisdiction of the English Court, whether by submission to the jurisdiction or pursuant to statutory procedures

or rules of court, he may be subjected to an injunction controlling his activities or conduct abroad: *Babanaft v Bassantne* [1990] 1 Ch 13 and *Acrow v Rex Chainbelt Inc* [1971] 3 All ER 1175. The Court must proceed with caution but here the Agreements are all governed by English law and with the exception of the London Agreement, the parties have agreed to submit disputes arising under the Agreements to the jurisdiction of the English courts.

176. In my judgement, it is just and convenient to grant a permanent injunction restraining the Defendants from taking any steps to interfere with IMM's rights of ownership in its shares in CMDN. Such injunctive relief would not in my view be exorbitant or exceed the permissible territorial limits of the Court.

Conclusion

177. Save in respect of its claim as to the true construction of the Share Option Agreement, the Claimants' claims succeed, as does their alternative claim in estoppel by convention.

178. A revised draft order should be submitted to the Court reflecting the conclusions reached in this judgement and the Claimants shall have liberty to make short written submissions on the wording of the order they contend the Court should make.